Neutral Citation Number: [2022] EWHC 2615 (Admin)

Case No: CO/3638/2020 & CO/3640/2020

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT, BIRMINGHAM

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 18/10/2022

Before :

MRS JUSTICE ELLENBOGEN

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Between :

THE KING (ON THE APPLICATION OF) **(1) JONATHAN EDWARD PETER TIPPER** **(2) JANET SUSAN TIPPER** **(3) JAMES DAVID FOULSHAM** **(4) DANIELLE LOUISE FOULSHAM** **(5) ANDREW JOHN CLEARY** **(6) NICOLA JANE CLEARY**	**Claimants**
- and -	
THE CROWN COURT AT BIRMINGHAM	**Defendant**
-and-	
HIS MAJESTY'S COMMISSIONERS FOR REVENUE AND CUSTOMS	**Interested Party**
THE KING (ON THE APPLICATION OF) **JONATHAN EDWARD PETER TIPPER** **AND FIVE OTHERS (AS ABOVE)**	**Claimants**
- and -	
BIRMINGHAM MAGISTRATES' COURT	**Defendant**
-and-	

HIS MAJESTY'S COMMISSIONERS FOR REVENUE AND CUSTOMS — **Interested Party**

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John Hardy KC (instructed by **Withers LLP**) for the **Claimant**
Andrew Bird KC (instructed by **HMRC Solicitor's Office and Legal Services**) for the **Interested Party**

Hearing dates: 3 November 2021

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Approved Judgment

Mrs Justice Ellenbogen DBE :

Introduction

1. So far as now pursued, the Claimants make two applications, in separate but related proceedings, for permission to apply for judicial review. The decisions challenged are, respectively, those of:

    a. the Crown Court, at Birmingham (HHJ Carr), on 2 July 2020, to issue:

        i. special procedure warrants, under section 9 of and schedule 1 to the Police and Criminal Evidence Act 1984 ('PACE'), permitting the search of the Claimants' premises for material likely to constitute relevant evidence in criminal proceedings; and

        ii. search and seizure warrants, under sections 352 and 353 of the Proceeds of Crime Act 2020 ('POCA'), to search the Claimants' premises and to seize material likely to be of substantial value to a confiscation investigation; and

    b. Birmingham Magistrates' Court (DJ Murray), dated 6 July 2020, to issue:

        i. 'prior approvals', under s.303E of POCA, to search for 'listed assets' under s.303C POCA; and

        ii. 'appropriate approvals', under s.47G of POCA, to search for and seize 'realisable property' from premises, persons or vehicles, under sections 47C to 47F of POCA.

2. A separate application is made to set aside or vary part of the order of Lang J, made on the papers on 30 March 2021, so as to permit the broadening of the principal applications to encompass a challenge to two further decisions of Birmingham Magistrates' Court, (DJ MacMillan) each made on 10 July 2020, whereby he extended the period of detention of certain 'listed assets', under section 303L of POCA. By her order (so far as material), Lang J refused the Claimants' application, dated 11 November 2020, to amend the claim forms and statement of facts and grounds, as constituting an improper attempt to extend the scope of the claims to include actions which extended beyond the decisions challenged by the claim forms, for which the Claimants had alternative statutory remedies and which had been made out of time.

3. The warrants and approvals under challenge were executed in simultaneous operations at the homes of, and other premises associated with, the Claimants, on 8 July 2020. At the same time, restraint orders granted by the Crown Court were served on the Claimants and certain other family members, as well as on a company. Broadly stated, it is the Claimants' contention that the relevant warrants and approvals were obtained by the Interested Party, HMRC, in breach of the duty of candour which attached to the making of its without notice applications and, in relation to the application made under PACE, in circumstances in which the court could not be satisfied that the condition imposed by paragraph 14(d) of Schedule 1 to that Act obtained. The broader challenge which they seek to advance by

amendment asserts that the Magistrates' Court lacked jurisdiction to make the decisions which it made on 10 July 2020, having been misled as to the timing of the earlier seizures of listed assets, and, accordingly, authorised a further period of detention which was unlawful.

4. The Claimants' criticism is expressly directed at the allegedly inaccurate and/or incomplete basis on which each application was advanced before the relevant court and not at the relevant courts, which, in the ordinary way, have declined to participate in these proceedings. Before me, the Claimants were represented by Mr John Hardy KC and the Interested Party by Mr Andrew Bird KC. I am grateful to them both for their clear and thorough submissions, including those advanced in writing subsequent to the hearing.

Summary of the factual background

5. For current purposes, it is necessary to summarise the background to this matter only in broad terms, though I have been provided with, and considered with care, a wealth of material, including the amended witness statements of: the First Claimant, dated 22 April 2021 and its exhibit; the Fourth Claimant, dated 24 April 2021; and the Fifth Claimant, also dated 24 April 2021. Subsequent to the hearing, on 5 November 2021, I was provided, by the Claimants, with an additional bundle and explanatory note and, by the Respondent, with the two further detention orders which had been made on 10 July 2020; on 21 January 2022, by the Claimants, with the witness statement of David Donovan, investigating officer in HMRC, dated 26 April 2021 and prepared in connection with a different, related investigation, together with an explanatory note; and, on 2 February 2022, with HMRC's response to that material.

6. As at the date of the hearing before me, none of the Claimants had been charged with any offence. The written applications for the warrants and approvals the subject of challenge identified fraudulent evasion of VAT, cheating the public revenue, fraud by false representation, money laundering, and conspiracy to commit those offences as being the offences the subject of a criminal investigation, named Operation Salmon. The focus of that investigation was a fraud believed to have had at its centre Backoffice One Limited, of which the First and Third Claimants were each fifty percent shareholders and former directors and the Fifth Claimant was a current director, appointed on the date on which the First and Third Claimants had resigned their directorships; 1 August 2017.

7. The essence of the case under investigation is that a legal tax avoidance vehicle has been used for a criminal purpose, resulting in a loss to the Exchequer of a sum in excess of £85,200,000. HMRC believes that outsourcing companies made false claims of input tax in respect of sham sourcing companies which were not genuine trading entities but had been created in order to perpetrate a fraud. To quote from paragraph 10 of the Claimants' Amended Statement of Facts and Grounds, dated 26 April 2021, *'Put in elementary terms, according to HMRC the male Claimants were 'rigging the books', and the fourth and sixth female Claimants were enjoying the proceeds of their husbands' misdeeds.'* Each of the Claimants denies any criminal activity.

8. In or about July 2012, the First and Third Claimants had founded a company which provided outsourced labour and associated administrative services. Temporary employees were supplied to employers through, or by, employment agencies all of the payroll responsibilities for whom were undertaken by that company. By 2017, the business had evolved into a corporate structure comprising a number of companies, each of which said to be engaged in particular activities undertaken by the business. The Fifth Claimant had joined as Chief Financial Officer in December 2015. In essence, HMRC alleges that the business was operated in an unlawful manner, resulting in the non-payment of the substantial sum previously mentioned.

9. The Claimants say that the structuring and operation of the corporate group had necessitated the taking of much legal and accounting advice, requiring regular liaison with HMRC. To HMRC's knowledge, in January 2016 they had appointed Mazars LLP, initially to assist with a civil investigation by HMRC and, subsequently, as their tax advisors and auditors. Mazars, together with solicitors, Shakespeare Martineau, had instructed leading counsel to advise in relation to the proposed business model and its potential tax implications. In March 2016, Mazars had provided tax advice on a proposed restructure. Mr Tipper (whose evidence is adopted by Messrs Foulsham and Cleary) states that, following advice received from leading counsel, his understanding was that the proposed business model was sound, from a tax perspective. At paragraph 50 of his witness statement, he states:

> 'The detail of the advice is complex and impossible to summarise here for the purpose of this witness statement. However, what is clear is that we obtained detailed advice on our business model, and specific tax elements of that model, over a period of time from professional advisers including Leading Counsel. This was because we wished to ensure that our business model was fully compliant with all applicable tax legislation.'

10. Following the conclusion of enquiries by HMRC's civil enforcement division into the affairs and dealings of two of the principal companies (Abacus Outsource Ltd ('Abacus') and MyPay Accountants Ltd ('MyPay')) and associated companies, on 18 January 2019 HMRC launched its criminal investigation into the Claimants' business dealings (Operation Salmon). On the Claimants' case in these proceedings, there was no apparent connection between the conclusion of the civil enquiries and the commencement of the criminal investigation. Abacus and MyPay went into members' voluntary liquidation, for the purposes of an asset sale and subsequent company restructure. The liquidators drew up final accounts for both companies, respectively dated 31 January and 20 September 2019, which showed that HMRC had given clearance for each company to be wound up and, in the case of (a) Abacus, had authorised a VAT repayment in the sum of c. £35,000 and (b) MyPay, had authorised refunds of c. £45,000 in corporation tax and c. £2,700 in PAYE. That authorisation had followed extensive enquiries and protracted civil involvement by HMRC in the affairs of the First, Third and Fifth Claimants' businesses, in the course of which HMRC had requested documentation and been provided, voluntarily, with in excess of 30,000 documents. At no stage had HMRC deregistered the companies for VAT. None of that information, it is said, was

disclosed to the courts which considered the applications for the warrants and approvals which the Claimants seek permission to challenge.

The parties' submissions

For the Claimants

11. It is common ground that an application for a warrant under PACE is governed by, in combination, section 9 of, and paragraphs 2 and 12 of Schedule 1 to, PACE and that, for current purposes, there is a discrete requirement that one of the four conditions specified in paragraph 14 of Schedule 1 be satisfied.

12. In summary, the Claimants contend that:

    a. (in relation to the orders made under PACE) the less intrusive option of a production order, combined with a restraint order, had not been explored in any great length and the assertions made in the written application were not supported by evidence. In all the circumstances, the court could not be satisfied that service of notice of an application for a production order 'may seriously prejudice the investigation' (as required by paragraph 14(d) of schedule 1 to PACE; the condition upon which HMRC had relied). Consistent with the position set out in *R (Hart & Ors) v (1) The Crown Court at Blackfriars & (2) The Commissioners for Her Majesty's Revenue and Customs [2017] EWHC 3091 (Admin)*, a production order would have sufficed for HMRC's purposes — particularly as, on the date on which the warrants were executed, separate requests for production orders, relating to certain additional documentation, had been made by HMRC — and the challenge which the Claimants seek to advance is, at least, arguable;

    b. the disclosure made by HMRC when applying for the PACE warrants had not revealed the long history of interaction between HMRC and the Claimants' business and advisors; had omitted to refer to certain material dealings in that respect, including the disclosure of over 30,000 documents in 2017 and the 'continued toing and froing between companies, advisors and HMRC from 2021 onwards'; and, generally, had sought, through inappropriate comment, to diminish or undermine any point which had been, or could be, made in the Claimants' favour. As articulated by Mr Hardy KC in the course of his oral submissions (in distillation of the way in which the matter had been put in writing), the issue is not whether facts had been drawn to the attention of the court, but whether the background and conclusions drawn by HMRC had been fairly presented. He submitted that the material presented had been subject to a series of qualifications and provisos which had negated the requisite candour and that, whilst he could not submit that, as a matter of principle, comment could never be made by an applicant, in this case HMRC's 'running commentary' had been inappropriate and had undermined that which would otherwise have constituted appropriate disclosure. The overarching impression conveyed by box 7 of the application form (headed 'Duty of Disclosure') had been that the now Claimants' position was deceptive, evasive, elusive and not to be trusted, whereas the history of their co-operation with HMRC should have led to a conclusion by the judge that a sledgehammer should not be used to crack a nut;

c. the material provided in support of the POCA applications had not remedied the above deficiencies, in simply cross-referring to the applications made under PACE;

d. HMRC's material failures to have complied with its duty of candour in respect of all applications had deprived each judicial decision-maker of the opportunity to make a properly-informed decision. Had full and appropriate disclosure been made, the warrants and approvals in question would not have been issued, or, at least, might reasonably not have been issued.

13. The prospective further challenge to the orders of the Magistrates' Court, the subject of Lang J's order, is founded upon a contention that the timings of the seizures which took place under s. 303J of POCA on 8 July 2020 were such that the statutory rubric for authorising extended detention had not been satisfied. In particular, it is said that the relevant orders were made more than 48 hours after the seizures had taken place and that there is no proper evidential basis for the timings recorded by the Magistrates Court, having regard to those recorded, or, in the case of the Fifth Claimant, not recorded, on the property control sheets left at the relevant properties and events on the relevant date. In response to HMRC's contention that an application could have been made to the Magistrates Court under section 303N of POCA, for release of the detained property, the Claimants submit that that provision is not apt to challenge jurisdiction. They further contend that the chronology of events and of HMRC's disclosure, together with the Claimants' need to prioritise compliance with the restraint orders, was such that it had not been possible to advance the proposed challenge at an earlier stage. In Mr Hardy's submission, time for the making of the application had not started to run until the information on which it was founded had been disclosed to the Claimants. In any event, it is said, no great prejudice would be caused to HMRC were permission to amend and to seek judicial review out of time, to be granted; on the face of the available evidence, the matter should be heard and it is in the interests of the administration of justice 'that the component parts of this judicial review challenge be heard by the same court'.

For the Interested Party

14. HMRC has filed Amended Summary Grounds of Resistance. It resists the grant of permission, on a number of bases, asserting that, albeit made within 3 months of the decisions challenged, the original claims have been made out of time (a submission which, realistically, Mr Bird, 'trailed very lightly' before me) and that, in any event, there has been no arguable breach of the duty of candour, or inadequacy in disclosure. Contrary to the Claimants' submission, at no point had Abacus or MyPay, or the group business model, been given 'a clean bill of health', as the Claimants knew, or ought to have known. When making disclosure to the court, there had been nothing improper in HMRC's making of 'anticipatory arguments in rebuttal'; a normal approach, designed to assist the judge in determining whether there were at least reasonable grounds for concluding that the access conditions were satisfied, notwithstanding the existence of counter-arguments. The additional requirement imposed by paragraph 14 of Schedule 1 to PACE, together with relevant caselaw, had been drawn, expressly, to the court's attention and evidence

had been provided as to why (1) each of the Claimants would not provide material voluntarily and would be unlikely to comply with a production order; and (2) the condition imposed by paragraph 14(d) was satisfied. The Claimants had not exhibited the tax advice which they had received, nor had they suggested that they had waived privilege in it, or provided it to HMRC. There must be a question over whether the advice received had been correct and, in any event, applied to the model as implemented in practice. Those matters remained unknown. The judge had been entitled to conclude that, for HMRC to have given advance warning of an application for the special procedure material which was likely to be present in the home (as opposed to office) premises to be produced 'may seriously prejudice the investigation'. Letters dated 8 July 2020 had been addressed to the First and Third Claimants but had given notice of applications for production orders against corporate entities which were under the control of third parties, who, in HMRC's view, would not be likely to act in contempt of court by concealing or destroying documents. In any event, those letters had not been supplied to the Claimants until after the warrants had been executed and the respective premises secured. By that stage, there had been no reason not to make them aware that further material would be sought by less intrusive means, demonstrating a considered and proportionate approach by HMRC's criminal investigators, based in the same case team. HMRC further submits that, in their application for permission to apply for judicial review, the Claimants ought to have drawn the court's attention to the fact that, upon the application of the Crown Prosecution Service, restraint orders had been made, by Birmingham Crown Court (HHJ Henderson), on 7 July 2020, applications to set aside which had been pending at the time of their claims.

15. Finally, HMRC contends that the outcome for the Claimants would not have been substantially different had the conduct complained of not occurred — the warrants and approvals would still have been issued by the respective courts; if anything, the disclosure of further information would have reinforced each application, such that permission to claim judicial review ought to be refused in accordance with sections 31(3C) and (3D) of the Senior Courts Act 1981 ('the SCA').

16. To the broadened challenge in respect of which permission to amend was refused by Lang J, HMRC responds that time runs from the date of the decisions under challenge: *R (Presvac Engineering Ltd and Another) v Secretary of State for Transport* [1992] 4 Admin LR 121, CA. The application to amend was made on 11 November 2020, long after time for challenging those decisions had expired; relates to decisions which had been made at a hearing on notice to the Claimants, which they, nevertheless, failed to attend or contest; constitutes a(n unmeritorious) dispute of fact and identifies no error of law on the part of the judge; gave rise to an alternative remedy under section 303N of POCA, pursuant to which the Claimants could have applied to the Magistrates' Court for the property to be released from detention; is made absent any attempt to address the necessary criteria for relief from sanction; and seeks relief which is academic because the orders under challenge expired in January 2021 and the seized items were released from detention under section 303L of POCA on 17 June and 5 July 2021 and returned to the relevant Claimants, there being no longer any listed assets proceedings in relation to those items. (It should be noted that, in the course of his oral submissions, Mr Bird rowed back from that final contention, as recorded later in this judgment [42].)

Discussion and conclusions
The warrants and approvals

Limitation

17. Mr Bird was right to trail his coat lightly in relation to limitation; the relevant claim form was filed within three months of the decisions which it seeks to challenge and, whilst the Claimants' obligation was to file them promptly, there is nothing to suggest that they did not do so in all the circumstances. In essence, Mr Bird's submission was that they could have been filed up to two weeks earlier, though no indication of the basis for selection of that particular period was given. There is nothing in this point, which does not afford a valid objection to the grant of permission.

The warrants under PACE

18. The legislative framework relevant to special procedure material was set out by the Divisional Court in *Hart* [12] to [15], repeated below:

> 'The legislative framework
>
> 12. Section 9(1) of the Police and Criminal Evidence Act 1984 provides –
>
> > "A constable may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Schedule 1 below and in accordance with that Schedule."
>
> …
>
> 13. Schedule 1 to the 1984 Act makes provision for a Circuit Judge to issue three types of order in respect of special procedure material: a production order or access order pursuant to paragraph 4 of the Schedule; or a search warrant pursuant to paragraph 12. Paragraph 4 requires notice of an application to be given to the person who holds the relevant material, but paragraph 12 does not require notice to the person whose premises are to be searched. Paragraphs 2 and 3 set out two sets of access conditions. By paragraph 1, a production order or access order may only be issued if the judge is satisfied that either the first set or the second set of access conditions is fulfilled. By paragraph 12, a search warrant may only be issued if the judge is satisfied, not only that either the first set or the second set of access conditions is fulfilled, but also that one of the further conditions set out in paragraph 14 is fulfilled.
>
> 14. So far as is material for present purposes, paragraph 2 provides as follows:

"The first set of access conditions is fulfilled if –

a) there are reasonable grounds for believing –

i) that an indictable offence has been committed;

ii) that there is material which consists of special procedure material or includes special procedure material and does not also include excluded material on premises specified in the application…;

iii) that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made; and

iv) the material is likely to be relevant evidence;

b) other methods of obtaining the material –

i) have been tried without success; or

ii) have not been tried because it appeared that they were bound to fail; and

c) it is in the public interest, having regard –

i) to the benefit likely to accrue to the investigation if the material is obtained; and

ii) to the circumstances under which the person in possession of the material holds it, -

that the material should be produced or that access to it should be given."

15. The further conditions, at least one of which must be fulfilled before a search warrant may be issued, are stated as follows in paragraph 14 of the Schedule:

"a) that it is not practicable to communicate with any person entitled to grant entry to the premises;

b) that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the material;

c) that the material contains information which –

> i) is subject to a restriction or obligation such as is mentioned in section 11(2)(b) above; and
>
> ii) is likely to be disclosed in breach of it if a warrant is not issued;
>
> d) that service of notice of an application for an order under paragraph 4 above may seriously prejudice the investigation."
>
> …'

19. In the present case, as in *Hart*, HMRC relied upon the first set of access conditions and upon the further condition identified in paragraph 14(d).

20. As set out in *Hart* [16] to [19]:

> '16. The meaning, in paragraph 2(b)(ii), of the words "because it appeared that they were bound to fail" was considered by Divisional Courts in *R (S,F and L) v Chief Constable of British Transport Police* [2013] EWHC 2189 (Admin), [2014] 1 WLR 1647, and in *R (Newcastle United Football Club Limited and others) v HMRC* [2017] EWHC 2402 (Admin), [2017] 4 WLR 187. Those cases establish that the subparagraph refers to the belief of the officer making the application at the time of the application. Accordingly, where an application for the issue of a warrant is made in reliance on paragraph 2(b)(ii), the investigating officer must, at the time of the application, believe that other less intrusive methods "were bound to fail", and the Circuit Judge to whom the application is made must consider whether the officer did so believe. Paragraph 14(d), however, requires that the judge must be satisfied that an application for a less intrusive method of obtaining the material sought "may seriously prejudice the investigation". That requirement of judicial satisfaction provides an additional protection for an owner of premises against whom the intrusive measure of a search warrant is sought.
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> 17. At paragraph 93 of the judgment of the court in *Newcastle United FC Ltd*, Beatson LJ and Whipple J said:
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> > "In considering whether the requirements of paragraph 2 have been met, the investigator is obviously not in a position to know for certain what the outcome of any request for voluntary disclosure of documents might be. Nor, in the context of an application for a warrant under paragraph 12, can the investigator know for sure whether a production or access order under paragraph 4 might have been sufficient to secure the documents. Therefore, paragraph 2 cannot, consistently with the

> purpose of the statute, be read literally: whether a less intrusive measure would, or would not, be "bound to fail" must in the end be a matter of judgment for the investigator based on his or her knowledge of the investigation so far and the evidence available. It must, in our judgement, be understood to mean that the investigator believes on the basis of the evidence that there is no lesser measure available which is likely to be effective in securing the relevant documents. Plainly, the investigator must have cogent grounds for his belief. In the context of an application for a warrant, where no notice will be given in advance of execution, the belief is likely to be based on the investigator's suspicion that the relevant material will be disposed of or hidden if advance warning is given, and for that reason, any lesser measure (which would mean that the target is put on notice of the investigation) would be an ineffective means of pursuing the investigation. But, as is clearly stated in *S, F and L* at [62 to 64] and [95 to 97], a bare assertion of such a belief is insufficient if the basis of that belief is not adequately explained in a focussed application dealing with the actual facts of the case. If the investigator has explained the reasons for so suspecting, in terms that are reasonable and compelling, he or she will have fulfilled the requirement in paragraph 2."

18. It is, of course, well established that when an application is made for a search warrant, the judge to whom the application is made must personally be satisfied that the material before the court is sufficient to show that it is proper to grant the warrant. In order that the judge has all the information which is necessary for him or her to make an informed, balanced and fair decision, the applicant is under a duty to make full and frank disclosure, and to draw to the attention of the judge any material facts which may be relevant to the judge's decision, including any matters which indicate the issue of a warrant might be inappropriate. These principles are clear from, for example, *R (Rawlinson and Hunter Trustees and others) v Central Criminal Court and Others* [2013] 1 WLR 1634 at paragraphs 81 - 83. In relation to the requirement of disclosure, the duty of the applicant was expressed in this way by Hughes LJ (as he then was) in *In re Stanford International Bank Ltd* [2011] Ch 33 at para 191: the applicant must –

> "put on his defence hat and ask himself what, if he was representing the defendant or a party with a relevant interest, he would be saying to the judge."

19. Where application is made for judicial review of the issue of a warrant, on the basis that the disclosure made by the applicant to

> the judge was inaccurate or insufficient, what test should the High Court apply in deciding whether to quash the warrant? Must it be shown that the inaccuracy and/or non-disclosure would have made a difference to the judge's decision, or is it sufficient that it might have done so? Although there are dicta to the contrary in *Rawlinson and Hunter*, I accept that the law in this regard is as stated by Stanley Burnton LJ in *R (Dulai) v Chelmsford Magistrates' Court* [2013] 1 WLR 220 at paragraph 45:
>
> > "The question for the court, in judicial review proceedings, is whether the information that is alleged should have been given to the magistrate might reasonably have led him to refuse to issue the warrant."
>
> That test was adopted in *R (Mills) v The Chief Constable of* Sussex [2015] 1 WLR 2199, in which Elias LJ considered the point in detail at paragraphs 47 to 64 of his judgment. Elias LJ set out cogent reasons of principle why Stanley Burnton LJ's approach was correct. He therefore applied, to the circumstance of the case before him, the test of whether –
>
> > "… the warrant should be set aside because there was material non-disclosure which may well have led the judge to issue a warrant which, had there been full candour, he would have refused to issue".
>
> Similarly, in *Newcastle United FC Ltd*, the court concluded (at paragraph 75) that although mistakes had been made in the application for a warrant, those mistakes were mere slips which were not material to the application or its treatment by the judge to whom it was made, and so –
>
> > "… the information which it is alleged should have been given to the judge could not be said to have reasonably led him to refuse to issue the warrant".'

21. In this case, the application for the warrants under PACE ran to 85 pages, setting out, in considerable detail, the offences being investigated, the bases for HMRC's belief that they had been committed and by which natural and corporate persons, the material sought and that which it would serve to clarify or evidence. In section 2(c)(i), under the pro forma heading, '..what methods did you consider trying but rejected as bound to fail? *Explain why you thought those methods were bound to fail*', a detailed account was given, relating to the First, Third, Fourth, Fifth and Sixth Claimants (amongst other persons and entities), reproduced below:

> 'For the most part, the material sought is expected to be in the control of the individuals under investigation.
>
> **James FOULSHAM ([address])**

It is believed that FOULSHAM would not fully or truthfully comply with a request for the material either voluntarily or under a Production Order. While he has not previously provided false information to HMRC, he is believed to be one of the key conspirators in the fraud. Operation Salmon is an investigation in to one such iteration of a fraud of this nature. FOULSHAM, is believed to have played a central role in the perpetration of similar frauds previously. He demonstrates a pattern of evasive behaviour towards HMRC in so far that when the department opens enquiries into companies to which he is associated, those companies are subsequently dissolved with little to no engagement.

Further, James FOULSHAM is believed to have received in excess of £1m in disguised 'Multiple Payments' and as such is believed to be one of the main beneficiaries of the fraud. It is believed that he has used the criminal property from the fraud to fund a lavish lifestyle. Therefore, it is considered likely that he would take every step to preclude HMRC's effort to secure evidence which could be used against him in the future trial and/or confiscation hearing, in an attempt to maintain the lifestyle to which he has become accustomed.

It is also considered that FOULSHAM has knowingly failed to properly declare his income to HMRC. While he has declared substantial amounts in respect of income from the Sigma entities, he has failed to declare any income in respect of Backoffice. It is believed this failure to declare income is a deliberate measure to distance himself from the criminal property and demonstrates a proclivity to fail to comply with HMRC.

Further, as per current Sentencing Council guidelines for Cheating the Public Revenue, where the offending is £50 million or more and individuals have a leading role where the offending is part of a group activity, where the fraud is conducted over a sustained period or committed in a sophisticated way, the sentencing range is between 10-17 years custody. Therefore, HMRC believe that the likelihood of receiving a full and transparent response from FOULSHAM is bound to fail, whether material be requested on a consensual basis or under the judicial authority of a Production Order.

Jonathan TIPPER ([addresses])

The points made above in respect of FOULSHAM also stand for Jonathan TIPPER. However, TIPPER also attended a meeting with civil officers as part of the enquiry into Abacus. While it was [X] who corresponded with and provided material to HMRC in respect of the enquiry, it is believed, given TIPPER's role as Director of Abacus, and thus his presumed authority over [X] that he would have had knowledge of the material provided. That material is believed to be false in so far as it included purchase ledger entries and purchase invoices in respect of Sourcing Companies which HMRC believe are

not real trading entities and which have been created by the criminal group purely to perpetrate the fraud. This further demonstrates the belief that people would not fully and truthfully comply with the request for material on either a voluntary basis or under the judicial authority of a production order.

Andrew CLEARY ([addresses])

The points made above in respect of FOULSHAM also stand for Andrew CLEARY. However, CLEARY was also named as the Accountant for Smart Labour and Vitazec and liaised with the liquidators in respect of both companies. It is believed the material provided to the liquidators by both Smart Labour and Vitazec was false, namely in so far as the purchase ledgers included Sourcing Companies which HMRC believe are not real trading entities. CLEARY could argue that [Y] and [Z], as the respective Directors and shareholders of these companies, were responsible for providing the information to him and that he was just a conduit to pass this information to the liquidators. However, HMRC believe CLEARY played a key role in the Backoffice fraud, acting as Financial Controller, and thus would have full knowledge of the true supply chain within the Backoffice model and thus would know that the material provided was false.

…

Nicola CLEARY, Danielle FOULSHAM and …

With regards Nicola CLEARY, Danielle FOULSHAM and …, whilst they may have access to some of the materials sought by virtue of living with persons or being related to persons who hold the said material, none of these actually have a position of official authority by which to supply the material. As such they would be required to seek permission from one of the individuals above in order to provide any material requested by HMRC… It is also considered, given their family ties to key suspects within the fraud that they would have motivation to conceal evidence which may implicate their spouse/relative in the fraud.

Some of the material sought may be held by other third parties, though it is not known how much of the material sought is so held. These third parties all have potentially close business relationships to the suspects. For example, the accountants of Backoffice, Pegasus and Verso Pay, namely Dains LLP and Four Oaks Accounting and Taxation Services Limited, both have longstanding ties to the suspects. It is also not known how close the business relationships are between the Employment Agencies and the suspect companies. As such, any approach to these third parties for material, whether on a consensual basis or under a Production Order would significantly increase the risk

of alerting the suspects as to the investigation into them. This would provide the suspects with the opportunity to destroy or conceal evidence, influence witnesses and collude with one another. The material therefore cannot be obtained by any other, less intrusive means.

Further, as this fraud is a suspected conspiracy, it will be important to establish both the role and level of knowledge of each suspect. Therefore, precisely where material is found during the searches will be of great significance as it will provide evidence of who was in control of what aspect of the fraud. Although, post-intervention, additional material will be sought under Production Orders from third parties (such as Dains LLP, as well as Employment Agencies believed to outsource labour and payroll to the Backoffice model), however the obtaining of such material will not carry the same significance in highlighting which suspect had knowledge of a particular document and what role that suspect played within the fraud.'

22. Section 7 of the application form, in the form included within the hearing bundle, is reproduced below:

'**(7) Duty of Disclosure.** *See also the declaration in box (8).*

Is there anything of which you are aware that might reasonably be considered capable of undermining any of the grounds of this application, or which for some other reason might affect the court's decision?

For example, you must disclose anything that could be said to raise doubts about the credibility or reliability of information you have received, and explain why you have decided that that information can be relied upon despite that. You must disclose also whether the premises have been searched before, and with what outcome, and whether there is any unusual feature of the investigation or of any potential prosecution. The court will not necessarily refuse to issue a warrant where you disclose something that tends to undermine the grounds of the application, but if you do not disclose something that might affect the court's decision then that could make any warrant ineffective.

A due diligence report [redacted] suggests that representatives of Abacus (this would likely be FOULSHAM and TIPPER in their capacity as company directors) sought tax advice from Mazars LLP regarding the structure of their model. This, on the face of it, might indicate that they have not knowingly evaded their tax liabilities. Given they have sought professional advice, it is also possible that they believe the structure to be aggressive tax avoidance, as opposed to evasion. However, the model for which it is believed they have sought advice would only stand chance of legitimacy if the Sourcing Companies and Micro Employers

weren't a sham and weren't all controlled by the same individuals. It is therefore believed that advice has been sought purely to give an air of legitimacy and that they have knowingly implemented a fraudulent variant of their own model.

It is of note that not all analysis work carried out to date in respect of banking material obtained is complete and this work remains ongoing. However, as this work is completed, it is not expected that this will materially alter HMRC's view of either the nature of the fraud or the scale on which it is believed to have been committed.

Constratum's bank statements show that they have paid approximately £1.5 million of VAT on behalf of some of the Sourcing Companies listed in Athena's September 2018 VAT audit report. However, this has not been deducted from the estimate of VAT evaded. This is because there is no business reason why Constratum would pay the VAT liability of what are purportedly unconnected companies. Even if the £1.5 million was accounted for, the fraud would still be significant, exceeding £85 million.

Checks show that the suspects in this application have no previous criminal convictions and therefore are deemed to be of good character [redacted]. However, the fact an individual has not previously been convicted of an offence does not mean they will not participate in criminal activity.

James FOULSHAM and TIPPER both engage Smith and Williamson as their agent in respect of their affairs. [Five named individuals], Athena and Constratum all engage, or have engaged, Adderley, Hill & Co Ltd in respect of their personal or company tax affairs. Equally, [two named individuals], Verso Pay and Pegasus engage Four Oaks taxation and Accounting Services Ltd as their agent for their respective personal and company tax affairs. Backoffice engage Dains LLP in respect of their (Corporation) tax affairs. It could be argued that the aforementioned individuals and entities have used agents and, therefore, sought professional advice with regards to their financial affairs. However, the fact that an individual or company engages an agent to act on their behalf, does not negate their personal or corporate legal liability to declare their taxable income.

Further, save for Nicola CLEARY, all suspects have declared income via Self-Assessment tax returns demonstrating some inclination towards compliance with the tax regime.

James FOULSHAM and TIPPER both declared capital gains in excess of £4 million for the 2017/2018 tax year. This suggests some compliance with the tax system and the apparent income would go some way, though not fully, to explaining how they have purchased luxury vehicles and property. However, the information provided

> in respect of the capital gain conflicts other information held by HMRC. Furthermore, even if the capital gain claim is genuine, it does not negate the fact they have taken deliberate steps to avoid VAT due to HMRC.
>
> Williams Associates Ltd is known to receive consultancy fees from Twenty Four Seven Recruitment Services Ltd into a Gibraltar based bank account. Backoffice have paid in excess of £34.7 million to that same bank account within the period of this fraud. At present, it is not known whether there is a legitimate business purpose behind these payments or whether the individuals within the criminal group are the ultimate beneficiaries of the monies paid out.
>
> Representatives of Abacus, Smart Labour, Vitazec and Athena have previously complied with requests for material made by HMRC as part of civil enquiries and as such may appear to be cooperative with HMRC enquiries. However, following analysis of the accounting records and bank statements provided, these are believed to be fraudulent, featuring what are believed to be false inputs in respect of sham Sourcing Companies. As such, I believe that to request material from them directly would only result in further false information being supplied.
>
> Some of the suspects of this application have not previously been asked to provide material to HMRC. It is therefore unknown if they would comply or not. However, this investigation regards a criminal group who are believed to have conspired to defraud the UK Treasury and, as such, it is deemed unlikely that they would fully and truthfully comply with any request for the material sought, especially given that fellow conspirators have previously provided what is believed to be falsified material under civil enquiries. Further, despite HMRC receiving responses to civil enquiries, this matter is now being dealt with criminally, as such, the seriousness and the likely implications are considerably higher, and the likelihood of a full and transparent response is considered far less likely. Further, even if an individual was willing to provide the material requested, there is a very high risk that any request made would lead to the tipping off of all the other members of the group concerning the criminal investigation into each.'

23. Pages 74 to 85 of the application notice comprised a table setting out the various premises to be searched; the reasons for HMRC's belief that material would be on those premises; and the reasons why the further necessary conditions would be met. The court's attention was directed to that table by section 3(c) of the application form, in support of HMRC's contention that service of an application under paragraph 4 of Schedule 1 to PACE might seriously prejudice the investigation. So far as material for present purposes, the table included the following text:

(a) Address or description of premises	(b) Reasons for believing material is on those premises	(c) Reasons why further condition(s) met
…		
[address]	[address] is the home address of Andrew CLEARY and Nicola CLEARY and, therefore, it is believed that any personal documents within the material sought, such as bank statements and personal contracts, will be kept at this address. It is considered likely that Andrew CLEARY has documentation and digital media in his possession that he uses to operate the fraud in a mobile capacity, and as such is likely to have an office area at his home address. Communications are considered vital evidence and as such it is imperative to secure the suspects' mobile phones, which are likely to be in their possession at this location at the time of any search.	Other methods of obtaining the material sought have been considered and I believe it is unlikely that the CLEARYs would comply with HMRC's request on a consensual basis. Further, if immediate entry could not be secured, I believe the CLEARYs will refuse entry to officers of HMRC and would likely use the opportunity to destroy or conceal the material sought. This is due to the serious nature and value of the offences being investigated and the possible significant consequences of being prosecuted. The material sought is evidence of an indictable offence believed to have been committed by the CLEARYs and co-conspirators. Andrew CLEARY is the director of Backoffice One Ltd which is at the heart of the entire fraud, including the laundering of the proceeds of the criminality. He is also believed to have provided information to the liquidators for both Smart Labour and Vitazec. Nicola CLEARY is the sole signatory of a bank account which is believed to have received a substantial amount of criminal property from the Backoffice bank

(a) Address or description of premises	(b) Reasons for believing material is on those premises	(c) Reasons why further condition(s) met
		account. The banking material held to date indicates that the queries are amongst those suspects who have benefited most from the fraud. As per current Sentencing Council guidelines for Cheating the Public Revenue, where the offending is £50 million or more and individuals have a leading role as part of a group activity, or the fraud is conducted over a sustained period or committed in a sophisticated way, the sentencing range is 10-17 years custody. In light of the above, I believe that the CLEARYs would have every reason to conceal, destroy and tamper with any relevant evidence which implicated them in the alleged criminal activity. This would frustrate the purposes of the search and the further investigation of the offences by HMRC.
[address and access route]	[address] is the home address of James and Danielle FOULSHAM and therefore it is believed that any personal documents within the material sought, such as bank statements and personal contracts, will be kept at this address. It is considered likely that FOULSHAM has documentation and digital media in his possession that he uses to operate the fraud in a mobile capacity, and as such is likely to have an office area at his home address. This is supported by the fact that the pass records provided by Colmore Gate	Other methods of obtaining the material sought have been considered and I believe it is unlikely that the FOULSHAMs would comply with HMRC's request on a consensual basis. Further, if immediate entry could not be secured, I believe the FOULSHAMs will refuse entry to officers of HMRC and would likely use the opportunity to destroy or conceal the material sought.

(a) Address or description of premises	(b) Reasons for believing material is on those premises	(c) Reasons why further condition(s) met
	suggest that he goes there approximately once a week. Communications are considered vital evidence and as such it is imperative to secure the suspects' mobile phones, which are likely to be in their possession at this location at the time of any search.	This is due to the serious nature and value of the offences being investigated and the possible significant consequences of being prosecuted. The material sought is evidence of an indictable offence believed to have been committed by FOULSHAM and co-conspirators. James FOULSHAM himself is a 50% shareholder of Backoffice One Limited which is at the heart of the entire fraud, including the laundering of the proceeds of the criminality. Danielle FOULSHAM is the sole signatory of a bank account which is believed to have received a substantial amount of criminal property from the Backoffice bank account. The banking material held to date indicates that the FOULSHAMs are amongst those suspects who have benefited most from the fraud. As per current Sentencing Council guidelines for Cheating the Public Revenue, where the offending is £50 million or more and individuals have a leading role as part of a group activity, or the fraud is conducted over a sustained period or committed in a sophisticated way, the sentencing range is 10-17 years custody.

(a) Address or description of premises	(b) Reasons for believing material is on those premises	(c) Reasons why further condition(s) met
		In light of the above, I believe that the FOULSHAMs would have every reason to conceal, destroy and tamper with any relevant evidence which implicated him in the alleged criminal activity. This would frustrate the purposes of the search and the further investigation of the offences by HMRC.
…		
…		
…		
[address]	[address] is the home address of Jonathan TIPPER and therefore it is believed that TIPPER will keep any personal documents within the material sought, such as bank statements and personal contracts, at this address. It is considered likely that TIPPER has documentation and digital media in his possession that he uses to operate the fraud in a mobile capacity, and as such is likely to have an office area at his home address. This is supported by the fact that the pass records provided by Colmore Gate suggest that he only goes there approximately once a week. In the absence of any other known associated addresses, it is deemed that he must work from home for the rest of the week. Communications are considered vital evidence and as such it is imperative to secure the suspect's mobile phones, which are likely to be in his possession at this location at the time of any search.	As per current Sentencing Council guidelines for Cheating the Public Revenue, where the offending is £50 million or more and individuals have a leading role as part of a group activity, or the fraud is conducted over a sustained period or committed in a sophisticated way, the sentencing range is 10-17 years custody. In light of the above, I believe that TIPPER would have every reason to conceal, destroy and tamper with any relevant evidence which implicated him in the alleged criminal activity. This would frustrate the purposes of the search and the further investigation of the offences by HMRC. TIPPER's wife, Janet Tipper, also lives at this property and it is anticipated that she will be present at the time of the search. Whether she has knowledge of the fraud or not, due to the serious nature of the

(a) Address or description of premises	(b) Reasons for believing material is on those premises	(c) Reasons why further condition(s) met
		allegations against her husband and the potential outcomes of any future prosecution, it is believed she would refuse to grant entry to Officers of HMRC and may conceal, destroy or tamper with evidence, or tip off TIPPER to do so.
…		
…		
[address]	This is the registered office of Backoffice One Limited, Backoffice Extra Limited, Right Pay Payroll Limited, Sigma Capital Investments Limited, Sigma Capital Assets Limited, Sigma Capital Holdings Limited and Dynasty Partners Limited. It has been established that FOULSHAM, TIPPER, Andrew CLEARY and employees of both Sigma and Backoffice, have entry passes to Colmore Gate which are all registered under 'Sigma' (the specific Sigma entity has not been specified to HMRC). No approach has been made at this time to iHub (which is the company operating the serviced office space from the 3rd and 4th floors of 2-6 Colmore Gate, Colmore Row, Birmingham) as the risk of them tipping off the suspects as to the investigation into them is deemed too great. Backoffice is registered specifically to the 4th Floor of 2-6 Colmore Gate. However, as iHub operate across both the 3rd and 4th floors, the investigation cannot be certain which floor Backoffice currently operate from. It is not known if the 4th floor entrance provides access to both the 3rd and 4th floors or if the 4th floor is where post is delivered to iHub and thus is effectively just the correspondence address; therefore, entry and search is sought of 2-6 Colmore Gate.	The fraud is believed to be operated from serviced office space controlled by iHub. It is believed that iHub wouldn't grant entry for officers of HMRC to conduct a search on a voluntary basis as they have a duty of client confidentiality. It is believed that either FOULSHAM, TIPPER or Andrew CLEARY will hold the rental contract with iHub in their capacity as officeholders of Backoffice and the 'Sigma' entities. However, I believe it is unlikely that FOULSHAM, TIPPER or Andrew CLEARY would comply with HMRC's request on a consensual basis given the serious nature and value of the offences being investigated and the possible significant consequences of being prosecuted. The material sought is evidence of an indictable offence believed to have been committed by FOULSHAM, TIPPER and Andrew CLEARY. They are the office holders of Backoffice

(a) Address or description of premises	(b) Reasons for believing material is on those premises	(c) Reasons why further condition(s) met
		which is believed to be at the heart of the fraud. They are also the suspects who are believed to have received the largest amount of the criminal property from the fraud. As per current Sentencing Council guidelines for Cheating the Public Revenue, where the offending is £50 million or more and individuals have a leading role as part of a group activity, or the fraud is conducted over a sustained period or committed in a sophisticated way, the sentencing range is 10-17 years custody. In light of the above, I believe that FOULSHAM and Andrew CLEARY would not grant access for officers of HMRC to search iHub on a consensual basis. This would frustrate the purpose of the search and the further investigation of the offences by HMRC.

24. At paragraphs 10(e) and 11 of the skeleton argument lodged in support of the applications made, it was said:

> '10(e) …It is important to note that some of the suspects have provided some material to HMRC during previous civil enquiries. The applications explain why, in each case, HMRC considers that a request for voluntary production or a Production Order would fail to obtain the material sought, despite the good character and professional standing of the suspects; and extent to which some of them have previously produced material to HMRC. In assessing this the Court may be assisted by having regard to the case of *Hart and Others v HMRC* [2017] EWHC 3091 (Admin), especially the passage from [56]. The Court will of course give the claims that a

search warrant is necessary, and a production order would not suffice, close scrutiny. The applications for the various warrants do not necessarily stand and fall together, it is open to the court to grant warrants in respect of some premises and refuse warrants in respect of others.

11 it is further submitted that the further condition required by paragraph 12(a)(ii) is fulfilled in that the condition in paragraph 14(d) is made good: **that service of notice of an application for an order under paragraph 4 above may seriously prejudice the investigation**: this is for reasons set out in the table at the end of the applications. This requirement is linked to (e) above, yet a distinct requirement.'

25. I have been provided with the transcript of the hearing before HHJ Carr, from which it is clear (pages 6A – 7A, 1 July 2020) that he had in mind, from the outset, the applicable statutory requirements; Mr Hardy has not suggested otherwise. At pages 5E – 6G, 2 July 2020, the judge read into the record his decision, noting his conclusion that each of the applications met the requisite legal tests, for the reasons set out in the application, and that the issuing of the warrants was necessary, justified and proportionate.

The duty of candour

26. Whilst the Claimants' challenge by reference to paragraph 14 of Schedule 1 to PACE is free-standing, it is linked to its contention that HMRC did not comply with its duty of candour, which I shall address first.

27. In the circumstances set out above, I am satisfied that it is not reasonably arguable that HMRC did not discharge its duty of candour, as that duty is elucidated in *Hart*. Mr Bird is right to contend that nothing in that duty requires a prospective argument on the part of those to whom the application relates to be identified without answer and Mr Hardy could direct me to no authority to the contrary. As long as all relevant material is fairly presented, there is no reason why an applicant cannot indicate the reasons why, in his or her submission, that material affords no, or insufficient, answer to the application made. Properly, Mr Hardy did not suggest that such an approach could not be taken by counsel when advancing the application and, that being so, it is difficult to see why those same points could not be made in the application form itself, in order that the judge might be suitably assisted. In this case, it was made clear to the court that there had been earlier co-operation with HMRC and that professional advice had been sought. The arguments likely to be advanced by the relevant individuals in that connection were identified. As HMRC observed, the taking of advice would not avail its recipients if the arrangements to which the advice related had themselves been a sham. It is not suggested that the advice itself had been made available to HMRC. Similarly, prior apparent co-operation, however extensive, with HMRC's civil enquiries would not avail those in question if subsequent analysis by HMRC had resulted in its belief that the materials provided had been fraudulent. Putting on the defence hat and asking what, if the applicant's advocate were representing the respondents, s/he would be saying to the judge, does not require the applicant uncritically to accept the merit in that

position, or to abstain from identifying the applicant's response to it in order that the judge be in a position to make an informed, balanced and fair decision. As Mr Bird observed, in an inter partes application it is open to counsel for the applicant to reply to the points raised on behalf of the respondents; the duty of candour in an ex parte application reflects the need to draw to the court's attention that which would be advanced were counsel for the respondents to be present, but it does not deprive the applicant of the right of reply which would ordinarily follow in such circumstances.

28. In a letter addressed to a partner of Smith and Williamson LLP, insolvency practitioners, dated 5 March 2019, to which HMRC's application did not refer, HMRC had refused Abacus' claim for input tax in respect of specified transactions, on the basis that those transactions had been connected with fraudulent evasion of VAT, to the actual or constructive knowledge of Abacus. Having set out the reasons therefor, HMRC had set out its conclusion that, *'When considering the above factors it must have been the case that Abacus Outsource Ltd was a knowing participant in an overall VAT fraud and accordingly your right to deduct on those transactions has been denied.'* On 10 July 2019, HMRC formally had reflected the denial of input VAT by raising a charge to VAT in the sum of £5,173,358, plus interest in the sum of £106,549.91, to be paid by Abacus. In the event, the debt was written off because Abacus had been dissolved on 22 May 2019, and a decision was taken by HMRC not to seek its restoration to the register. Whether or not the letter of 5 March 2019 had been disclosed to the directors of Abacus at the relevant time, Mr Bird is right to submit that it is not indicative of a 'clean bill of health' having been issued by HMRC and that, had fuller information regarding the dealings between the Claimants and HMRC been provided in the application form, it would inevitably have incorporated reference to that letter and to HMRC's related actions, which could only have served to fortify the application. Mr Hardy acknowledged that the letter ought to have formed part of the fuller information with which he contends the court ought to have been provided and that, on the face of it, it was adverse to the Claimants, but submitted that it would have fallen to be considered in the context of all other available material and that it was difficult to form a clear view as to what the judge might have done had he been faced with it; he might have concluded that it was incomprehensible. I regard that latter submission as fanciful.

29. It is no part of this court's role to determine the substantive merit, if any, in HMRC's stated beliefs regarding the Claimants or the business model with which they were concerned/from which they benefited and I do not do so. For current purposes, I am satisfied that nothing stated by HMRC in its application under PACE, or omitted from it, even arguably negated its duty of candour, or resulted in an application which was unfairly presented. Sufficient information had been provided to alert the court to prior voluntary co-operation with HMRC, the seeking/taking of advice from reputable professional advisors and the submissions which would be likely to flow from those matters on behalf of the now Claimants.

Paragraph 14 of Schedule 1 to PACE

30. Against that background, the applicant had set out cogent grounds for her belief, on the basis of the investigation to that date and the evidence available to her, that there

was no available lesser measure which would be likely to be effective in securing the relevant documents. Those grounds had included HMRC's stated concern to identify precisely where material was located, as evidence of which individuals were in control of which aspects of the suspected fraud, and to avoid the risk that certain individuals would tip off others. She had adequately explained her reasons, focusing on the facts of the case, in terms which were reasonable and compelling and which had explored, at suitable length, why a less intrusive order appeared bound to fail.

31. The requirement imposed by paragraph 14(d) of Schedule 1 to PACE was distinct, but related to those considerations. As noted above, by section 3(c) of the application the court's attention had been drawn to the table at the end of the form, on which HMRC relied for that purpose. From the material there provided, in the context of the information disclosed by section 7 of the application (both of which highlighted in HMRC's skeleton argument), it was open to the judge to conclude that he was satisfied that the condition imposed by paragraph 14(d) was fulfilled, if necessary having sought any clarification which he deemed appropriate. HMRC's letters of 8 July 2020, notifying the Claimants that orders for the production of further material by corporate entities would be sought, do not undermine that conclusion, for the reasons advanced in these proceedings by HMRC, summarised at paragraph 14 above. Judicial questioning of the nature set out at paragraph 42 of *Hart*, which Mr Hardy submitted to have been conspicuous by its absence in this case, was not required because the application form itself, to the truth of which the applicant had attested at the hearing, had set out the information which the questioning in that case had been designed to elicit. I have had regard to the conclusions reached by the Divisional Court on the facts of *Hart*, in particular at [57] to [59], as Mr Hardy has urged me to do. Ultimately, each case is fact-sensitive. In this case, in my judgment, the challenge based on paragraph 14(d) of Schedule 1 is not arguable with a realistic prospect of success.

32. In all the circumstances, I am satisfied that it is not arguable that the warrant should be set aside, including by reason of any material non-disclosure which might well have led the judge to issue a warrant which, had there been full candour, he would have refused to issue, or, put another way, which might reasonably have led him to refuse to issue the warrant. It follows that I refuse permission to apply for judicial review of the PACE warrant, whether on the basis of inadequate exploration of a less intrusive option, and/or of material non-disclosure. Further, in relation to the latter, I accept Mr Bird's submission, having regard to HMRC's correspondence with Smith and Williamson, in March 2019, and related actions, that it is highly likely that, had fuller information been provided to the court, the outcome for the Claimants would not have been substantially different. It follows that, in accordance with sections 31(3C) and 31(3D) of the SCA, I 'must' refuse to grant leave to apply for judicial review, on that basis.

The POCA search and seizure warrants

33. Separate applications for search and seizure warrants were made before the same judge, at the same hearing, in relation to: (1) Jonathan Tipper; (2) James Foulsham and Danielle Foulsham; (3) Andrew Cleary and Nicola Cleary; (4) James Foulsham and Jonathan Tipper; and (5) Jonathan Tipper, for the dominant purpose of

benefiting a confiscation investigation in Operation Salmon. The material in question could not be sought under PACE, hence the need for applications under section 352 of POCA. Each application contained the following question and answer, at section 3, followed by application-specific free text. The example below is taken from the first application made in relation to Jonathan Tipper:

> *'In a case in which no production order has been made, complete either (c) or (d) as appropriate:*
>
> (c) If the material is identified in box (2)(a), why do you believe that it would not be appropriate to make a production order for any one or more of the following reasons? *Tick to indicate which.*
>
> ☐ (i) it is not practicable to communicate with any person against from the production order could be made.
>
> ☐ (ii) it is not practicable to communicate with any person who would be required to comply with an order to grant entry to the premises.
>
> ☒ (iii) the investigation might be seriously prejudiced unless an appropriate person is able to secure immediate access to the material.
>
> Please see the application for the search warrants under section 9 PACE in Operation Salmon, in particular at sections 2(c), 3(c) and the table of premises at the end of that application.'

34. Section 5 of each application was headed 'Duty of Disclosure' and contained the following pro forma text:

> 'Is there anything of which you are aware that might reasonably be considered capable of undermining any of the grounds of this application, or which for some other reason might affect the court's decision?'

Whilst each application contained material which was common to all others and cross-referred to the application made under PACE, it also contained case-specific material. By way of example, in the first application made in relation to Jonathan Tipper, the following answer was provided:

> 'Please see the duty of disclosure section at section 7 of the search warrants under section 9 PACE in Operation Salmon, and, in particular, please note –
>
> TIPPER does not have any previous criminal convictions.

TIPPER engaged Smith and Williamson as his agent in respect of his personal tax affairs; however, the fact that an individual or company engages an agent to act on their behalf, does not negate their legal responsibility to declare their taxable income.

TIPPER declared a capital gain in excess of £4m for the 2017/18 tax year. This suggests that he is compliant with the tax system and the apparent income would go some way, though not all, to explaining how he has purchased luxury vehicles and property. However, the information provided in respect of his capital gain conflicts other information held by HMRC. Furthermore, even if the capital gains claim is honest, it does not negate the fact that he has taken deliberate steps to evade the VAT due to HMRC.

A due diligence report [redacted] suggests that the criminal group sought tax advice from Mazars LLP regarding the structure of their model. This, on the face of it, might indicate that they have not knowingly evaded their tax liabilities. However, the model for which it is believed they have sought advice would only stand chance of legitimacy if the Sourcing Companies and Micro Employers weren't a sham and weren't all controlled by the same individuals. It is therefore believed that advice has been sought purely to give an air of legitimacy and that they have knowingly implemented a fraudulent variant of their own model.

It should be noted that HMRC will also be applying for a search and seizure warrant under section 352 POCA to search for evidence of assets at…, which is a storage unit HMRC believed to be under the control of TIPPER and another suspect, James FOULSHAM. The application in respect of [that unit] is made on the basis that, in addition to the material sought at TIPPER's residential address, it is reasonably believed that such material might also be located at [that storage facility].

Similarly, it should be noted that HMRC will also be applying for a search and seizure warrant under section 352 PACE to search for evidence of assets at…, as HMRC believes TIPPER controls a safety deposit box at that premises.

The application in respect of the safety deposit box at… is made is on the basis that, in addition to the material sought at TIPPER's residential address, it is reasonably believed that such material might also be located at [that address].

Further, it should be noted that HMRC will also be applying for prior approval under Section 47G and 303E POCA to search for and seize assets found at the TIPPERs' residential address. It is also for this reason that a valuation expert will be attending the premises with HMRC officers at the time the search warrant is executed in order to advise on the likely valuation of identified assets, thereby

> mitigating unnecessary removal of material. Arrangements will be in place for the secure removal, transport, storage and if necessary, disposal of materials and assets seized.' (sic)

35. By section 352(1) of POCA, a judge is empowered, on the application of an appropriate officer, to issue a search and seizure warrant, if s/he is satisfied that either of the requirements for so doing is fulfilled. Those requirements are set out in section 352(6): (a) that a production order made in relation to material has not been complied with and there are reasonable grounds for believing that the material is on the premises specified in the application for the warrant, or (b) that section 353 is satisfied in relation to the warrant. For current purposes, it is unnecessary to set out the requirements of section 353 in full, though it should be noted that, amongst the conditions imposed by sub-sections 353(3) and (4) is one that there be reasonable grounds for believing that it would not be appropriate to make a production order, for any one or more of three specified reasons, including that the investigation might be seriously prejudiced unless an appropriate person were able to secure immediate access to the material. Those conditions are reflected in the terms of the pro forma application form, from which I have cited above.

36. On behalf of HMRC, it is, rightly, accepted that the duty of candour applies equally to an application under section 352 of POCA (see the principles set out in *R (Chatwani & Others) v (1) NCA and (2) Birmingham Crown Court* [2015] EWHC 1283 (Admin), DC [105] to [107]). The alleged failure by HMRC to have complied with that duty has as its basis the same alleged failure to have referred to all relevant material, or, at least, the qualification of that material by inappropriate commentary, which I have addressed above. It is not reasonably arguable, for essentially the same reasons. Here again, it is not arguable that the relevant warrants should be set aside by reason of a material non-disclosure which might well have led the judge to issue a warrant which, had there been full candour, he would have refused to issue, or, put another way, which might reasonably have led him to refuse to issue the warrants. It follows that I refuse permission to apply for judicial review on this ground, too, and, as above, in accordance with sections 31(3C) and 31(3D) of the SCA.

Applications for prior and appropriate approvals

37. The relevant approvals were sought from the Magistrates' Court, as required by (as the case may be) sections 47G and 303E of POCA. They related, respectively, to Messrs Tipper; Foulsham; and Cleary (under section 47G), and to Jonathan Tipper; James and Danielle Foulsham; and Andrew and Nicola Cleary (under section 303E). All applications made under 47G set out the timing and nature of the criminal investigation commenced by HMRC in January 2019, noting that it was ongoing, as was the exact quantification of criminal benefit; set out HMRC's planned activities going forward, including searches under sections 9 of PACE and 352 of POCA and the making of an application for a restraint order; set out the bases upon which it was contended that the applicant had reasonable grounds for suspecting that realisable property might otherwise be made unavailable for satisfying any confiscation order, or that the value of the property might be diminished; listed the premises, persons and/or vehicles to be searched and detailed the currently known assets which it was intended to seize; and concluded with a section headed 'Duty of

Disclosure' which, so far as material for present purposes, cross-referred to the application which had been made under PACE. In Mr Tipper's case, and in that of James and Danielle Foulsham, that section also included the material relating to Smith and Williamson and the declared capital gain of £4 million, cited at paragraph 34 above. All applications made under section 303E set out the timing and nature of the criminal investigation commenced by HMRC in January 2019, noting that it was ongoing, as was the exact quantification of criminal benefit; listed the premises, persons and/or vehicles to be searched and detailed the currently known assets which it was intended to seize; identified the known 'listed assets' (as that term is defined by section 303B); and concluded with a section headed 'Duty of Disclosure' which cross-referred to the application which had been made under PACE. As before, in Mr Tipper's case, and in connection with James Foulsham, reference was made to the engagement of Smith and Williamson and the declared capital gain of £4 million for the 2017/18 tax year.

38. For current purposes, it is not necessary to recite the legislative framework relating to the applications here under consideration; here again, the basis of the application for judicial review is confined to the applicant's alleged failure to have complied with his duty of candour, in the respects previously identified and considered. For the reasons earlier set out, I am satisfied that, in connection with these applications, too, it is not reasonably arguable that the relevant approvals should be set aside by reason of a material non-disclosure which might well have led the district judge to approve that which, had there been full candour, he would have refused to approve, or, put another way, which might reasonably have led him to refuse approval. It follows that I refuse permission to apply for judicial review on this ground, too, and, here again, in accordance with sections 31(3C) and 31(3D) of the SCA.

The application to set aside/vary the order of Lang J

39. As Mr Hardy acknowledged in the course of the hearing, if the application for permission to apply for judicial review on the existing grounds were to be refused, as it has been, there could and would be no claim to amend. It follows that, by reason of my conclusions above, his application to vary the order of Lang J, so as to permit an amendment which would advance an additional challenge, to separate decisions, fails for that primary reason. For the sake of completeness, however, I address, below, its substantive merit.

40. By section 303K of POCA, detention of listed assets seized under section 303J may be authorised by a 'senior officer' for up to 48 hours, that is for up to 42 hours beyond an initial period of 6 hours. Under section 303L, the period for which all or part of that property may be detained may be extended by a first order of the Magistrates' Court for up to 6 months, beginning with the date of the order. The order must be made before any previously authorised period of extension has expired: *Revenue and Customs Commissioners v Mann* [2021] EWHC 1182 (Admin). The first orders for further detention, made, unopposed, on 10 July 2020, related to property seized from, respectively, Jonathan Tipper and Andrew Cleary. Each pro forma order, extending the period of detention for a period of six months from that date, was completed by DJ MacMillan and recorded the following:

a. in connection with Mr Cleary, the identified property had been seized at 13:31on 8 July 2020; the application had been made by Lynne Kemble of HMRC, who had given oral evidence and made representations; the order had been signed, electronically, at 11:00 on 10 July 2020;

b. in connection with Mr Tipper, the identified property had been seized at 12:01on 8 July 2020; the application had been made by Lynne Kemble of HMRC, who had given oral evidence and made representations; the order had been signed, electronically, at 11:13 on 10 July 2020.

41. HMRC has since acknowledged: (1) by letter dated 9 December 2020, that there had been two seizures of different assets from the First Claimant, timed at 12:01 and 12:29 on 8 July 2020; and (2) by letter dated 18 December 2020, that the timing of the relevant seizure from Mr Cleary had, in fact, been 11:44 on 8 July. It is said that Senior Officer David Birtwistle had authorised an initial extension of the period of detention, at 13:51 (in re: the First Claimant) and at 14:20 (in re: the Fifth Claimant). If those matters are correctly stated, each order had been made within 48 hours of the relevant seizure and the district judge had had jurisdiction to make both orders. The prospective basis of challenge to his orders is that the contemporaneous evidence is said to indicate that the timings of each relevant seizure had been incorrectly stated and that, in each case, the relevant property had, at least arguably, been seized more than 48 hours in advance of the orders made. It is said that the 'overwhelming inference' from the available material is that the property in question had been seized much earlier, having regard to alleged discrepancies in the timings and the inherent lack of credibility in the timings advanced by HMRC.

42. Notwithstanding the fact that the property in question has since been released from detention, Mr Bird acknowledged in oral submissions that this challenge, were it to be permitted by amendment, would not be academic, as the declaratory relief which would be sought by the Claimants might have a bearing on any asserted entitlement to damages, in response to which the orders made by the district judge would be said by HMRC to have provided a lawful basis for detention (without prejudice to its contention that the statutory regime for compensation for which section 303W of POCA provides, where goods are seized but, ultimately, not forfeited, excludes a right to claim common law damages).

43. I accept Mr Hardy's submission that section 303N of POCA did not afford an appropriate alternative mechanism through which to challenge the court's jurisdiction to make the original orders. That section provides (with emphasis added):

'**303N Release of detained property**

(1) This section applies while any property is detained under section 303K or 303L.

(2) A magistrates' court or (in Scotland) the sheriff may direct the release of the whole or any part of the property if the following condition is met.

> (3) The condition is that the court or sheriff is satisfied, on an application by the person from whom the property was seized, that the conditions in section 303K or 303L (as the case may be) for the detention of the property are no longer met in relation to the property to be released.
>
> (4) A relevant officer or (in Scotland) a procurator fiscal may, after notifying the magistrates' court, sheriff or justice under whose order property is being detained, release the whole or any part of it if satisfied that the detention of the property to be released is no longer justified.'

As a point of construction, it seems to me that the emphasised wording is directed at a change of circumstance following the making of an earlier lawful order, rather than affording a means of challenge to the court's jurisdiction to make the latter. Neither side drew my attention to any authority on the point.

44. I also accept Mr Hardy's submission that the property control sheets record, or fail to record (as the case may be), timings which might reasonably be said to give rise to questions as to whether the relevant property had been detained for a period in excess of 48 hours at the time of the district judge's orders (irrespective of whether time runs from a formal act of seizure or from any asserted 'effective surrender' of the property by Mr Cleary to Mr Donovan at an earlier time on 8 July 2020). I further accept that the seizure timing recorded in each of the judge's orders did not constitute a finding of fact, so much as a record of the timing which he had been given by HMRC, albeit on an uncontested basis. Nevertheless, this had been a hearing on notice to the Claimants, who had been at liberty to attend and to question the officer as to the timing of the seizures and to make the associated submission that the district judge lacked jurisdiction to make the orders sought by HMRC. It is accepted by Mr Hardy that copies of the property control sheets had been left at the Claimants' premises, albeit, it is said, in incomplete, or faintly legible form. Having elected not to do so at the hearing before the Magistrates' Court, it is not appropriate for the Claimants to seek to raise an issue of fact for the first time by way of judicial review and no error of law by the judge is asserted on the basis of the material with which he had been provided. It is no answer for Mr Hardy to assert, as he does, that the Claimants had instructed solicitors to deal with the restraint orders which had been made separately and which had required disclosure of assets within one month, by comparison with which the hearing on 10 July had been considered to be a minor matter.

45. Furthermore, the decisions of 10 July 2020 were not identified as being the subject of intended challenge (by way of application to amend the claim forms) until 11 November 2020. That was four months after the decisions which it was proposed to challenge had been made, and there is no satisfactory explanation for why that challenge could not have been included within the original claim forms, filed in October 2020, or, in any event, raised within three months of the relevant decisions. Whilst Mr Hardy submits that it had not been until 7 January 2021 that full disclosure (including the officers' notebooks) had been made available to the Claimants, that cannot explain the Claimant's ability to make their original application to amend their claim forms to raise the relevant challenge two months

earlier. In *Presvac* [133D to 134A], the Court of Appeal rejected a submission that a cause of action did not arise and, therefore, that time did not begin to run for the making of an application for judicial review, until the proposed applicant had sufficient evidence reasonably to mount an application which would have reasonable prospects of success, or for which he had sufficient 'ammunition' with which reliably to make an application. It held that each such submission amounted to the importation of qualifying words into the relevant provision (now to be found in CPR 54.5(1)) of which the actual wording did not admit, whilst acknowledging [134A-B] that the applicant's subjective state of knowledge might be of relevance to whether there was good reason for the applicable limitation period to be extended. On the facts as summarised earlier in this and the preceding paragraph, in my judgment it cannot be said that the Claimants lacked sufficient evidence/ammunition to mount an application within time. I note that the original claim forms, filed in October 2020, were accompanied by a document entitled 'Preliminary Grounds' and that, in the 'Finalised Grounds' of challenge, dated 25 November 2020, a challenge concerning property seized under section 47 of POCA had been included, expressly, on a precautionary basis:

> '49. The Claimants accept that this head of challenge may be unsustainable, but, given the other challenges, and the uncertainty presently surrounding this particular aspect of the overall case, seek to keep this head of challenge alive unless and until disclosure and/or service of documents renders it impossible to proceed with it.'

There is no reason advanced or apparent why a similar approach could not have been adopted in relation to the proposed challenge now under consideration, on the basis of the property control sheets. I consider it to be significant that, in his Note supplementing the Claimants' application to broaden their challenge, dated 18 November 2020, at paragraphs 7 and 8, Mr Hardy had stated (with emphasis added):

> '7. While notice was given to the Claimants by letters dated 10 July from Lynne Kemble to the effect that magistrates earlier that same day had ordered an extension of the permitted period of time for the detention of listed assets pursuant to section 303L of POCA 2002, and copies of property control sheets were left at the searched premises, they were carbon copies of handwritten pages which were often too faint to read and, in several cases, indecipherable. Issues were canvassed in correspondence over alleged incompleteness of and inaccuracies on the property control sheets, insofar as they could be deciphered. However the lawfulness of the seizure can only be fully and properly challenged if the relevant property control sheets are served. <u>At present, the challenge under this head is made by dint of making out as best one can the contents of the copies of the property control sheets left at the searched premises. The contents of those sheets form the crux of the challenge to the continued detention of certain listed assets.</u> While, therefore, it is correct to say that the Claimants have had access to those documents since 8 July, that access is rendered almost useless by virtue of illegibility. [In the circumstances, if necessary, the

Claimants will apply out of time to pursue the section 303 head of challenge.]

8. Service of legible copies of all of the property was requested on 15 September. It remains outstanding. Equally, service of the authorisations of the initial extension of the time limit for detention of listed assets under section 303K of POCA 2002 have been requested, but not received.'

That being so, there is no good reason why 'the crux of the challenge to the continued detention of certain listed assets' could not have been made within the primary time limit.

46. In my judgment, this application marks an attempt to achieve by amendment a challenge to two decisions of the Magistrates' Court which were not the subject of the original claim forms; which would have been out of time were it to have been the subject of a separate claim; and where no good reason for extending the applicable limitation period exists.

47. Furthermore, for the reasons set out at paragraph 44 above, the broadened challenge is not arguable with a realistic prospect of success, such that permission would not be granted to advance it, and I would have refused the amendment on that, additional basis, had I granted permission to advance the original bases of challenge to the decisions of 2 and 6 July 2020.

Summary of conclusions

48. For the reasons set out in this judgment:

a. I refuse permission to apply for judicial review of the decisions of 2 and 6 July 2020, on which basis there is no claim form which may be amended and I refuse the application to amend on that basis.

b. had I granted permission to advance the existing grounds of challenge, I would, in any event, have declined to set aside in part/vary the order of Lang J by which she refused permission to amend the claim forms so as to advance a challenge to the decisions made by the Magistrates' Court on 10 July 2020.