

Neutral Citation Number: [2019] EWHC 2006 (Admin)

Claim No: CO/4828/2018

# IN THE HIGH COURT OF JUSTICE **QUEEN'S BENCH DIVISION ADMINISTRATIVE COURT**

Rolls Building, Royal Courts of Justice

Kons Building	g, Royal Courts of Justice Fetter Lane, EC4A 1NL
	<u>Date: 25 July 2019</u>
Before :	
MR JUSTICE NUGEE	
Between :	
The Queen on the application of	
(1) JJ MANANGEMENT LLP	
(2) BOISSON CONSULTANTS LTD	
(3) INTEREUROPE FOODS LTD	
(4) BRYN ROBERTSON	
(5) OVERSEAS IMPORTS SL	
(6) OVERSEAS SUPERMERCADOS	
UNIPESSOAL LDA	<u>Claimants</u>
<b>- and</b> –	
(1) THE COMMISSIONERS FOR	
HM REVENUE AND CUSTOMS	
(2) THE FIRST-TIER TRIBUNAL	
(TAX CHAMBER)	<b>Defendants</b>

Mr Philip Moser QC and Mr David Bedenham (instructed by Memery Crystal LLP) for the Claimants

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Ms Aparna Nathan QC and Mr Tom Richards (instructed by the General Counsel and Solicitor to HM Revenue and Customs) for the First Defendants

Hearing dates: 16 and 17 July 2019

# **Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of thi
Judgment and that copies of this version as handed down may be treated as authentic.
MR JUSTICE NUGEE

## **Mr Justice Nugee:**

## Introduction

- 1. The 4<sup>th</sup> Claimant ("**Mr Robertson**") is a successful businessman who lives in Essex. He is both UK resident and UK domiciled. The other Claimants are corporate entities in which he is beneficially interested. In the early 1990s he opened a supermarket in Tenerife importing UK food to sell to the expat community. Since then, the business has grown significantly and he now operates, through corporate vehicles, over 20 stores in Spain (including the Canaries and the Balearics) and Portugal. The 5<sup>th</sup> Claimant ("**Overseas Imports**") is incorporated in Spain and concerned in the operation of the business in Spain; the 6<sup>th</sup> Claimant ("**Supermercados**") is incorporated in Portugal and concerned in the operation of the business in Portugal. The 1<sup>st</sup> to 3<sup>rd</sup> Claimants, JJ Management Consulting LLP ("**JJ**"), Boisson Consultants Ltd ("**Boisson**") and Intereurope Foods Ltd ("**Intereurope**"), are each incorporated in the UK.
- 2. Since at least June 2016, Her Majesty's Commissioners for Revenue and Customs ("HMRC") have been investigating Mr Robertson's tax affairs. This has included making requests to the taxing authorities in Spain and Portugal. In this application for judicial review Mr Robertson and the other Claimants challenge the lawfulness of HMRC's investigation. Permission to proceed against HMRC on the grounds pleaded against them was granted by Holman J on 1 February 2019. There are four of these, which in summary are as follows:

## (1) **Ground 1**

Ground 1 is that there is no lawful basis for HMRC's investigation and that it is *ultra vires*.

# (2) Ground 2A

Ground 2A is that HMRC have acted to deprive the Claimants of access to justice.

## (3) Ground 2B

Ground 2B asks the Court to exercise a supervisory jurisdiction over HMRC's irrational and disproportionate decision to investigate all of Mr Robertson's tax affairs.

## (4) **Ground 3**

Ground 3 is that the requests made to the Spanish and Portuguese taxing authorities are unlawful.

3. The claim form also included three grounds of challenge (Grounds 4 to 6) to decisions of the First-tier Tribunal ("FTT"). Holman J ordered that these grounds be stayed (permission to appeal to the Upper Tribunal having been given); I am not concerned with them and the FTT has taken no part in this hearing.

## Statutory provisions

- 4. It is convenient to set out the relevant statutory provisions at the outset. There are three sets of provisions relied on by one or other of the parties. First, there are the general statutory functions of HMRC, found in the Commissioners for Revenue and Customs Act 2005 ("CRCA 2005"). Second, there are the provisions relating to tax returns in the Taxes Management Act 1970 ("TMA 1970"). Third, there are the provisions relating to information notices in sch 36 to the Finance Act 2008 ("FA 2008"). In each case I will give the current version of the statutes: taxation statutes are regularly amended but although HMRC's investigation has extended over the last three years, it has not been suggested that it is necessary to consider any other than the current version. I will also have to refer to an EU Directive on tax co-operation and the relevant double taxation treaties between the UK and Spain and Portugal respectively, but it is more convenient to do that when dealing with Ground 3.
- 5. First, CRCA 2005. This established the Commissioners for Her Majesty's Revenue and Customs to succeed to the functions of both the Commissioners of Inland Revenue and the Commissioners of Customs and Excise. s. 1 provides for the appointment of the Commissioners by Her Majesty; s. 2 for the appointment by the Commissioners of staff, to be known as officers of Revenue and Customs; and s. 4 for the Commissioners and the officers together to be referred to as "Her Majesty's Revenue and Customs" or HMRC.
- 6. The Commissioners' functions are provided for by s. 5 CRCA 2005 as follows:

## "5 Commissioners' initial functions

- (1) The Commissioners shall be responsible for—
  - (a) the collection and management of revenue for which the Commissioners of Inland Revenue were responsible before the commencement of this section,
  - (b) the collection and management of revenue for which the Commissioners of Customs and Excise were responsible before the commencement of this section, and
  - (c) the payment and management of tax credits for which the Commissioners of Inland Revenue were responsible before the commencement of this section.
- (2) The Commissioners shall also have all the other functions which before the commencement of this section vested in—
  - (a) the Commissioners of Inland Revenue (or in a Commissioner), or
  - (b) the Commissioners of Customs and Excise (or in a Commissioner).
- (3) This section is subject to section 35.
- (4) In this Act "revenue" includes taxes, duties and national insurance contributions."
- 7. It may be noted here that the Commissioners of Inland Revenue were created as a

statutory body by the Inland Revenue Regulation Act 1890 ("IRRA 1890"), which remained in force until its repeal by CRCA 2005, and that s. 13(1) of that Act provided:

## "13 Commissioners to keep accounts

(1) The Commissioners shall collect and cause to be collected every part of inland revenue, and all money under their care and management, and shall keep distinct accounts thereof at their chief office."

This remained in force until the coming into force of s. 5 CRCA 2005 on 18 April 2005.

8. s. 5 CRCA 2005 is supplemented by s. 9 CRCA 2005, which provides for the Commissioners' ancillary powers as follows:

# "9 Ancillary powers

- (1) The Commissioners may do anything which they think—
  - (a) necessary or expedient in connection with the exercise of their functions, or
  - (b) incidental or conducive to the exercise of their functions.
- (2) This section is subject to section 35."

The references in s. 5(3) and s. 9(2) to s. 35 can be ignored, s. 35 (which was concerned with certain functions in relation to criminal proceedings) having been repealed in 2014.

- 9. There is an interpretation section in s. 51 CRCA 2005. This includes a definition of "function" in s. 51(2)(a) as follows:
  - "(2) In this Act—
    - (a) "function" means any power or duty (including a power or duty that is ancillary to another power or duty)..."
- 10. Next, TMA 1970. This deals with the processes of assessing and collecting direct taxes such as income tax (as opposed to the various taxing statutes which contain the substantive charging provisions). As enacted, s. 1 provided that income tax, corporation tax and capital gains tax should be under the "care and management" of the Commissioners of Inland Revenue; the phrase "care and management" has a long history (dating back to at least s. 13(1) IRRA 1890). In its current form s. 1 TMA 1970 provides as follows:

# "1 Responsibility for certain taxes

The Commissioners for Her Majesty's Revenue and Customs shall be responsible for the collection and management of—

- (a) income tax,
- (b) corporation tax, and

- (c) capital gains tax."
- 11. Part II TMA 1970 (ss. 7 to 12D) deals with tax returns. s. 8 provides that a person may be required by notice to make a return for the purpose of establishing the amounts in which he is chargeable to income tax or capital gains tax. s. 8(2) provides:
  - "(2) Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete."
  - s. 9 (as first introduced in 1996) deals with self-assessment. It provides that a tax return under s. 8 has to include a self-assessment, that is to say an assessment of the amounts in which the person making the return is chargeable to income tax and capital gains tax, and of the amount payable. s. 9A deals with the opening of an enquiry into a tax return by HMRC. So far as relevant it provides as follows:

## **"9A Notice of enquiry**

- (1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ("notice of enquiry")—
  - (a) to the person whose return it is ("the taxpayer"),
  - (b) within the time allowed.
- (2) The time allowed is—
  - (a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the day on which the return was delivered;
  - (b) if the return was delivered after the filing date, up to and including the quarter day next following the first anniversary of the day on which the return was delivered:
  - (c) if the return is amended under section 9ZA of this Act, up to and including the quarter day next following the first anniversary of the day on which the amendment was made.

For this purpose the quarter days are 31st January, 30th April, 31st July and 31st October.

- (3) A return which has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) of the return under section 9ZA of this Act.
- (4) An enquiry extends to—
  - (a) anything contained in the return, or required to be contained in the return, including any claim or election included in the return, ..."

The emphasised parts are those the Claimants particularly rely on.

12. Closure of an enquiry is dealt with by s. 28A TMA 1970, as follows:

#### "28A Completion of enquiry into personal or trustee return

- (1) This section applies in relation to an enquiry under section 9A(1) of this Act.
- (1A) Any matter to which the enquiry relates is completed when an officer of Revenue and Customs informs the taxpayer by notice (a "partial closure notice") that the officer has completed his enquiries into that matter.
- (1B) The enquiry is completed when an officer of Revenue and Customs informs the taxpayer by notice (a "final closure notice")—
  - (a) in a case where no partial closure notice has been given, that the officer has completed his enquiries, or
  - (b) in a case where one or more partial closure notices have been given, that the officer has completed his remaining enquiries.
- (2) A partial or final closure notice must state the officer's conclusions and-
  - (a) state that in the officer's opinion no amendment of the return is required, or
  - (b) make the amendments of the return required to give effect to his conclusions.
- (3) A partial or final closure notice takes effect when it is issued.
- (4) The taxpayer may apply to the tribunal for a direction requiring an officer of the Board to issue a partial or final closure notice within a specified period.
- (5) Any such application is to be subject to the relevant provisions of Part 5 of this Act (see, in particular, section 48(2)(b)).
- (6) The tribunal shall give the direction applied for unless satisfied that there are reasonable grounds for not issuing the partial or final closure notice within a specified period.
- (7) In this section "the taxpayer" means the person to whom notice of enquiry was given.
- (8) In the Taxes Acts, references to a closure notice under this section are to a partial or final closure notice under this section."

(emphasis again added).

13. s. 29 TMA 1970 deals with what are called 'discovery assessments'. It provides, so far as relevant:

## "29 Assessment where loss of tax discovered.

- (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
  - (a) that any income, unauthorised payments under section 208 of the Finance Act 2004 or surchargeable unauthorised payments under section 209 of that

Act or relevant lump sum death benefit under section 217(2) of that Act which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax have not been assessed, or

- (b) that an assessment to tax is or has become insufficient, or
- (c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

. .

- (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
  - (a) in respect of the year of assessment mentioned in that subsection; and
  - (b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

- (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
- (5) The second condition is that at the time when an officer of the Board—
  - (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
  - (b) in a case where a notice of enquiry into the return was given—
    - (i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or
    - (ii) if no such partial closure notice was issued, issued a final closure notice,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above."

The issue of discovery assessments is subject to certain time limits, the details of which it is not necessary to set out: see ss. 34 to 40 TMA 1970. By s. 36(1A) that can extend to 20 years after the end of the relevant tax year in certain circumstances, including in particular if a loss of tax has been brought about deliberately.

14. Third, sch 36 FA 2008. This is given effect to by s. 113 FA 2008 and contains what is in effect a self-contained code in relation to HMRC's information and inspection

powers. Part 1 (paras 1 to 9) concerns powers to obtain information. Paras 1 and 2 deal with what are called "taxpayer notices" and "third party notices" respectively, as follows:

## "1 Power to obtain information and documents from taxpayer

- (1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer")—
  - (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 taxpayer's tax position.

(2) In this Schedule, "taxpayer notice" means a notice under this paragraph.

## 2 Power to obtain information and documents from third party

- (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."
- 15. Some other provisions of sch 36 can be shortly noted. By para 3(1) the issue of a third party notice requires the agreement of the taxpayer or the approval of the FTT. By para 6(1) notices under (inter alia) paras 1 or 2 are referred to as "information notices". Part 4 (paras 18 to 28) contains various restrictions on the use of information notices. Part 5 (paras 29 to 33) contains certain rights of appeal to the FTT against information notices. Part 7 (paras 39 to 52) provides that persons who fail to comply with notices served under it become liable for penalties, including daily default penalties. Para 58 contains definitions, including a definition of "checking" as follows:

"In this Schedule-

"checking" includes carrying out an investigation or enquiry of any kind."

#### **Facts**

16. Mr Robertson gives an account of the beneficial ownership and directorships of the other Claimants as follows:

## (1) Overseas Imports

Mr Robertson is the ultimate beneficial owner of 80% of Overseas Imports; Mr Garry Richardson ("Mr Richardson") is the ultimate beneficial owner of the other 20%. Mr Robertson is Chairman of the company, and Mr Richardson Managing Director.

# (2) Supermercados

Supermercados is a wholly-owned subsidiary of Overseas Imports. Mr Robertson and Mr Richardson are the directors.

## (3) JJ

The members of this LLP are Mr Robertson, Boisson and Mr Richardson.

## (4) **Boisson**

Mr Robertson is the sole shareholder and director of Boisson.

## (5) **Intereurope**

Intereurope is a wholly-owned subsidiary of JJ. Mr Richardson is a director.

- 17. Overseas Imports and Supermercados do not file tax returns in the UK. Mr Robertson says (and it has not been disputed) that he himself and each of JJ, Boisson and Intereurope have filed their UK tax returns in time in each of the tax years that are being investigated.
- 18. On 9 June 2016 Mr Robertson received a letter from Mr Timothy Brown, an officer of HMRC, informing him that Mr Brown was starting an investigation into his taxation affairs. It referred to HMRC holding information which suggested that returns that he had submitted might be incorrect; it explained that the investigation would cover his current business interests but also other businesses he was or had been connected with, and would cover all taxes, direct and indirect; it said that HMRC welcomed his co-operation with their investigation and that the extent to which he co-operated and provided them with information was "entirely a matter for you"; and it said that the investigation was being conducted with the aim of achieving a civil financial settlement of any unpaid tax together with any interest and penalties arising, with the level of penalty depending on the extent to which he co-operated.
- 19. The letter was written under the letterhead "Criminal Taxes Unit, Civil Compliance" which Mr Robertson understandably says he found alarming and inappropriate. Mr Brown has explained that the Criminal Taxes Unit ("CTU") (now part of Proceeds of Crime (PoC) within HMRC's Fraud Investigation Service (FIS) Directorate) in fact carried out both criminal and civil investigations and that HMRC has made it clear throughout that the investigation into Mr Robertson is a civil one. There has been some correspondence between the parties about the use of the terms Criminal Taxes Unit, Fraud Investigation Service, Proceeds of Crime and FIS PoC, but I need not refer to it in detail as it does not form any part of the grounds of judicial review that I am asked to decide, and I understand it is no longer a live issue.

- 20. Another question of terminology that has arisen is that at an early stage Mr Brown of HMRC referred to potential "offshore" issues. Mr Robertson assumed that this was a reference to his having assets or income in an offshore tax haven such as the Channel Islands, and denied that there were any offshore issues. As explained by Ms Aparna Nathan QC, who appeared with Mr Tom Richards for HMRC, it seems fairly evident that all that Mr Brown meant by "offshore" was "non-UK", and that what he was referring to was primarily Mr Robertson's business interests in Spain and Portugal. (This usage is indeed what TMA 1970 contemplates: see s. 36A which deals with "Loss of tax involving offshore matter" and includes a definition in s. 36A(3) which uses "offshore" to mean any territory outside the UK). Again this does not form any part of the matters I am asked to decide, but it forms part of the background to Mr Robertson's concerns about the investigation.
- 21. The letter of 9 June 2016 was the beginning of what has become a significant investigation. It is not necessary at this stage to trace the detail, although I refer to some of the correspondence later. A meeting was held in November 2016 with Mr Robertson and his advisers. A number of requests for information followed. In March 2017 a Mr Craig Tully of Gilbert Tax, tax consultants who were then advising Mr Robertson, wrote querying what the statutory basis for the investigation was; Mr Brown told him on the telephone and again by e-mail that he had not opened an enquiry under s. 9A TMA 1970, but had made informal requests for information and documentation, and if it was not provided would have to consider making a formal request under sch 36 FA 2008.
- 22. Further requests for information followed, and another meeting (between HMRC and Mr Tully) on 11 May 2017. Mr Robertson says that he provided a large amount of information in December 2016 and thereafter, but that HMRC repeatedly asked for further information. On 4 July 2017 HMRC issued a formal information notice under para 1 of sch 36 FA 2008 to Mr Robertson. Mr Robertson provided some information in response in July 2017 but objected to the width of the notice; in August 2017 he asked for a review by HMRC (which upheld the original decision in November 2017); and in December 2017 he appealed the notice to the FTT. In March 2018 HMRC withdrew the information notice and consented to the appeal being allowed.
- 23. Meanwhile however in January 2018 Mr Brown had written to Mr Robertson telling him he intended to issue third party information notices (that is under para 2 of sch 36 FA 2008) to the bankers to JJ, Boisson and Intereurope, something that would need the approval of the FTT under para 3(1) of sch 36. That was followed up in June 2018 with letters addressed to each of JJ, Boisson and Intereurope with details of information that would be requested from their respective bankers. correspondence in which the Claimants' solicitors, Memery Crystal LLP, contended that what HMRC intended would be unlawful, and ultimately to an application to the FTT by Mr Robertson and the three UK corporate entities asking that any application by HMRC under para 3(1) of sch 36 should be heard inter partes. That was refused by the FTT (Judge Barbara Mosedale) in a decision released on 9 October 2018, effectively on the ground that she had no power to direct an *inter partes* hearing. On 31 October 2018 Judge Mosedale further refused a stay pending an appeal which the applicants had brought to the Upper Tribunal; and on 28 November 2018 she approved the issue of third party notices pursuant to para 3(1) of sch 36. HMRC has subsequently agreed not to serve them pending the conclusion of the claims for

judicial review. Grounds 4 to 6 in the judicial review concern the FTT's decisions on 9 October, 31 October and 28 November 2018 respectively, but as I have already referred to, Holman J stayed those grounds (on the basis that the relevant points were likely to be considered in the appeal to the Upper Tribunal), and they have not been argued or referred to before me.

- 24. In addition HMRC in 2018 made requests of the Spanish and Portuguese tax authorities. I will give an account of these later when considering Ground 3.
- 25. The overall position is as follows. Mr Robertson says that the investigation has caused him enormous stress; he feels that he has been treated like a criminal; the investigation, which has now persisted for three years, has impacted his private and family life, as well as his relationships with his staff; it is an enormous distraction and very time-consuming; it has strayed into the lives of his friends (Mr Richardson and a Mr Jamie Bottomley), who have been contacted by Mr Brown and wrongly issued with assessments or penalties; and it has cost him very significant sums obtaining professional advice. He says he pays substantial sums of tax and is willing to pay all that is legally due; that he has always sought professional advice to ensure that his tax affairs are in order; but that he now feels hounded by HMRC to the extent that he is considering "relocating to Spain or actually moving to an 'offshore' jurisdiction". Mr Philip Moser QC, who appeared with Mr David Bedenham for the Claimants, says that although the investigation has turned up a few issues, no actual or attempted evasion of tax has been discovered or even asserted: there is no smoking gun.
- 26. Mr Brown for his part says that there is still information outstanding and that HMRC continue to have a number of concerns, which he refers to in his witness statement. I do not intend to set out the details of those concerns here. I will have to consider them to some extent when dealing with Ground 2B, but for the most part the argument has proceeded by reference to the applicable principles rather than the particular facts of the investigation.
- 27. I can now consider the Grounds argued before me.

*Ground* 1 – the investigation is ultra vires

- 28. The Claimants' case under Ground 1 is that where HMRC have not opened an enquiry into a taxpayer's tax return under s. 9A TMA 1970, they do not have a general power to conduct the sort of wide-ranging lengthy investigation that they have been conducting in relation to the Claimants.
- 29. In the present case it is not disputed that Mr Robertson filed a personal tax return for each of the years in question under s. 8 TMA 1970 by the relevant filing date (the end of January following the tax year in question). In a case where the return is filed on or before the filing date, the effect of s. 9A(2)(a) TMA 1970 is that HMRC have a period of 12 months after the day on which the return was delivered to open an enquiry into the return under s. 9A. This period was referred to in argument as 'the enquiry window'. It is common ground that in the present case HMRC did not open an enquiry into any of Mr Robertson's tax returns in the relevant enquiry window.
- 30. Mr Moser submitted that once the s. 9A powers cease to be available, the only statutory mechanism available to HMRC to carry out an investigation is by use of the

powers to seek information or documents under sch 36 FA 2008. The use of those powers has a number of safeguards built in.

- 31. First, the statutory pre-conditions have to be met. That means that both in the case of a taxpayer notice under para 1 and of a third party notice under para 2 the information or document must be "reasonably required for the purpose of checking" the taxpayer's tax position.
- 32. Second, there are a number of restrictions on the use of the sch 36 powers, contained in Part 4 of sch 36. Thus for example by para 21, where a taxpayer has made a tax return in respect of a chargeable period, a taxpayer notice may not be given for the purpose of checking that person's income tax or capital gains tax position in relation to that period unless one of four specified conditions is met. One (condition A) is that a notice of enquiry has been given into the return and the enquiry has not been completed (para 21(4)). This enables HMRC to use para 1 of sch 36 in the course of an open enquiry under s. 9A TMA 1970. Another (condition B) is as follows (para 21(6)):
  - "(6) Condition B is that, as regards the person, an officer of Revenue and Customs has reason to suspect that—
    - (a) an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed,
    - (b) an assessment to relevant tax for the chargeable period may be or have become insufficient, or
    - (c) relief from relevant tax given for the chargeable period may be or have become excessive."

There are two other conditions, C and D (paras 21(7) and 21(8)), but these only apply in limited circumstances, which means that if HMRC wish to issue a taxpayer notice under para 1 of sch 36 when they have not opened an enquiry (and in particular after the expiry window has expired), they can usually only do so on the basis of a reason to suspect.

- 33. Third, the use of the sch 36 powers is subject to the scrutiny of the FTT, either by way of prior approval or on appeal. In the case of a third party notice under para 2, a notice cannot be issued unless either the taxpayer agrees or the FTT gives prior approval (para 3(1)); and in the case of a taxpayer notice under para 1, HMRC may ask for the prior approval of the FTT (para 3(2)). In either case the FTT cannot approve the giving of the notice unless it is satisfied that the officer giving the notice is "justified in doing so" (para 3(3)(b)), and that (save in certain circumstances) various other conditions have been met (paras 3(3)(c)-(e) and 3(4)). In the case of a taxpayer notice which has not been the subject of prior approval by the FTT, the taxpayer may appeal against the notice or any requirement in it (paras 29(1) and 29(3)); and in the case of a third party notice which has not been the subject of prior approval by the FTT (that is where it is given with the agreement of the taxpayer), the third party may appeal against the notice or any requirement in it on the ground that it would be unduly onerous to comply with it (paras 30(1) and 30(3)).
- 34. Mr Moser accepts that where HMRC have not opened a s. 9A enquiry in the enquiry

window, they can in an appropriate case use the sch 36 powers to obtain information, and if the information obtained by use of such powers leads HMRC to discover that tax is owed, they can look to assess the taxpayer by a discovery assessment under s. 29 TMA 1970 (subject to the time limits and other conditions applicable to discovery assessments). But he submits that what HMRC cannot do is conduct a wide-ranging investigation into a personal tax return despite not opening a s. 9A enquiry, something which he characterised as a s. 9A enquiry by another name, or as he put it an "innominate extra-statutory investigation". As a statutory body, HMRC have the powers conferred on them by statute, but no general powers to do things that are not authorised by statute.

- 35. I will use the term 'informal investigation' to refer to the sort of investigation that HMRC have carried out, and are continuing to carry out, in the present case. The evidence is that there is nothing peculiar about Mr Robertson's situation, and that HMRC regularly make use of such informal investigations. Indeed it appears from the recent FTT decision in *Hunter v HMRC* [2019] UKFTT 0312 (TC) (Judge Rupert Jones and Mr David Batten) ("*Hunter*") that Mr Brown's letter of 9 June 2016 initiating the investigation is, as one might expect, in the form of a standard HMRC template.
- 36. Ms Nathan accepts that HMRC is a statutory body and can only do the things it is empowered to do by statute, but she submits that that gives rise to no difficulty. By s. 5(1) CRCA 2005 and s. 1 TMA 1970 HMRC's functions include the collection of taxes; conducting an investigation into whether a taxpayer has declared all his income and paid the correct amount of tax is expedient or conducive to the exercise of that function; and it is therefore something that HMRC have statutory power to do under s. 9(1) CRCA 2005.
- 37. I accept this submission, which seems to me plainly well-founded. Indeed although Mr Moser had no difficulty persuading me that the investigation has had a number of real adverse consequences for Mr Robertson, he never came close to persuading me that he had any answer to Ms Nathan's simple but compelling analysis.
- 38. In more detail, the position as I see it is as follows (this is effectively in line with Ms Nathan's submissions but I have expressed it in my own words). First, HMRC's functions include the collection of tax. Indeed that seems to me undoubtedly their primary function: in R v IRC ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545 (not cited to me but very well-known to practitioners in this field) Bingham LJ said at 1569B that every ordinarily sophisticated taxpayer knows that the revenue is a tax-That is what HMRC do. collecting agency. That function is given statutory expression both in s. 5(1) CRCA 2005, which provides that HMRC are "responsible for ... the collection ... of revenue" for which the Commissioners of Inland Revenue (ie broadly direct taxes) and the Commissioners of Customs and Excise (ie broadly indirect taxes) were respectively previously responsible; and in s. 1 TMA 1970 which more specifically makes HMRC "responsible for the collection ... of" income tax, corporation tax and capital gains tax. Ms Nathan told me that there is, as one would expect, similar provision made in relation to VAT in the relevant VAT legislation.
- 39. Under s. 51(2)(a) CRCA 2005 the "functions" of HMRC may be either powers or duties. The function of collecting tax necessarily includes a power for HMRC to collect tax; but there is no doubt in my mind that it also involves a duty on HMRC to

do so. That seems to me implicit in the very word "responsible": it is HMRC's responsibility, and hence statutory duty, to collect tax. If there were any doubt about it, which I do not think there is, then s. 5(2) CRCA 2005 provides that HMRC shall have all the other functions which were vested in the Commissioners of Inland Revenue before the commencement of s. 5, and that would include the statutory duty to collect tax imposed on them by s. 13(1) IRRA 1890 ("the Commissioners shall collect and cause to be collected every part of inland revenue") which remained in force until s. 5 CRCA came into force: see, for example, *R v IRC ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 ("the Fleet Street casuals case"), where the speeches of their Lordships are full of reference to the Commissioners' statutory duties to collect tax (eg Lord Roskill at 660A, referring to the Commissioners as "a public body charged with the performance of a public duty of crucial importance").

40. But the duty to collect tax cannot be limited to collecting only the tax that taxpayers admit to owing. It must be a duty to collect, so far as reasonably possible, the correct amount of tax from taxpayers. Ms Nathan referred in this context to the statement by Henderson J in *Tower MCashback LLP 1 v HMRC* [2008] EWHC 2837 (Ch) at [115] (cited with approval by Lord Walker in the same case on appeal to the Supreme Court at [2017] UKSC 19 at [15]) that:

"There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the commissioners in exercise of their statutory functions to have regard to that public interest."

Reference to the full passage in the original judgment, rather than merely the extract cited by Lord Walker, makes it clear that Henderson J, in referring to "the commissioners", was not in fact referring to the Commissioners of Inland Revenue as such, but to the General Commissioners and Special Commissioners who then heard appeals against assessments. Henderson J was himself hearing an appeal from a Special Commissioner and was considering the extent to which the Special Commissioner could consider legal arguments not relied on by the officer in issuing a closure notice. The precise relationship between the General and Special Commissioners on the one hand and the Commissioners of Inland Revenue on the other is now only of historical interest and I do not intend to go into it. Nevertheless what is undoubtedly as true today as it ever was is that it is in the public interest that taxpayers pay the correct amount of tax; and hence that HMRC's duty to collect tax is to collect, so far as they can, the right amount of tax, not just the tax that taxpayers accept is due.

41. In a perfect world no doubt every taxpayer who was obliged to file a tax return under s. 8 TMA 1970 would do so, and every taxpayer filing such a return would scrupulously comply with the declaration required by s. 8(2) and ensure that the return was to the best of his knowledge correct and complete. But it is everyday experience that not all taxpayers do so comply, some through honest misunderstanding or oversight, some through carelessness and some through deliberate non-disclosure. HMRC are of course largely dependent on what taxpayers tell them to ensure that they are collecting the correct amount of tax; but in a world where not all taxpayers tell them everything they should, it must be open to them, in exercising their duty to collect the right amount of tax, to investigate whether a return is accurate and

comprehensive or not. That seems to me a paradigm case of something which is necessary, expedient, incidental or conducive to the exercise of their function of collecting the right amount of tax.

42. The way in which it was put by Ms Nathan was to refer first to the *Fleet Street casuals* case where Lord Diplock at 636G said:

"the board are charged by statute with the care, management and collection on behalf of the Crown of income tax, corporation tax and capital gains tax. In the exercise of these functions the board have a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection."

(See also *R* (*Wilkinson*) *v IRC* [2005] UKHL 30 at [20] per Lord Hoffmann). She then said that the investigation of whether a person may have underpaid tax falls *prima facie* within HMRC's broad collection and management and ancillary powers. Mr Moser expressly confirmed that he did not dispute this.

43. Mr Moser however referred to the principle that ancillary powers such as conferred by s. 9(1) CRCA 2005 have to be construed in accordance with the statutory scheme of which they form part. The principle is well established, and was not disputed by Ms Nathan: see *Hazell v Hammersmith LBC* [1992] 2 AC 1 ("*Hazell*") at 31D-E per Lord Templeman:

"The authorities deal with widely different statutory functions but establish the general proposition that when a power is claimed to be incidental, the provisions of the statute which confer and limit functions must be considered and construed. The question is not whether swap transactions are incidental to borrowing but whether swap transactions are incidental to a local authority's borrowing function having regard to the provisions and limitations of the Act of 1972 regulating that function.

The authorities also show that a power is not incidental merely because it is convenient or desirable or profitable."

Mr Moser also referred me to R (oao ABC Ltd) v HMRC [2017] EWCA Civ 956, which itself concerned the application of s. 9(1) CRCA 2005. The substantive question was whether HMRC, who had refused certain taxpayers' applications for approval to sell liquor on the grounds that they were not fit and proper persons, could grant interim approval pending an appeal to the FTT. Burnett LJ held that they could not, for reasons summarised at [35] and given in more detail at [47]-[49]. He referred (at [47]) to s. 9 CRCA as being in wide terms; he cited (at [48]) what Lord Templeman had said in *Hazell*; and what Woolf LJ had said at first instance in that case ("Before the subsection can authorise an activity which is not otherwise authorised there must be some other underlying function which can be authorised, to the discharge of which, the activity will facilitate or be conducive or incidental"); he then at [49] identified the underlying function in that case to be HMRC's function of determining applications for approval, and held that once HMRC had concluded that the applicants were not fit and proper persons, it would be "contrary to the statutory scheme" for HMRC then to pretend that they were for the purpose of granting temporary approval. In summary he held that:

- "To use the statutory power in the way suggested by the claimants would be inconsistent with the statutory scheme."
- 44. Mr Moser said that in accordance with these principles s. 9(1) CRCA 2005 could not be relied on as a source of a statutory power to carry out an informal investigation. As I understood it he put the point in two slightly different ways.
- 45. First he said that an ancillary power had to be ancillary to something else, and that could not be the general functions in s. 5(1) CRCA 2005 and s. 1 TMA 1970 as those were not powers but functions. I do not accept this submission. I have already said that HMRC's function of collecting tax includes both a power and a duty; but in any event what s. 9(1) does is confer power on HMRC to do anything which they think (a) necessary or expedient in the exercise of their functions, or (b) incidental or conducive to the exercise of their functions. The question therefore is not strictly whether carrying out an informal investigation is ancillary to another power, but whether it is ancillary (or more precisely is thought by HMRC to be necessary, expedient, incidental or conducive) to their functions, which includes the function of collecting tax. HMRC clearly do in fact think that it is both expedient and conducive to that function, and since they have a wide managerial discretion as to the best means of collecting tax, I do not think it can be possibly be said that that is an impermissible or unreasonable view for them to hold. It is only common sense that it can be more effective to ask taxpayers to co-operate voluntarily with an investigation than to move immediately to coercive powers. This is a point I will return to below.
- 46. Mr Moser's second point was that the use of an informal investigation was inconsistent with the statutory scheme. He characterised the statutory scheme as consisting of (i) the power to open a s. 9A enquiry during the enquiry window and (ii) the power, after the expiry of the enquiry window, to issue information notices under sch 36, both of which were formal powers regulated by statute and subject to judicial supervision in one form or another. For HMRC to open an informal investigation, with no statutory regulation and no judicial oversight, was inconsistent with this.
- 47. I do not accept this submission either. It is to my mind to take far too narrow a view of the statutory scheme in question. The statutory scheme is that the collection of tax is entrusted to HMRC. I have already said that this imposes both a power and a duty on HMRC not just to collect the tax that taxpayers tell them about, but (so far as possible) the tax that taxpayers do not tell them about. For this purpose they have a range of tools to enable them to investigate, discover and collect tax that has not been, as it should have been, declared by way of self-assessment. This includes the power to open an enquiry into a return under s. 9A TMA 1970 and the issuing of information notices under sch 36 FA 2008, but I see no reason to conclude that it is limited to that.
- 48. The statutory scheme as I see it includes the following features:
  - (1) HMRC's power to open a s. 9A enquiry does not require them to have any particular suspicion that there is an error. There is FTT authority to this effect: Spring Capital Ltd v HMRC [2015] UKFTT 0008 (TC) at [34]. They are entitled to check a taxpayer's tax position and do not need any particular reason to do so. That seems to me right. Indeed I believe that HMRC do check some returns on a random basis, but whether that is so or not, there is

- nothing in s. 9A TMA 1970 which imposes any pre-conditions, and no reason to imply any. The fact that HMRC may check a taxpayer's return (and if errors are found levy penalties) is more likely to encourage taxpayers to be accurate and complete in their returns than if HMRC had to have a specific reason to suspect before they could open a s. 9A enquiry.
- (2) The opportunity to open a s. 9A enquiry is however a limited one, and once the 12-month window has closed, s. 9A is no longer available. That however is not the end of HMRC's opportunity to collect further tax if further tax is due, as s. 29 TMA 1970 enables them to assess further amounts to tax by way of discovery assessment, subject to the time-limits and other conditions in s. 29. That requires HMRC to have discovered that there has been a loss of tax. The word "discover" in this context has a long history, and there is a substantial body of authority on what it means, but in essence it involves a real officer of HMRC subjectively coming to the conclusion that the information available to him points in the direction of there being an insufficiency of tax, and his belief being objectively one which a reasonable officer could form: Anderson v HMRC [2018] UKUT 159 (TCC) at [25]-[30]. There must be more than suspicion, and a threshold must be crossed, although there need not be a "eureka moment": ibid, Charlton v HMRC [2012] UKFTT 770 (a decision of the Upper Tribunal, despite the neutral citation) at [24]-[28], Hicks v HMRC [2018] UKFTT 0022 (TC) at [51].
- (3) Since it is part of the statutory scheme that HMRC can issue discovery assessments, it is necessarily part of HMRC's functions to consider whether discovery assessments should be issued. For that purpose it must also be part of their functions to investigate a taxpayer's affairs to see if the information available to them does lead to a conclusion that there has been an insufficiency of tax. No doubt, as Mr Moser suggested, in some cases that may simply involve the officer, or another officer, re-reading the file and coming to a different conclusion (see *Charlton v HMRC* at [44]), but in the majority of cases it is likely to be as the result of some new information that the threshold is crossed. As Ms Nathan submitted, that in itself suggests that HMRC can carry out investigations to see whether a discovery assessment can be raised.
- (4) The fact that it is part of HMRC's functions to check the accuracy of a taxpayer's return is confirmed by the terms of sch 36. Paras 1 and 2 of sch 36 enable information notices to be issued to taxpayers and third parties respectively "for the purpose of checking" a taxpayer's position. "Checking" is expressly defined by para 58 to include carrying out "an investigation or enquiry of any kind". That is clearly not confined to a s. 9A enquiry, as Mr Moser accepts, as para 21(6) shows that the sch 36 powers can be exercised after the expiry of the enquiry window. So what other sort of investigations or enquiries does sch 36 envisage? The obvious answer is that they are, or at any rate include, investigations and enquiries designed to enable HMRC to determine whether there has been an underassessment of tax such as to justify a discovery assessment under s. 29 TMA 1970.
- (5) That conclusion is strongly supported by the terms of para 21(6) itself. As set out above (paragraph 32) para 21(6) requires an officer of HMRC to have reason to suspect one of three things, namely in summary (a) that some

income or gain or other amount may not have been assessed to tax (b) that an assessment may be insufficient or (c) that a relief may be excessive. Comparison with the terms of s. 29(1) TMA 1970 (paragraph 13 above) shows that these three things are precisely the same three things that enable a discovery assessment to be made.

- 49. In those circumstances it seems to me beyond doubt that the statutory scheme is such that HMRC's functions include not only opening an enquiry into a return under s. 9A TMA 1970 during the enquiry window, but also checking returns without opening a s. 9A enquiry, including after the enquiry window has closed, with a view to ascertaining if there is ground to issue a discovery assessment, and that such checking can include not just re-reading the file but carrying out investigations and enquiries to see if any further information can be obtained that can shed light on the question. As Ms Nathan submitted, sch 36 is not drafted so as to *confer* power on HMRC to check tax returns by way of conducting investigations or enquiries; it proceeds on the basis that HMRC *has* power to check tax returns, and confers power to obtain information and documents by compulsion for that purpose.
- 50. Since that is the statutory scheme, I see nothing inconsistent with it in HMRC having power to ask a taxpayer for information and documents on a voluntary basis. That seems to me ancillary to HMRC's function of checking a taxpayer's tax position, or more strictly something that HMRC can legitimately think is either (a) necessary or expedient in the exercise of that function or (b) incidental or conducive to the exercise of that function. It is therefore authorised by s. 9(1) CRCA 2005.
- 51. Indeed Mr Moser's submission seems to me to have serious practical difficulties. It became apparent during the course of his argument that what he was contending was that once the opportunity to open a s. 9A enquiry had passed, HMRC could only carry out any further investigations by resorting to the sch 36 powers, with the practical result that instead of HMRC writing to a taxpayer inviting him to co-operate on a voluntary basis with an informal investigation and only moving to compulsory powers under sch 36 if the information could not be obtained voluntarily, HMRC's sole recourse was to initiate an investigation by serving a taxpayer with a sch 36 notice. That would mean, as Mr Moser accepted, a taxpayer receiving out of the blue a formal demand from HMRC for information and documents, backed by penal sanction, and unheralded by any previous attempt to obtain the information voluntarily.
- 52. That is not HMRC's current practice. Indeed, it appears from *Hunter* at [388] that HMRC's guidance to its officers includes the following:
  - "You should normally ask for information you need at every stage of the enquiry before you consider the use of information powers... Normally you should not issue a notice under FA08/Sch36/Para1 unless the taxpayer has refused to co-operate with an informal request for information..."

That seems to me an entirely proper approach for HMRC to take. But if Mr Moser were right, it would be unlawful.

53. That proposition only has to be stated to be seen to be a most unattractive and surprising one. It is not a conclusion I would come to unless compelled to do so. As

Ms Nathan submitted, it would seem the very antithesis of good administration for an arm of the state to use compulsory powers as a first step in obtaining information from an individual, rather than resort to them only when all attempts to obtain the information voluntarily had run into the sand. Nor would it be likely to be beneficial either to the obtaining of information or the collection of the correct amount of tax. It seems no more than common sense that HMRC should wish to encourage taxpayers to co-operate with their investigations voluntarily rather than reaching immediately for the sch 36 powers, something that one would have thought would be likely to cause many taxpayers to adopt a defensive, hostile and litigious attitude that would do little to assist HMRC in their function of collecting so far as possible the correct amount of tax. Indeed in the MFK case Bingham LJ referred to evidence (albeit in a different context) that the Commissioners saw it as part of their function to generally encourage co-operation between the Inland Revenue and the public, and that this facilitated the collection of the public revenue. And in *Hunter* the FTT at [368] recorded a submission by HMRC that informal requests "often create an atmosphere of co-operation and collaboration", a submission which the FTT accepted; and at [379] a similar submission that Officer Booth informally requested bank statements in that case:

"as this promotes co-operation, collaboration and often progresses a tax investigation expeditiously."

That all seems to me to be entirely what one would expect.

- Mr Moser said that if there were a lacuna in the statutory scheme, the correct solution would be for HMRC to ask Parliament for further legislative powers, putting these informal investigations onto a proper statutory basis. As I have explained I do not think there is any such lacuna; but the fact that Mr Moser recognised that HMRC might want such powers if they did not already have them might be said to be a tacit acknowledgment that HMRC might think it appropriate to have such powers to enable them to carry out their functions. But if so, that I think comes very close to an acceptance that HMRC could reasonably conclude that such powers would be expedient or conducive to the exercise of their function of collecting the tax that ought to be paid, and hence that such powers fall squarely within the terms of s. 9(1) CRCA 2005 already.
- 55. For the reasons I have given I do not accept Ground 1. Before leaving it, I should note some of the other points raised by Mr Moser in this connection, although none of them affects the conclusion I have come to.
- 56. He took me through some of the history of the investigation in the present case. He referred first to Mr Brown's initial letter of 9 June 2016, and in particular the following aspects of it:
  - (1) The width of the investigation. What Mr Brown said was:

"The investigation will cover your current business interests but will also cover other businesses which you are or have been connected with and any dealings with companies that may have an effect on your personal tax liability. It will include all sources of income and gains giving rise to any taxes, both direct and indirect. These taxes include Income Tax, VAT, Corporation Tax and Capital Gains Tax."

Mr Moser drew attention to the fact that there was no limit on the proposed investigation, either in time or scope.

(2) The tone of the letter. As well as bearing the letterhead "Criminal Taxes Unit, Civil Compliance", the letter referred to the possibility of penalties as follows:

"My investigation is being conducted with the aim of achieving a civil financial settlement of any unpaid tax together with any interest and penalties arising. The penalty is a percentage of the tax unpaid, understated or underassessed. The level of penalty percentage applied will depend upon your behaviour, which led to any errors or omissions, and the extent to which you help us arrive at the correct liability. Full cooperation will ensure that any penalties are reduced to their minimum levels and you may be able to avoid having your details published."

Mr Brown's letter said that it enclosed four HMRC factsheets, including one on "Penalties for inaccuracies in returns and documents" and one on "Publishing details of deliberate defaulters". Mr Robertson cannot in fact remember whether the factsheets were enclosed, but Mr Moser said that the overall impression was that the investigation could have serious consequences.

(3) The failure to make it clear upfront that Mr Robertson was under no compulsion to provide the information requested and that it was entirely voluntary whether he did so or not.

Mr Moser said that he did criticise the form of the letter, as well as relying on the investigation being *ultra vires*.

- 57. I have already referred to the fact it appears from *Hunter* that Mr Brown's letter is in the form of a standard template. In *Hunter* the FTT said that they were not satisfied that the template was appropriately worded, and that more careful thought should be given to the terms of such letters, identifying material that gives rise to HMRC opening an investigation (if it can be revealed without disclosing anything sensitive) or the nature of the allegation, and the specific years under investigation, and emphasising that the investigation is on a voluntary basis and not pursued under any statutory power at that stage (although such powers might be available if the taxpayer did not co-operate): see at [349]-[350].
- 58. In the present case the drafting of the letter is not itself one of the Grounds relied on, and I do not think I ultimately need to reach a conclusion on whether it is appropriately worded. But I should say that I am not myself persuaded that Mr Moser's criticisms of the letter are well-founded. As to the particular points relied on:
  - (1) It is true that the investigation proposed is a wide one. But that is scarcely surprising. As already referred to, HMRC are dependent on the taxpayer making a correct and complete return of income and capital gains under s. 8 TMA 1970. If HMRC receive information suggesting that a taxpayer's returns may not have been correct and complete, it is in the nature of things quite likely that they will not know with precision in what respects it may be incorrect or incomplete: the very purpose of an investigation is to find out what they do not know. As Ms Nathan put it, there may be known unknowns,

but there may also be unknown unknowns. Where HMRC for whatever reason suspect they may not have been told the whole story, they may very well also be unable to specify precisely which of a taxpayer's affairs merit further investigation, which taxes might be involved, or which years might be affected. Where HMRC are able to be more specific, for example by focusing on a particular issue, a particular business, a particular tax or a particular year, it is no doubt good practice to make this clear. But a failure to do so does not seem to me to be necessarily inappropriate; and if HMRC had to specify with precision the scope of their investigation at the outset, it is predictable that any attempt to ask questions outside that might meet with resistance from some taxpayers. Some taxpayers are no doubt entirely cooperative with HMRC investigations; some, one suspects, are reluctant or deliberately obstructive.

- (2) I agree that the letter gives the impression that the matter is potentially serious. But I see nothing inappropriate in that. An investigation may lead to a conclusion by HMRC that there has indeed been an under-declaration of income or gains, or a claim to a relief that the taxpayer was not entitled to, and hence an under-assessment of tax. That is likely to lead to a discovery assessment being issued and in that case HMRC will no doubt usually seek to levy penalties and interest. I was told by Ms Nathan that the practice referred to in Mr Brown's letter of HMRC seeking to levy penalties on a scale that depends, among other things, on the level of co-operation a taxpayer has shown, although not mandated by statute, is a well-established and published practice of HMRC. That accords with my own experience in other cases. Indeed, although it is not in evidence, it seems likely that the first factsheet said to have been enclosed with Mr Brown's letter (Factsheet CC/FS7a "Penalties for inaccuracies in returns and documents") addressed precisely this question. If this is HMRC's practice, and I have no reason to doubt that it is, then it seems to me entirely appropriate that HMRC should draw attention to it when opening an investigation. If the letter gives the impression that an investigation of this type is potentially serious, that is because it is.
- (3) I do not accept that Mr Brown's letter did not make it sufficiently clear that co-operation was voluntary. It said in terms:
  - "HMRC welcomes your cooperation with our investigation and in establishing your correct liabilities. The extent to which you cooperate with us and provide us with information is entirely a matter for you."

That seems to me to be clear enough, even if the message that co-operation is entirely voluntary is rather blunted by the next paragraph (quoted at paragraph 56(2) above), which refers to the level of penalties being affected by the extent of co-operation. The FTT in *Hunter* may be right that it would be preferable to emphasise that the investigation was on a voluntary basis and not pursued under any statutory powers compelling answers at that stage, but I do not think it can really be said that Mr Brown's letter failed to say that compliance with the requests for information was voluntary. Moreover Mr Robertson, as one suspects many taxpayers in his position do, took professional advice and even if he did not read the letter carefully and understand the implications, it is to be presumed that his advisers did so. I do not think it was misleading.

I have thought it appropriate to express my views in the light of the criticisms of the letter made by Mr Moser, but none of this affects the question under Ground 1 whether there was any power for HMRC to conduct such an investigation at all.

59. Mr Moser next referred to a letter from Mr Brown dated 15 July 2016 to Bark & Co, Mr Robertson's then solicitors. This stated, in answer to a letter from them:

"As stated in my letter 8 June 2016 [sic – in fact 9 June], my investigation will cover all of Mr Robertson's business interests and will include all sources of income and gains giving rise to any taxes. One of the items I would want to discuss at the proposed meeting is the £3.3m gain made by Mr Robertson during the 2014/2015 tax year following the sale of goodwill in JJ Management Consulting LLP to Boisson Consultants Limited. I would be grateful if documentation in relation to this gain was provided at, or prior to the meeting, including details of how the goodwill was valued."

As can be seen, this refers to a transaction, disclosed in Mr Robertson's tax return for 2014/15, under which goodwill in JJ was sold to Boisson, apparently realising a substantial gain for Mr Robertson. I received very little explanation as to the underlying facts, although it appears that the gain was taxed at 10% due to a relief called Entrepreneurs' Relief. The questions this transaction gives rise to, referred to compendiously as 'the goodwill issues', were not gone into in any depth at the hearing, but HMRC have now issued a discovery assessment against Boisson which is related to the goodwill issues, and that assessment has been appealed to the FTT. In those circumstances neither counsel was tempted to get drawn into the goodwill issues before me and it is not necessary to consider them any further.

- 60. For present purposes the relevance is that Mr Moser said that as the gain was referred to in Mr Robertson's return for the tax year 2014/15, which it can be assumed was filed towards the end of January 2016, the enquiry window was still open in June 2016 and HMRC could have pursued any queries that it had by opening an enquiry under s. 9A TMA 1970. I was not I think told when the tax return was in fact filed but on the assumption that it was after July 2015, which is no doubt likely, Mr Moser is right that it would have been open to HMRC to open a s. 9A enquiry. But as Ms Nathan pointed out, HMRC are not obliged to open a s. 9A enquiry: see s. 9A(1) which provides that an officer of the Board (now an officer of HMRC) "may" enquire into a return, and Langham (Inspector of Taxes) v Veltema [2004] EWCA Civ 193 at [32] per Auld LJ. Mr Brown's evidence was that where matters are referred to the CTU, it is normal for enquiries not to be opened under s. 9A TMA 1970 (or its equivalent for corporations, para 24 of sch 18 FA 1988). Ms Nathan submitted that that was understandable. In a case like the present, HMRC wish to conduct a widerange investigation, wider than would be possible under s. 9A, where an enquiry is limited to investigating only a single year's return. I think that submission is probably well made; ultimately, however, I do not think I need to decide why HMRC decided not to open a s. 9A enquiry into the goodwill issues: all that I need to decide, and have already decided, is whether, having chosen not to, they had power to conduct an investigation as they did. I do however accept that HMRC had a choice whether to open a s. 9A enquiry, and I see no reason to think that the decision not to was improper or unlawful in any way.
- 61. Mr Moser next referred to a letter from Mr Brown, this time to Bruce Allen LLP,

Mr Robertson's accountants, dated 21 November 2016. This was a follow-up to a meeting between HMRC and Mr Robertson and his advisers on 3 November 2016. In his letter Mr Brown said:

"As I have previously highlighted to Mr Makkonnen [of Bark & Co], my main concerns relate to Mr Robertson's ability to fund his lifestyle based on his declared income and issues arising from the sale of the goodwill of JJ Management Consulting LLP to Boisson Consultants Ltd."

The letter continued by referring to certain specific matters and asking for certain information.

62. On 27 March 2017 Mr Tully of Gilbert Tax wrote to HMRC asking what the statutory basis for their enquiries was. Mr Brown spoke to Mr Tully on the telephone on 6 April 2017 and followed it up with an e-mail of 11 April 2017 in which he said:

"As I stated on the telephone on 6 April 2017, I have not opened Section 9A enquiries into Mr Robertson's tax returns. I have information to suggest that Mr Robertson's tax returns are incorrect and, under Section 29, TMA 1970, I could consider raising assessments to charge tax that may be due.

I met with Mr Robertson and his advisors on 3 November 2016 to discuss his tax affairs and I subsequently made informal requests for information and documentation. Most of this information and documentation was requested in my letter dated 21 November 2016 and remains outstanding. I believe this information and documentation is reasonably required for the purpose [of] checking Mr Robertson's tax position as I suspect that an amount that ought to have been assessed to tax may not have been assessed. If the information and documentation is not provided I will have to consider making a formal request to Mr Robertson (FA 2008, Sch36, para 1 / para 21 (6))."

Mr Moser pointed out that there was no reference here to s. 9 CRCA 2005, and suggested that reliance on s. 9 was an *ex post facto* justification. I do not think this is a fair reading of Mr Brown's e-mail. On the analysis I have adopted above, Mr Brown's understanding of HMRC's powers was essentially correct, namely that although he had not opened a s. 9A enquiry, he was carrying out an informal investigation and that the information he had requested was reasonably required for checking Mr Robertson's tax position; that would justify the use of sch 36 powers, but before involving formal powers, he was inviting Mr Robertson to provide the information voluntarily. Save that he did not actually refer to s. 9 CRCA 2005, this is no different from what I have found to be the correct analysis.

63. Mr Moser next referred to a further letter from Mr Brown, this time to Mr Robertson personally, dated 1 August 2017. This included a statement as follows:

"HMRC is entitled to carry out a check of an individual's tax position outside the time limit for opening a S9A TMA 1970 enquiry. When HMRC has ceased to be able to enquire into a tax return under S9A TMA 1970, the legal basis that allows an Officer to ask for information to check a person or entity's tax position is schedule 36 FA 2008."

Mr Moser said that at this stage Mr Brown was seeking to justify the investigation under sch 36 FA 2008, something no longer relied on as such. Again I do not think

this is a fair reading of the letter as a whole. Mr Brown continues in the next paragraph:

"To that end, HMRC officers can request further information to quantify a taxpayer's liability without immediate recourse to legislative powers, which does of course depend on co-operation by the person concerned....

HMRC reserves its rights to use schedule 36 FA 2008 powers to obtain any information that might be required to check the tax position, and to make assessments under S29 TMA 1970 to make good any loss of tax."

Taken overall, that again seems to me an essentially correct statement of the position.

64. Mr Moser also referred to SALF 404. This is an extract from an HMRC manual entitled "Self Assessment: the legal framework". This is one of a number of internal HMRC manuals. They are primarily aimed at giving guidance to HMRC staff, but it has been the practice for some years for HMRC (and the Inland Revenue before them) to make them publicly available. The relevant passage is as follows:

## "Enquiries after time limit for notice of enquiry has elapsed

It is not possible for HMRC to commence enquiries under the Section 9A powers once the time limit for giving a notice of enquiry has passed. Any enquiries commenced outside these time limits may only be made for the purposes of a discovery assessment under Section 29 (see SALF409 onwards). HMRC may sometimes refer to such cases as 'investigations', in order to distinguish them from enquiries pursued under the S9A powers. In such cases HMRC have to rely on the information powers in FA08/Sch36 to support the investigation. Discovery assessments are limited to where a loss of tax has been brought about carelessly or deliberately by the taxpayer or a person acting on his behalf, or there has been a failure to disclose all the relevant information."

Mr Moser submitted that this official HMRC guidance confirmed his submission that once the enquiry window had closed, the only powers HMRC had were those in sch 36 FA 2008. But I do not think this is what SALF 404 means. As Ms Nathan submitted, it envisages that HMRC may carry out investigations for the purposes of seeing if a discovery assessment should be raised, and refers to the sch 36 powers not as the source of the power to carry out such investigations but as being available to be used in support of such an investigation. Again that seems to me essentially correct.

- 65. Finally under Ground 1 Mr Moser referred me to the decision in *Hunter*. His submission was that in that case the FTT, although upholding HMRC's powers to carry out informal investigations, accepted that such powers could not be found in any statutory provisions but concluded that they were extra-statutory. Mr Moser said that they were right to conclude that there were no statutory powers, but wrong to conclude that HMRC could have extra-statutory powers as (as is accepted) HMRC is a statutory body and limited to the powers conferred on it by statute.
- 66. I do not think this is a correct reading of the FTT's decision. It is a long and detailed decision, and the lawfulness of HMRC's investigation is dealt with at [354]-[373] and [379]-[390], although the FTT recognised that this was ultimately not a matter within their jurisdiction. The culmination of the decision on the relevant point is at [382]-[386]. At [382], the FTT says this:

"382. HMRC's request for private bank statements was not made under Schedule 36 to the FA 2008 nor within the remit of an enquiry under section 9A of the TMA 1970. However, it was made pursuant to HMRC's general responsibility for the collection and management of revenue."

They then at [383] and [384] set out s. 5 CRCA 2005 and s. 1 TMA 1970, and continue:

- "385. HMRC submitted that Officer Booth's compliance check and request for private bank statements were made by virtue of these legislative provisions which afford HMRC responsibility for the collection of taxes. They submit that Officer Booth was not acting ultra vires even though he was not acting pursuant to section 9A of the TMA 1970 nor Schedule 36 of the FA 2008.
- 386. As set out above, the Tribunal is of the view that HMRC are empowered to make requests for voluntary cooperation from taxpayers even if not using statutory powers to obtain material under compulsion. Section 1 TMA 1970 and section 5 CRCA simply explain the extent of HMRC's powers and responsibilities, they do not address the question specifically.
- 387. Ultimately, for the reasons set out above, it is not within the Tribunal's jurisdiction to determine the lawfulness of non-statutory enquiries or investigations."

Save that they do not refer to s. 9 CRCA 2005 (and so far as one can tell from the report it was not cited to them), this analysis seems to me entirely in line with my own. At [382] they express their overall conclusion that HMRC's request for documents in that case was made pursuant to HMRC's general responsibility for the collection and management of revenue. For the reasons I have given at rather greater length I agree. Even in the absence of s. 9 CRCA 2005, the responsibility to collect taxes imposed on HMRC by s. 5(1) CRCA 2005 would impliedly confer on HMRC all the powers that might fairly be regarded as incidental to or consequential on that responsibility (see *Hazell* at 29B-E where Lord Templeman held that s. 111 of the Local Government Act 1972 embodied this principle), and the FTT to my mind were effectively proceeding on the basis of this principle, even if they did not spell it out.

- 67. I do not read the reference in [387] to "non-statutory enquiries or investigations" (and a similar reference at [365]) as meaning that they thought HMRC's power to carry them out did not after all flow from their statutory responsibilities for the collection of revenue. I think all they meant was that the enquiries and investigations were not specifically provided for by statute in the way that s. 9A enquiries or sch 36 information notices are.
- 68. *Hunter* is of course not binding on me, both because it is, as the FTT recognise, *obiter* and because I am not bound by their decisions in any event, but it can be seen that I agree both with their conclusions and in its essentials with their analysis, albeit they do not appear to have had the benefit of submissions on s. 9(1) CRCA 2005.
- 69. I have now dealt with all the points raised by Mr Moser in support of Ground 1, save that by the end of the argument he accepted that his Ground 2A was effectively a further argument in support of Ground 1. I will consider that next.

#### Ground 2A

- 70. Ground 2A is that HMRC's informal investigation has deprived Mr Robertson of his access to justice. The right of access to justice is a 'constitutional right' inherent in the rule of law: *R* (oao Unison) v Lord Chancellor [2017] UKSC 51 at [66]-[85] per Lord Reed. As it is put by Professor Zuckerman in Civil Procedure Principles of Practice (3<sup>rd</sup> edn, 2013) at §3.23:
  - "Few rights would be of any practical value in the absence of a reasonable opportunity to seek court assistance to enforce them when threatened or violated. The right of access to court merely spells out what is already implied by the very existence of a right: the availability of a mechanism for enforcing the right."
- 71. Mr Moser referred me to the recent decision in *R* (oao Haworth) v HMRC [2019] EWCA Civ 747 ("Haworth") as an illustration of the importance of the right of access to justice in the context of HMRC's collection of tax. In that case the Court of Appeal was considering the validity of a follower notice given under the provisions of Part 4 of the Finance Act 2014 ("FA 2014"), and among other considerations took into account the fact that receipt of a follower notice may deter a taxpayer from resorting to the FTT: see at [36(v)], [66].
- 72. As formulated in his written submissions, Mr Moser submitted that HMRC, by conducting an informal investigation rather than a s. 9A enquiry, had deprived Mr Robertson of his right to apply to the FTT under s. 28A(4) TMA 1970 for a direction requiring the issue of a closure notice within a specified period. On such an application, s. 28A(6) would apply which would mean that HMRC would have to satisfy the FTT that there were reasonable grounds not to give such a direction. By proceeding outside s. 9A, HMRC had prevented Mr Robertson from seeking a direction that their investigation be brought to a close.
- 73. Put like that, I do not think that can be right. HMRC, as I have already referred to, is not obliged to open a s. 9A enquiry, and by the time HMRC decided to open an investigation in June 2016, it was too late to do so in relation to any tax year except the most recent (2014/15). But HMRC wished to carry out a wider investigation than that, so even if they had opened a s. 9A enquiry into 2014/15, they would still have opened an informal investigation into other years and asked Mr Robertson for much of the same information.
- 74. In oral argument, Mr Moser said that this aspect of his case was really further support for his argument on Ground 1, and indeed might be better numbered Ground 1B. The formal statutory processes of (i) an enquiry opened under s. 9A TMA 1970 and (ii) information notices issued under sch 36 FA 2008 each came with judicial supervision from the FTT, either in the right to seek a closure notice under s. 28A(4) TMA 1970, or in the various rights of appeal in sch 36. The fact that there was no equivalent for informal investigations was a reason for finding that HMRC had no power to conduct them.
- 75. He also said that one of the disadvantages to a taxpayer such as Mr Robertson of an informal investigation is that without any means to bring it to a head, it might rumble on for years, essentially unchecked.

- Ms Nathan said that, as the citation from *Zuckerman* showed, the core content of the right of access to justice is to vindicate legal rights that have been or are being infringed. Mr Robertson does not have a legal right as such to stop HMRC asking him questions. An informal investigation by itself does not have any legal consequences: it is a process that may lead to something with legal consequences (a discovery assessment under s. 29 TMA 1970, or one or more information notices under sch 36 FA 2008), but if it does, those steps do come with rights for the taxpayer to appeal the assessment or the notice to the FTT. *Haworth* was not in point: the basis of that decision was that a taxpayer normally has a right to appeal assessments to the FTT, but the statutory system of follower notices provides significant disincentives for those who exercise that right. That is a reason for carefully circumscribing the circumstances in which follower notices can be validly issued. That reasoning has no parallel in the present case, as Mr Robertson is not being disincentivised from exercising his right of access to justice.
- 77. Moreover, although a taxpayer does not have a right not to be asked questions, he or she does have rights flowing from HMRC's duty to act in accordance with the ordinary public law duties applicable to a public body, and in an appropriate case can apply for judicial review. If therefore HMRC is acting unlawfully in a public law sense in the way it is conducting an informal investigation, the right of access to the Courts is there for the taxpayer to vindicate their right not to be unlawfully dealt with. So if HMRC acted for some improper purpose (out of spite, to take an example mentioned in argument), judicial review, as Ms Nathan accepted, would be available. Equally it is well established (as Mr Richards convincingly demonstrated by reference to Fordham, Judicial Review Handbook (6th edn, 2012) §§ 46.1.5, 57.3.5 and 60.8.2, and as Mr Moser unsurprisingly accepted) that delay by a public body can itself be a ground for judicial review. If therefore a taxpayer is faced with an investigation that is simply drifting, the taxpayer may not be without remedy. Moreover, ultimately a taxpayer who considered that he had provided all the information HMRC could reasonably require could simply decline to answer any further questions. That would be likely to lead to one of three outcomes: either HMRC would conclude they already had enough to issue a discovery assessment, or they would resort to sch 36 notices, or they would conclude that nothing was to be gained by further questioning and abandon the attempt.
- 78. I accept these submissions from Ms Nathan. I do not think that by proceeding with an informal investigation HMRC have deprived Mr Robertson of access to justice, or disincentivised him from exercising his rights, in any relevant sense.
- 79. Nor do I think that the points made by Mr Moser under this head are sufficient to change the analysis I have already adopted for the purposes of Ground 1. They show that there is a difference between informal investigations conducted on a voluntary basis of co-operation, and formal statutory processes which may have legal consequences in the shape of assessments (whether by closure notice on completion of a s. 9A enquiry or by discovery assessment) or obligations to provide information under pain of penalties. That does not seem to me surprising, nor do I think it is a reason for concluding that HMRC cannot seek to obtain information through the voluntary co-operation of taxpayers before resorting to compulsory powers.
- 80. In those circumstances I reject Ground 2A.

#### Ground 2B

- 81. Ground 2B asks the Court to exercise a supervisory jurisdiction over HMRC's investigation. In oral argument Mr Moser said that what it really amounted to was the submission that HMRC should give reasons for their investigation. This Ground is not dependent on Ground 1 succeeding and is a separate and freestanding one.
- 82. He referred me to *Haworth* where Newey LJ, having referred at [36(vi)] to some of the jurisprudence on the *Kittel* principle in VAT law (*Kittel v Belgium* C-439/04), continued at [37]:

"In a similar way, it seems to me that, to give a follower notice, HMRC must be of the opinion that the principles or reasoning in the ruling in question would deny the advantage, not merely that they would be more likely than not to do so. That implies, I think, a substantial degree of confidence in the outcome."

Mr Moser said that that showed that before HMRC could issue a follower notice, a high degree of confidence was required. That is true, but I do not see that it is at all analogous to the situation in the current case. A follower notice can only be given if HMRC "is of the opinion that there is a judicial ruling which is relevant to the chosen arrangements", and that is only the case if "the principles laid down, or reasoning given, in the ruling would ... deny the asserted advantage" (s. 204(4), s. 205(3)(b) FA 2014). That evidently requires HMRC to have considered the question and come to a conclusion on it. What Newey LJ is addressing is the degree of confidence that HMRC must have in the conclusion that the judicial ruling would deny the asserted advantage.

- 83. That seems to me a long way from the present case. The opening of an informal investigation does not require HMRC to have come to any conclusion at all: it is the opening of an investigation, not the conclusion of it. The whole point of opening an investigation and asking the taxpayer for information or documents is to provide material with which HMRC can check the return. It would be stultifying to require HMRC to have come to any conclusions, let alone with a high degree of confidence, before an investigation could be launched.
- Ms Nathan did not suggest that HMRC could or did open informal investigations without any basis for them at all (unlike the case of a s. 9A enquiry where I have accepted (paragraph 48(1) above) that HMRC do not need to have any suspicions before opening an enquiry). She took specific instructions on the basis of which she told me that HMRC investigate where they have a concern; that may be as a result of information received; or it may arise in some other way. She accepted that if an investigation is started without a proper purpose, it may be susceptible to judicial review. But she said there was nothing exceptional about the present case which justified judicial review. I accept these submissions. *Haworth* is not in my judgment of any direct assistance in the present case, and it is not necessary for HMRC to have any particular degree of confidence in the outcome before opening an informal investigation.
- 85. As to the suggested duty to give reasons, I was referred to *R v Secretary of State for the Home Department ex p Doody* [1994] 1 AC 531 ("*Doody*") for the general principles applicable. These are set out by Lord Mustill at 560D-G as follows:

"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects, (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both, (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

Lord Mustill also made it clear that the law does not recognise a general duty to give reasons for an administrative decision (at 564E). It is common ground that that is still the law, that the question whether there is a duty to give reasons in any particular case is context-specific, and that the more closely a decision resembles a judicial decision, the more likely it is to require reasons. In *Doody* itself the decision in question was the Home Secretary's decision as to how long a prisoner sentenced to a mandatory life sentence should serve for the purposes of retribution and deterrence. That was obviously not dissimilar to decisions taken by judges in sentencing other convicted persons: see per Lord Mustill at 565A-D.

86. Mr Moser said that in the present case Mr Robertson and his advisers had repeatedly asked HMRC why he was being investigated, and had not received an answer. Thus for example by letter dated 30 April 2019 Memery Crystal LLP asked HMRC to disclose:

"the information purportedly received by HMRC in 2014 and the 'further information' purportedly received subsequently as being the foundation for its decision to commence and continue an investigation"

and:

"the material passed to CTU that was said to justify (against the 'normal' criteria for investigation) the commencement of an investigation into the Claimants."

HMRC's response in a letter of 28 May 2019 was that disclosure was not necessary where HMRC did not seek to justify the continuing investigation on the basis of such documents. Mr Moser said that Mr Robertson was entitled to know whether the information that HMRC had received was sufficient to justify launching the investigation. He described the situation as "Kafkaeqsue" in that Mr Robertson was being accused of something but was not being told what. At the very least fairness required that he be told the gist of the case against him, in accordance with Lord Mustill's principle (6) in *Doody*.

- 87. He also submitted that if HMRC did not have sufficient reasons to start the investigation, then the investigation was unlawful at the outset, and it was no answer for HMRC to say that they were no longer relying on the same matters to justify continuing the investigation; once the investigation was unlawful, it remained unlawful, and HMRC could not justify it by reference to any information it had discovered as a result of the investigation, as these would be "fruits of the poisoned tree". If that was wrong, he had a fallback position, which was that HMRC's investigation should be stopped save for any specific matters where reasons for HMRC's concerns had been provided and it could be seen that there were matters which genuinely remained unresolved.
- 88. Ms Nathan's answer was three-fold. First, she said that what Mr Robertson was asking for was for the Court to exercise a supervisory jurisdiction over an informal investigation akin to that exercised by the FTT over a s. 9A enquiry on an application for a closure notice under s. 28A(4) TMA 1970. That, she said, was not open to the Court, citing *CC & C Ltd v HMRC* [2014] EWCA Civ 1653 at [41] per Underhill LJ:

"Parliament could have provided for the First-tier Tribunal to have power to make suspensory orders pending the outcome of an appeal, but it did not do so. I do not think that it is open to the court to provide remedies or procedures for which the statute does not provide—particularly so when, as I have pointed out above, care was obviously taken to specify precisely what the tribunal could and could not do."

I do not accept that that case is of any real assistance. I prefer Mr Moser's submission on this point, which was that the issue there was that Parliament had provided a right of access to the FTT, but had not provided for the FTT to have a particular power in those proceedings. It was in those circumstances that Underhill LJ said that it was not for the Courts to provide a remedy by way of judicial review that was not available in the FTT proceedings. That seems quite a long way from the complaint in the present case, and I do not think it provides an answer to Mr Moser's Ground 2B, which as developed orally was really a demand for Mr Robertson to know the reason he was being investigated.

- 89. Ms Nathan's second answer was that the proper approach of a judicial review Court to a decision to investigate such as that under challenge here is well-established, namely that judicial review will only be justified in a wholly exceptional case. She referred to this as the "Fayed principle" after R v Panel of Takeovers and Mergers ex p Fayed [1992] BCC 524: see at 536B-C per Steyn LJ ("in the absence of evidence of fraud, corruption or mala fides, judicial review will not be allowed to probe a decision to charge individuals in criminal proceedings"). Other cases illustrating the same principle to which she referred were R (Bermingham) v Director of the Serious Fraud Office [2006] EWHC 200 (Admin) at [64] per Laws LJ ("it will take a wholly exceptional case on its legal merits to justify a judicial review of a discretionary decision by the Director to investigate or not"); and Sharma v Brown-Antoine [2006] UKPC 57 at [14(5)] per Lord Bingham ("judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy"). In the last case Lord Bingham backed his review of the principles by reference to a large number of other similar citations.
- 90. Mr Moser said that these cases, concerned respectively with decisions in relation to criminal investigations or disciplinary proceedings, were very different from the

present case. I accept that Mr Robertson is not facing a criminal investigation, but the investigation he is facing shares some characteristics with one. In each case a body charged with duties in the public interest (to prosecute crime, to collect the right amount of tax) makes a decision to seek more information about the facts from an individual before taking a further decision (whether to charge a criminal offence, whether to make a discovery assessment). In each case the public body is unlikely to have sufficient information at the outset to reach a conclusion on the further decision - that is precisely why the investigation is launched. In each case the initial decision is very far removed from a judicial determination – it is not a final determination of anything, except that it is appropriate to investigate. In each case the investigation may in the event lead the public body to conclude that the evidential basis for formal action (charging or assessment) is lacking, and that no further action should be taken, but it may conclude that there is sufficient reason to proceed; in each case if formal action is taken the person concerned can generally require a judicial determination of the matter (by pleading not guilty and standing trial; by appealing the assessment to the FTT), with all the safeguards that court or tribunal proceedings bring.

- 91. By contrast, HMRC's decision to investigate Mr Robertson's tax affairs does not in any way resemble the decision at issue in *Doody*. If administrative decisions are notionally arranged on a spectrum of how closely they resemble judicial decisions, the Home Secretary's decision in *Doody* would be at the other end of the spectrum from HMRC's decision in this case, being akin to a judicial determination of how long a serving prisoner should serve before being considered for parole.
- 92. In those circumstances I accept Ms Nathan's submission that the *Fayed* principle is applicable by analogy to the question whether judicial review of HMRC's decision to investigate is available. And I further accept that there is nothing sufficiently egregious about the present case which would justify taking the wholly exceptional course of reviewing that decision, whether that review is directed at the initial decision to launch the investigation or the current decision to continue with it.
- 93. Ms Nathan's third answer was specifically directed to the question whether HMRC should disclose the reasons why they decided to investigate. She accepted that HMRC had not disclosed the source of the information which led to their initial concerns. She said that they did not have to; what they did and had done in the present case was explain what those concerns were. Mr Moser accepted that he was not pressing for identification of the source; what he said he was entitled to was an intelligible explanation of the gist of the case against Mr Robertson. He said that the basis of HMRC's concerns was still utterly mysterious.
- 94. In the light of my conclusion that the *Fayed* principle applies and that this is not a case which falls within the exceptional category such as to justify judicial review of HMRC's decision to investigate, or to continue investigating, it is not strictly necessary to decide this point; but in case I am wrong about that, I should consider the material relied on by Ms Nathan. This requires tracing the course of the investigation. I was taken through it in some detail, but it is not necessary to set it all out, and I will try to summarise it, as follows:
  - (1) Mr Brown's initial letter of 9 June 2016 was admittedly very widely worded (paragraph 56(1) above). But he invited Mr Robertson to a meeting and in his letter of 15 July 2016 he explained that one of the matters he wished to discuss

at the meeting was the goodwill transaction (paragraph 59 above).

- (2) The meeting took place on 3 November 2016. A note of the meeting indicates the matters discussed, and this was followed up by Mr Brown's letter of 21 November 2016. This referred to his "main concerns" as being Mr Robertson's ability to fund his lifestyle based on his declared income, and issues arising from the sale of the goodwill (paragraph 61 above). It also detailed a number of particular matters on which he asked for further information, namely an inheritance by his wife used to fund private expenditure, the purchase price of a barn, the sale of a flat, a property in Dubai, and the goodwill issue.
- (3) On 11 May 2017 a further meeting was held. A meeting note details the specific matters raised, namely the goodwill issue, the means used to sustain Mr Robertson's expenditure (Mr Brown said that his mortgage payments alone exceeded his declared income), his drawings from JJ which exceeded his share of the profits and raised the question of the Mixed Membership Partnership legislation applying, the reconciliation of his director's remuneration as shown in Boisson's accounts and as shown on his tax returns, chargeable gains on the sale of the barn and another property, and the fact that no foreign income had been declared although Mr Robertson had investment and business interests in Dubai, Spain and Portugal.
- (4) On 4 July 2017 Mr Brown issued Mr Robertson with a taxpayer notice under para 1 of sch 36. That asked for a list of 24 specific items. They were linked to the matters that had already been raised. The very first item for example was bank statements for 2011 to 2016 for all businesses operated by Mr Robertson, whether as director or partner, including the non-UK ("offshore") businesses.
- (5) Mr Tully of Gilbert Tax appealed the sch 36 notice on behalf of Mr Robertson on 17 July 2017. He also provided certain information on the same date, but not all the information required by the sch 36 notice. In particular he declined to provide bank statements for Mr Robertson's businesses as Gilbert Tax was not instructed to act for them.
- (6) Mr Brown responded on 1 August 2017 by letter addressed to Mr Robertson. His letter referred to each of the 24 items listed in the sch 36 notice, indicating which items had been provided and which were still outstanding. Ms Nathan submitted that he not only said what he still needed to see but why he needed to see it. I was not invited to consider every item on the list (and have not done so) but that does appear to be the case. In relation to the first item (business bank statements) for example he said:
  - "I have requested your business bank statements so that I can identify payments made to you by your business interests and establish if any further tax is due."
- (7) After further correspondence, Mr Brown wrote to Bark & Co on 16 March 2018. Among other things he said that he had advised that one of his concerns was Mr Robertson's means position and that:

"Although information has been provided in relation to Mr Robertson's means position I have continuing concerns that Mr Robertson has received income from his businesses that has not been taxed correctly....

In order to fully address my concerns, and to confirm that all payments made to Mr Robertson have been correctly accounted for and taxed, I have requested the bank statements of Mr Robertson's businesses.

I will be happy to discuss all aspects of my investigation at a meeting but before I provide a comprehensive response to the information and documentation so far provided I will require the business bank statements."

- (8) By letter dated 29 March 2018 Bark & Co responded declining to provide the business bank statements on the grounds that it would be onerous, disproportionate and unnecessary.
- 95. In his evidence in these proceedings (by way of witness statement dated 25 March 2019), Mr Brown set out in some detail HMRC's outstanding concerns. He said that information provided about Mr Robertson's drawings from JJ and from the director's loan account with Boisson "may go some way to" addressing HMRC's concerns about how Mr Robertson funded his lifestyle. Mr Moser suggested that in the light of this there was nothing really left in the lifestyle point, but this is not what Mr Brown says, and Ms Nathan told me on instructions that this was not the case. Indeed Mr Brown refers to the further concerns raised by the disclosure of drawings from JJ, from loans said to be made by Mr Robertson to Overseas Imports, and a suggestion said to have been made by Mr Tully (but which he later denied making) about loans to Mr Robertson from other associates; Mr Brown also refers to HMRC's concerns as including "undisclosed personal and business income".
- 96. He also refers to HMRC's other main concerns under a number of heads. Several of these are related to the goodwill issue, and Mr Moser suggested that since the discovery assessment against Boisson was now the subject of proceedings in the FTT, that was sufficient to deal with all of those. In the absence of an explanation from either side about the detail of the goodwill issues, I am in no position to form a view whether they will all be clarified by the discovery assessment proceedings or not, but I am certainly not going to assume they will be.
- 97. Other outstanding issues which Mr Brown lists concern: (i) a reconciliation of Mr Robertson's monthly drawings as provided by Bark & Co with his bank statements; (ii) a loan of £580,000 said to have been made to Mr Robertson by Overseas Imports but not apparently included in the figure for debtors shown in Overseas Imports' accounts; (iii) a discrepancy of some £50,000 between income declared by Mr Robertson from Boisson, and the sum shown in Boisson's accounts; (iv) an item relating to overclaimed foreign tax credit relief; and (v) a suggestion that undeclared rental income had been received by Mr Robertson.
- 98. Of these Mr Moser suggested that (iii) to (v) were no longer live and should not be the subject of further investigation. Ms Nathan accepted that HMRC regard (iv) (the foreign tax credit relief) as no longer live, but otherwise denied that matters had been resolved to HMRC's satisfaction.
- 99. In the light of the explanations given in correspondence and evidence I do not think it

is appropriate to characterise HMRC's investigation as one where Mr Robertson and his advisers do not know the gist of HMRC's concerns. I therefore reject the suggestion that Mr Robertson is entitled to further explanation of the basis of their concerns.

- 100. As to Mr Moser's fallback position that HMRC's investigation should be stopped save where specific reasons for continuing had been provided, Ms Nathan's submission was that unless the Court was satisfied that it had been established that the investigation was being conducted unlawfully, then it was not for the Court to dictate how far HMRC could go. On the facts, the case was not within the *Fayed* principle, and it was not possible for the Court to set any sort of limit on the scope of the investigation.
- 101. I accept this submission. I find that it has not been established that HMRC's actions in deciding to carry out the investigation, or in continuing it, involve any breach of public law. In those circumstances it is not for the Court by way of judicial review to micro-manage HMRC's conduct of the continuing investigation. Mr Brown's witness statement indicates what his remaining concerns are and why. They are not on the face of it irrational or misconceived. I was not asked to consider, let alone decide, any of the substantive tax issues and this would not be an appropriate forum to do so. If however Mr Robertson and his advisers are truly confident that they have already provided all that HMRC can reasonably require to check his tax return, they always have the option of declining to provide any more. By doing so Mr Robertson would of course run the risk (probably a high one) that HMRC will take a different view and again resort to compulsory powers under sch 36; as already explained, however, the use of sch 36 powers is subject to the supervision of the FTT, either on an application for prior approval or by way of appeal. Those are the judicial remedies provided by Parliament for the situation where HMRC demand information that cannot be justified; it is in my judgment not for the Administrative Court, save in exceptional cases, to step in in advance and dictate to HMRC what questions they can continue to ask, or what areas they can continue to investigate.
- 102. For the reasons given above I reject Ground 2B.

## Ground 3

- 103. Ground 3 concerns the validity of requests made by HMRC to the Spanish and Portuguese tax authorities.
- 104. As appears above, one class of information which Mr Brown particularly requested to see was the bank statements for Mr Robertson's businesses, but Mr Robertson declined to provide these. Mr Brown's evidence is that it is common practice for HMRC to make requests to overseas authorities when it is known that individuals have overseas interests. He referred the matter to HMRC's Exchange of Information ("EOI") team. They made requests to both Spain and Portugal. I will consider them in turn.

## Spain

105. The facts in relation to the Spanish request are as follows:

- (1) The EOI team made a number of linked requests to the relevant Spanish tax authorities on 22 May 2018. One related to Overseas Imports, the others to a number of other Spanish companies. It is not necessary to refer to these latter ones and I will concentrate on the request in relation to Overseas Imports.
- (2) The request was made by filling out an online form in what appears to be a standard format. Box A1-1, headed "Legal basis and related agreements" permits the requesting authority to tick one or more boxes. HMRC ticked two boxes, namely:

"Council Directive 2011/116/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EC

Double Taxation treaty - Article 26 of the UK/Spain Double Taxation Convention."

I will refer to Council Directive 2011/116/EU as "the Directive".

(3) Box A1-5, headed "Reciprocity", contained two options. HMRC ticked the box:

"I confirm that our country is able to provide similar information".

The option left unticked was:

- "I confirm that our country is unable, for legal reasons, to provide similar information."
- (4) Box A1-6, headed "Exhaustiveness" contained one box only, which HMRC ticked, namely:
  - "I confirm that I have exhausted the usual sources of information which I could have used in the circumstances to obtain the information requested, without running the risk of jeopardising the outcome of the enquiry."
- (5) Box B3-5 was headed "General case description and tax purposes for which the information is sought". HMRC gave some background. They referred in particular to payments totalling £358,200 from Overseas Imports to Mr Robertson which their investigator had been unable to reconcile.
- (6) In Section C7, HMRC asked for statements of Overseas Imports' bank account. There were a number of other specific requests made.
- (7) The Spanish authorities evidently accepted the request as on 26 June 2018 the Oficina Nacional Investigacion del Fraude served a formal request on Overseas Imports requiring an explanation and documents in relation to the payments to Mr Robertson. Overseas Imports complied with the request on 6 July 2018 by sending extracts from its bank statements confirming the payments, and a copy of the agreement between Overseas Imports and Mr Robertson.
- 106. On these facts two points were taken by Mr Moser. One related to the Directive, and one to the UK/Spain Double Taxation Convention. It is clear from Box A1-1 that the

request was made under both instruments, which means, as Mr Moser accepted, that if the request was validly made under either it was valid. I propose to consider the point on the Double Taxation Convention first.

#### The Double Taxation Convention

- 107. The UK/Spain Double Taxation Convention was signed on 14 March 2013 and came into force on 12 June 2014. Although referred to as the Double Taxation Convention, and although many of its provisions are directed at avoiding double taxation, its full title refers to it as a convention for both the avoidance of double taxation and the prevention of fiscal evasion; and Art 26.1 provides for exchange of information for the purpose of enforcement of the domestic laws of the Contracting States concerning all kinds of taxes, in particular for the prevention of fraud and tax avoidance.
- 108. Art 26.3 provides, so far as relevant, as follows:
  - "In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation...
  - (b) to supply information which is not obtainable under the laws or in the normal course of administration of that or of the other Contracting State..."

Mr Moser submitted, and Ms Nathan accepted, that as a matter of grammar, subparagraph (b) applies if the information is either not obtainable under the laws of the requesting state (here the UK) or the requested state (here Spain).

- 109. Mr Moser's point on Art 26.3(b) is that the information requested by HMRC was not obtainable under the laws of the UK. The argument was in fact developed by reference to the Portuguese Double Taxation Convention, which is in similar form (paragraph 121 below), but the point taken was the same. HMRC could not have sought or obtained information about the Spanish and Portuguese companies in the UK, and that meant it could not request it under the Double Taxation Conventions either.
- 110. I do not accept this submission. I prefer Ms Nathan's submissions, which were as follows. Art 26.3(b) is about reciprocity. The underlying idea is that the requested state (here Spain) should not be *obliged* to obtain information from its nationals and provide it to the UK in circumstances where the UK could not obtain, and provide to Spain, similar information from its own nationals. That is why Box A1-5 in the form requires the requesting state to confirm whether or not it could provide similar information. I accept this analysis.
- 111. Two things flow from it. First, Art 26.3(b) is not about whether the UK could obtain the very same information in the UK. Indeed if it could, it is unlikely that the UK would need to ask Spain to obtain the information for it. What Art 26.3(b) is concerned with is whether the UK is asking Spain to obtain information, for example the bank statements of a Spanish company, and provide it to the UK, in circumstances where the UK could not obtain similar information, for example the bank statements of a UK company, and provide it to Spain.
- 112. Second, even if the UK were unable to confirm that it could obtain similar information in the UK, that would not invalidate the request or make it unlawful.

What it would do is give the Spanish authorities the option to decline to provide the information for lack of reciprocity.

113. In the present case, I am not satisfied that HMRC could not obtain similar information in the UK – I do not decide the point, as this (or something like it) is likely to be considered by the Upper Tribunal when considering the appeal against the issue of the third party notices under sch 36 against the UK entities, and it was not argued before me. But even if it could not, it would not invalidate the request. I therefore conclude that the request to the Spanish authorities was valid and not unlawful.

## The Directive

- 114. That makes it strictly unnecessary to consider Mr Moser's point on the Directive. I will however consider it briefly.
- 115. Recital (9) to the Directive is as follows:

"Member States should exchange information concerning particular cases where requested by another Member State and should make the necessary enquiries to obtain such information. The standard of 'foreseeable relevance' is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Member States are not at liberty to engage in 'fishing expeditions' or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. While Article 20 of this Directive contains procedural requirements, those provisions need to be interpreted liberally in order not to frustrate the effective exchange of information."

## 116. Art 1.1 provides as follows:

- "1. This Directive lays down the rules and procedures under which the Member States shall co-operate with each other with a view to exchanging information that is foreseeably relevant to the administration and enforcement of the domestic laws of the member States concerning the taxes referred to in Article 2."
- Art 2.1 refers in wide terms to all taxes of any kind, subject to certain exceptions in Art 2.2 (VAT and certain other matters).
- 117. Art 5 provides for the requested authority to communicate to the requesting authority:

"any information referred to in Article 1(1) that it has in its possession or that it obtains as a result of administrative enquiries."

## 118. Art 17.1 provides as follows:

- "1. A requested authority in one Member State shall provide a requesting authority in another Member State with the information referred to in Article 5 providing that the requesting authority has exhausted the usual sources of information which it could have used in the circumstances for obtaining the information requested, without running the risk of jeopardising the achievement of its objectives."
- 119. Mr Moser's submission was based on the requirement in Art 17.1 that the UK had exhausted the usual sources of information which it could have used in the

circumstances. His submission was bound up with his submission that HMRC's investigation, or the continued prosecution of it, was *ultra vires* or otherwise unlawful. It was to the effect that HMRC could only have been said to have exhausted the usual sources of information if there were usual sources of information that had been lawfully pursued. If therefore HMRC's investigation was unlawful, it could not be said that they had exhausted the sources of information and it could not be right that they could pursue enquiries in Spain. Ms Nathan accepted that if HMRC were not entitled to investigate at all, they were not entitled to request information from overseas. Since however I have not found the investigation, or its continuation, to be unlawful, this principle has no application, and I reject Mr Moser's submission that the request was not validly made under the Directive.

## **Portugal**

- 120. The facts in relation to the Portuguese request are as follows:
  - (1) The EOI team made a request to the relevant Portuguese tax authorities, again on 22 May 2018.
  - (2) This was in similar form to the Spanish request. In Box A1-1 it relied on both the Directive and the relevant Double Taxation Treaty (being Art 25 of the UK/Portugal Double Taxation Convention); in Box A1-5 it confirmed that the UK was able to provide similar information; in Box A1-6 it confirmed that the usual sources had been exhausted.
  - (3) In Box B3-5 the general case description included the following:

"An enquiry was opened into Mr Robertson's tax affairs on 6 June 2016...

A meeting was held with Mr Robertson in November 2016 and written requests followed for bank statements in respect of all UK and offshore business and private bank accounts. Although he has provided statements in respect of one UK private bank account he has failed to provide documentation in respect of his UK business interests or any offshore accounts, despite repeated requests. A formal request is now being made to the Tax Tribunal in order to obtain documentation in respect of UK business bank accounts."

- (4) In Box C7-12 it asked for details of any bank accounts held in Portugal by Mr Robertson or Supermercados.
- (5) The request was evidently accepted by the Portuguese tax authorities as three requests for information were made: one dated 5 November 2018 from the Faro tax office (Direção de Finanças de Faro) addressed to Supermercados seeking various accounting information, which Supermercados responded to on 21 November 2018; a second dated 16 November 2018 from the Department of International Relations (Direção de Serviços de Relações Internacionais) addressed to Mr Robertson personally, seeking the lifting of banking secrecy in relation to his accounts, to which he responded on 6 December 2018 confirming that he had no Portuguese bank accounts; and a third also dated 16 November 2018 from the same department, this time addressed to Supermercados, and also about the lifting of banking secrecy.

#### The Double Taxation Convention

- 121. The UK/Portugal Double Taxation was signed on 27 March 1968 and came into force on 17 January 1969. As with the UK/Spain convention its full title refers to it as a convention for both the avoidance of double taxation and the prevention of fiscal evasion (with respect to taxes on income). Art 25 provides for exchange of information in very similar terms to Art 26 of the UK/Spain convention. Art 25(2) provides, so far as relevant, as follows:
  - "In no case shall the provisions of paragraph (1) be construed so as to impose on one of the Contracting States the obligation:...
    - (b) To supply particulars which are not obtainable under the laws or in the normal course of administration of that or of the other Contracting State..."
- 122. Mr Moser's submissions on this were those I have referred to above in the context of Art 26.2 of the UK/Spain convention and I reject them for the reasons already given (paragraphs 109 to 113 above). As with the Spanish request, it follows in my judgment that the Portuguese request was valid, and it is not strictly necessary to consider the points taken on the Directive, but I will indicate what they were.

## The Directive

- 123. Mr Moser's first submission on the Directive was essentially the same as with the Spanish request, namely that as the investigation was unlawful, the request was unlawful. The answer to it is the same, namely that I have not found the investigation to be unlawful.
- 124. Mr Moser had a second submission on the request under the Directive. This is that the request contained misrepresentations. The two specifically identified by him were (i) the statement in Box B3-5 that "an enquiry was opened" into Mr Robertson's tax affairs and (ii) the statement that Mr Robertson had "failed" to provide documentation.
- 125. As to (i), Mr Moser's point was that no formal enquiry (under s. 9A TMA 1970) had ever been opened. That is true, but I do not think it was misleading to describe Mr Brown's informal investigation as an enquiry. It was not said to be a formal enquiry under s. 9A TMA 1970, and although SALF 404 shows that HMRC sometimes refer to informal investigations as "investigations" precisely in order to distinguish them from s. 9A enquiries (paragraph 64 above), there seems to me no real difference between the ordinary meaning of "investigation" and "enquiry", and I do not think it can be supposed that the use of one word rather than the other would have made any difference to the Portuguese authorities.
- 126. As to (ii) Mr Moser's point was that Mr Robertson could not be said to have "failed" to produce information when he was under no obligation to produce it. Again this is a semantic point which I do not think can bear the weight sought to be put on it. Mr Robertson was asked for the bank accounts of Supermercados. He did not provide them. It does not seem to me inaccurate or misleading to say that he failed to provide them. In fact a careful examination of the statements in Box B3-5 might have indicated that HMRC was distinguishing between mere "requests" made to the taxpayer, and "formal requests" made to the Tax Tribunal, but I do not suggest that

the statements in the Box fall to be construed with that much rigour. As a matter of ordinary language, if someone is asked to provide some information and does not do so, he can quite reasonably be said to have failed to do so, and that is so even if he was under no obligation to provide it. Again I do not think that the Portuguese authorities can have been misled.

- 127. Finally, Mr Moser submitted that the information sought from Supermercados could have been sought by third party notices under sch 36 issued to Supermercados (and the same was true of Overseas Imports), and hence that HMRC had not exhausted the usual sources of information. That raises the question whether a third party notice can be issued against a non-UK company with no presence in the jurisdiction. Since it does not in fact arise (as I have found both requests valid under the respective Double Taxation Conventions in any event), and since I heard very little argument on it, I propose not to decide this point, which is potentially one of wider significance.
- 128. It is established by the Court of Appeal's decision in *R* (oao Jimenez) v FTT [2019] EWCA Civ 51, that sch 36 has an extra-territorial reach to the extent of enabling a taxpayer notice under para 1 to be issued to a UK national who was a UK taxpayer, formerly resident in the UK but now resident abroad. But it does not follow that the same is true of a third party notice issued to non-UK companies that have never been resident in the UK nor UK taxpayers, simply because they hold information relevant to a UK taxpayer's affairs.
- 129. There is in fact a very recent decision of the FTT (Judge Mosedale) in *ex parte PQ* [2019] UKFTT 371 (TC) to the effect that a third party notice could be validly issued against British nationals resident abroad, either in any event, or at any rate where there was a sufficient connection between them and the information sought; in that case the intended recipients had been both the owners (through a holding company) and directors of the taxpayer company, and responsible for the underlying transaction, and Judge Mosedale held that that would have amounted to a sufficient connection even if they had not been British nationals. No argument was however addressed to me on whether the decision was right or not, and I express no views on that. It is evident that the point is one on which careful analysis of the authorities would be required to reach a conclusion.
- 130. For the reasons I have given however I find that the Portuguese request, like the Spanish requests, was valid, and I reject Ground 3.

## Conclusion

131. I have not found any of the Grounds of judicial review argued before me well-founded and this application must be dismissed. I am very grateful to counsel for their interesting and well-researched arguments.