Neutral Citation Number: [2024] EWHC 1531 (Admin)

Case No: AC-2024-LON-1526

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19th June 2024

**Before** :

**THE HONOURABLE MR JUSTICE LINDEN**

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**Between :**

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| **THE KING** | **Claimant** |
| **(on the application of MILEAGE RECLAIM LIMITED (trading as TAXBUDDI))** | |
| **- and -** | |
| **NORTH SOMERSET MAGISTRATES' COURT** | **Defendant** |
| **- and –** | |
| **COMMISSIONERS OF HIS MAJESTY'S REVENUE AND CUSTOMS** | **Interested Party** |

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**Kennedy Talbot KC** (instructed by **Peters & Peters Solicitors LLP**) for the **Claimant**
**Riccardo Calzavara** (instructed by **HMRC Solicitors' Office**) for the **Interested Party**

Hearing date: 6 June 2024

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# JUDGMENT

**Mr Justice Linden :**

## Introduction

1. In these proceedings, the Claimant challenges a decision of the North Somerset Magistrates' Court, on 22 February 2024, to make an account freezing order ("the AFO") in relation to two of the Claimant's bank accounts pursuant to section 303Z3 of the Proceeds of Crime Act 2002 ("POCA"). The application for the AFO was made without notice by His Majesty's Revenue and Customs ("HMRC") on the basis that there were reasonable grounds for suspecting that the accounts contained *"recoverable property"* as defined under POCA i.e. the proceeds of crime. On 4 April 2024, the AFO was discharged administratively in relation to one of the accounts, but it remains in force in relation to the Claimant's account with Revolut Limited.

2. On 3 March 2024 the Claimant made an application to the Magistrates' Court to set aside the AFO pursuant to section 303Z4 of POCA. However, there were difficulties with securing a hearing of the application which is now due to be heard at the City of London Magistrates' Court on 27 June 2024. In the meantime, on 7 May the Claimant issued proceedings in the Administrative Court and sought an expedited hearing between 28 May and 7 June 2024. The Magistrates' Court filed its Acknowledgment of Service on 23 May and HMRC did so on 28 May 2024. On 31 May Lavender J listed a one day "rolled up" hearing, on 6 June 2024, of the Claimant's application for permission to claim judicial review, with the Claim to be determined if permission was granted.

3. At the end of that hearing, I indicated that I would reserve my decision overnight with reasons to follow and, on 7 June 2024, I made an order refusing permission. My reasons for that order are set out below but, essentially, my conclusion was that the

Claimant has a suitable alternative remedy in the form of its application to the Magistrates' Court to set aside the AFO. The better course was to allow that Court to determine that application rather than for the Administrative Court to intervene.

## The legal framework for the proceedings before the Magistrates' Court

4. Mr Talbot helpfully summarised the law which was applicable to HMRC's application to the Magistrates' Court on 22 February 2024 ("the 22 February application") and to the Claimant's application to set aside the AFO ("the application to set aside"). I set out that summary below, which Mr Calzavara accepted.

5. Part 5 of POCA enacts powers for the courts to recover or forfeit the proceeds of crime in civil proceedings without there having been a prosecution or conviction. Chapters 2 and 3B of Part 5 provide for interim measures to freeze or restrain dealings with property which may become the subject of such proceedings.

6. Section 303Z1 of POCA provides that where an enforcement officer (as defined in section 303Z1(6)) has reasonable grounds for suspecting that money held in an account with a relevant financial institution is *"recoverable property"* or is intended for use in unlawful conduct, they may make an application to the Magistrates' Court for an account freezing order. Subsection (2) explains that, subject to any exclusions made pursuant to section 303Z5, such an order prohibits each person who operates the account, or for whom the account is operated, from making withdrawals or payments from the account, and subsection (5) provides that the order may be in respect of all or part of the credit balance in the account.

7. The order may be made by the Magistrates' Court if it is satisfied that there are reasonable grounds for suspecting that the monies are recoverable property: section

303Z3(3). The role of the Magistrates' Court is therefore to decide the question for itself rather than merely to review the opinion of the enforcement officer. This requires a detailed examination by the Court of the material put before it: compare *Windsor v Crown Prosecution Service* [2011] 2 Cr App R 7 at [51]-[53].

8. Section 303Z1(4) provides that an application for an account freezing order may be made without notice if the circumstances of the case are such that notice of the application would prejudice the taking of any steps to forfeit money that is recoverable property. There is also clear authority which confirms that there is a duty of full and frank disclosure when applications without notice are made in this context: see *National Crime Agency v Simk*us [2016] 1 WLR 3481 at [27]. As Edis J (as he then was) said:

> *"There is a general duty in civil proceedings on a party applying for a without notice order to make full and candid disclosure of all material facts. This applies to paper applications and is an important safeguard in all without notice applications. A litigant pursuing a purely private interest in litigation is required to fulfil this duty, and the obligation is no less on a public authority such as the NCA pursing the public interest."*

9. At [27]-[35], which deserve careful reading, Edis J went on to spell out the implications of this duty. Mr Talbot particularly emphasised the following points:

   i) The duty includes a requirement for proper inquiries to be made as well as to disclose known material facts and not to mislead the court.

   ii) There is a duty on the applicant's advocate to ensure that the duty of disclosure is complied with. As Hughes LJ put it in *In re Stanford International Bank*

[2011] Ch 33 at [191] the applicant for an order without notice *"must put on his defence hat and ask himself what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the judge"*.

iii) The statement in support of the application for a freezing order should contain more than a mere assertion that the investigator is aware of their duty and has complied with it: [34] *Simkus.*

iv) The court should give reasons for making the order: [39]-[42] *Simkus*.

10. As to the hearing of an application for such an order, Mr Talbot drew attention to *Barnes v Eastenders Cash & Carry Plc* [2015] AC 1 at [118]-[124] which, again, applies by analogy in this context. He emphasised the following *"Lessons for the future"* which were explained by Lord Toulson JSC:

i) The applicant should give as much advance notice of the application to the listing office of the court as it reasonably can, providing realistic time estimates for pre-reading and for the hearing of the application [119].

ii) The fact that an application is being made without notice, and the potential seriousness of the consequences for the respondent and for potential third parties mean that there is a special burden on the applicant and the court [120].

iii) The judge should be given sufficient time to read and absorb the papers and conduct a hearing, and the application should not be forced into a busy list, with limited time for the judge to deal with it, unless there is a true emergency [120].

iv) At [123] Lord Toulson JSC said:

*"A judge to whom such an application is made must look at it carefully and with a critical eye. The power to impose restraint and receivership orders is an important weapon in the battle against crime but if used when the evidence on objective analysis is tenuous or speculative, it is capable of causing harm rather than preventing it. Where third parties are likely to be affected, even if the statutory conditions for making the order are satisfied, the court must still consider carefully the potential adverse consequences to them before deciding whether on balance the order should be made and, if so, on what conditions. A judge who is in doubt may always ask for further information and require it to be properly vouched."*

11. Mr Talbot also pointed out that the ability of a respondent to apply to set aside or vary an order made without notice is not a substitute for a fair hearing of the original application, and that it is vitally important that the hearing is fair given the draconian nature of such orders: *Windsor* (supra) at [59].

12. Section 303Z4(1) POCA provides that any person affected by an account freezing order may apply to the Magistrates' Court for it to be varied or set aside. Rule 4 of the Magistrates' Courts (Freezing and Forfeiture of Money in Bank and Building Society) Rules 2017 applies to such applications and allows for them to be heard on an expedited basis. Although there is no specific equivalent in the Magistrates' Court Mr Talbot submitted, and I accept for present purposes, that the following passage from the listing guidance in relation to restraint orders in the Crown Court should be applied by analogy as far as reasonably practicable. [5.12.14] of Criminal Practice Direction 2023 provides:

> *"In order to prevent possible dissipation of assets of significant value, applications under the Proceeds of Crime Act 2002 should be considered urgent when lists are being fixed. In order to prevent potential prejudice, applications for the variation and discharge of orders…should similarly be treated as urgent and listed expeditiously."*

13. As to the approach of the court where an application to set aside is made: see *National Crime Agency v Westminster Magistrates' Court and Ingliston Management* [2022] EWHC 2631 (Admin) at [45]-[48]. If the threshold *"reasonable grounds to suspect"* test is not passed, the order will be set aside but there is also a discretion to set it aside even if the test is passed. In exercising this discretion it is relevant to consider the circumstances in which the original order was made including whether the court was misled or it was improperly obtained. The court is specifically entitled to take into account public law principles in considering the exercise of its discretion. As Collins-Rice J put it at [48]:

> *"Again, it is plain that, if the threshold test is passed, it gives rise to a power rather than a duty for the court to make (or refuse to set aside) an AFO. In exercising that power, a court must have regard in the first place to the legislative scheme of POCA, within which it has its place and purpose. And there may be other considerations relevant to whether a court makes or maintains an AFO where its power to do so arises. It is not controversial between the parties, for example, that the conduct of the [applicant], and wider considerations of fairness, may in an appropriate case come into play and result in the court refusing to make or uphold an AFO even although it is satisfied that reasonable grounds for suspicion are properly made out. On a set-aside application, and*

*particularly where an AFO has been obtained ex parte in the first place, a court will certainly need to be alive to examine the merits of any challenge that the AFO was improperly obtained, or the granting court misled. The court will look at all the circumstances of the matter in such a case. It must, in other words, exercise the power – if it arises on the threshold test – properly and fairly, for the purposes for which it was conferred, in the interests of justice, and on ordinary public law principles*."

## Outline of the facts

14. The key facts for present purposes are as follows.

15. The Claimant was incorporated on 4 October 2020 and its sole director and owner is Mr James White. It trades as Taxbuddi and is in the business of making claims for tax rebates on behalf of its customers in respect of expenses which they have incurred in the course of their work. It offers its services to the general public on the internet and charges them a commission of 30% of any sums repaid by HMRC. Since May 2023 it has filed tax claims for around 2,500 customers. At the time of the AFO it had 89 employees, 55 of whom were based in the United Kingdom and 34 in India.

16. On 22 February 2024 an application for an account freezing order in respect of two of the Claimant's bank accounts – an account with Revolut and an account with Wise Payments Limited - was made by Mr Mark Humphreys who, is an officer of HMRC of a rank designated by the Commissioners for HMRC as equivalent to that of a senior police officer. He did this submitting a standard form ("the Form") in which he set out the details of what was applied for. The application was also supported by a 9 page statement of the same date which was made by him.

17. Section 6 of the Form asked this under the heading *"Duty of disclosure":*

> *"Are you aware of any material information 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?"*

18. Mr Humphreys ticked the *"No"* box.

19. Mr Humphreys went on to make the following declaration in Section 7:

> *"To the best of my knowledge and belief:*
>
> *(a) this application discloses all of the information that is material to what the court must take into consideration when deciding on the application, including anything that might reasonably be considered capable of undermining any of the grounds of the application; and*
>
> *(b) the content of this application is true."*

20. Mr Humphreys' statement said that the Claimant and Mr White were subject to a criminal investigation together with Pierre Netty of Peterson James & Co Ltd, who had been arrested the day before by officers of HMRC, and Mr James Trull and his company Taxbuddi Limited. He said that these companies operated as high volume repayment agents or tax refund companies. They submitted income tax self-assessment ("ITSA") returns on behalf of their customers, claiming rebates for travel and subsistence and other expenses which the customer had *"supposedly incurred through their employment"* and they charged a commission of 30% of any sums recovered. Peterson James had successfully claimed over £20 million from HMRC

through tax rebate claims which Mr Humphreys suspected to have been made fraudulently and had paid over £4.1 million to the Claimant over the same period.

21. Mr Humphreys said that he had reasonable grounds to suspect that the monies in the two accounts were obtained by criminal conduct, namely fraud and money laundering. He described the suspected fraud at [2] as follows:

*"The account holder Mileage Reclaim Limited is a tax agent that I suspect has fraudulently claimed over £1.7 million in false tax rebates for its customers…by misrepresenting payroll employees as being self-employed and therefore falsely claiming back travel and subsistence expenses that they would not be entitled to."*

22. At [17]-[19] he went on to say:

*"17. … if the customer is employed on a Pay As You Earn basis, rather than being genuinely self-employed, then any expenses incurred would either be reimbursed by the employer or remain the responsibility of the individual and no tax rebate would be possible.*

*18. An open source Google search for 'Mileage Reclaim Limited' leads to a two year-old video on YouTube with the title 'Welcome to Mileage Reclaim' that shows James White advising viewers that if they are a payroll employee who has travelled for work they can claim back those expenses from HMRC. Prospective customers are invited to contact Mileage Reclaim Limited and speak to a tax advisor who will submit a claim to HMRC on their behalf.*

*19. Again, this advice is not correct. Travel and subsistence expenses for payroll employees are not refunded by HMRC, they would be the*

*responsibility of the individual or remunerated by their employer. Any such claim for expenses would be either in error or fraudulent. I would expect any legitimate tax agent to be aware of this fact."*

23. And at [33] he said:

*"Based on the factors described above I submit that I have reasonable grounds to suspect that the over £21.7 million in tax rebates obtained by Peterson James & Co Ltd and Mileage Reclaim Limited through their ITSA claims derives from unlawful conduct in the form of what appears to be a large scale organised fraud operation against HMRC that falsely records PAYE employees as being self-employed in order to generate unearned tax rebates."*

24. As Mr Talbot points out, Mr Humphrey's application and statement did not exhibit any original documentation or evidence. Despite what Mr Humphreys had said and declared in sections 6 and 7 of the Form, nor did his statement contain any consideration of, or evidence about, the effect of the proposed order on the business of the Claimant. It did not, for example, point out that all of the Claimant's working capital was in the Revolut account so that freezing it was likely to be highly damaging to its business. It appears from HMRC's evidence that the investigation which Mr Humphreys was describing had been on going since at least August 2023 and the likely effect of the proposed order on the Claimant's business must have been known to him or, at least, the HMRC investigators.

25. The North Somerset Magistrates' Court considered HMRC's application on the day the application was made, apparently at a remote hearing. The hearing appears to have been a very short one lasting, perhaps, 5 minutes. Mr Humphreys attested to the truth

of his statement and he introduced himself. The Court asked Mr Humphreys why the application was made without notice and he explained that this was because Mr White lives in Dubai and it was considered that there was a serious risk of dissipation of the funds if he had notice of the application. The Court said that they had read the application, asked whether Mr Humphreys wanted it to be added as his evidence, asked whether there was anything which he wanted to change or update and, when he said that there was not, made the AFO. There appear to have been no questions about the merits of the application or the consequences of the proposed order for the Claimant's business, and nor does there appear to have been any consideration of when an application to set aside could be accommodated if the Claimant wished to make one.

26. On 3 March 2024, the Claimant made an application to set aside the AFO. That application was supported by a witness statement, made by Mr White, which explained the nature of the Claimant's business and challenged, in detail, the allegations of fraud made by Mr Humphreys in his first statement. He also gave evidence of the harmful effect of the AFO on the Claimant's business. Importantly, for present purposes, Mr White pointed out that Mr Humphreys' statements that PAYE employees could not claim reimbursement of the sorts of expenses which were being claimed through the Claimant were quite simply wrong. Section 336 of the Income Tax (Income and Pensions) Act 2003 specifically envisages such claims and HMRC itself has published guidance as to what may be claimed and how it may be claimed.

27. On 7 March 2024 Mr Humphreys made a statement in which he accepted that what he had said at [17], [19] and [33] (and by implication [2]) of his original statement was

incorrect. He said that this was an error on his part *"based on my misunderstanding of the mechanics of how these claims were being made"*. He said that prior to the application he had had a discussion with the senior officer in charge of the criminal investigation and had reviewed primary reference materials. He did not explain how he came to misunderstand the position. He said he had not sought to deceive the court and he presented the situation as he understood it at the time. However he submitted that, for reasons which he gave, this error did not change the material nature of his grounds for suspicion.

28. Mr Humphreys' statement was followed by a statement from Mr Stephen Hughes, another officer at HMRC, dated 13 March 2024. This ran to 18 pages. Mr Hughes also accepted that Mr Humphreys' evidence in his 22 February 2024 statement was wrong. At [8] he added:

> *"Having sought advice from HMRC PAYE specialists, <u>we have now established</u> that such claims can be made legitimately and there are mechanisms in place to facilitate this. Given this, HMRC accept that the working of the original application was inaccurate. This however was not done deliberately to mislead the court and was purely an error based on a misunderstanding at the time the application was made."* (emphasis added)

29. It will be noted that this paragraph implies that nor was Mr Hughes aware of the true position in terms of the ability, at least in principle, of PAYE employees to make the relevant claims at the time of the original application to the Magistrates' Court. HMRC PAYE specialists had been consulted in the light of Mr White's statement and had explained the position to him. If that is the correct interpretation of this paragraph, it seems extraordinary that senior HMRC officers should launch the 22 February

application without a proper understanding of what is and is not lawful in relation to this type of claim for reimbursement.

30. Mr Hughes then went on to address Mr White's evidence in detail and to explain why, in his view, the AFO was nevertheless justified.

31. Mr White then filed two affidavits dated 21 March 2024 which responded, in detail, to HMRC's evidence thus far and contested the claim that there were grounds to suspect fraud.

32. The Claimant's application came before Taunton Magistrates' Court on 21 March 2024 but could not proceed. It had been listed without pre reading time before a bench of three magistrates who had to deal with a number of other matters which were listed before them. The indications at that stage were that the matter could not be heard until August or even September 2024. The solicitors for the Claimant therefore took steps to find out whether the application could be heard elsewhere. There were also attempts to persuade HMRC to vary the terms of the AFO, so as to mitigate the highly damaging effect which it was having on the Claimant's business, by permitting the release of monies to the Claimant's clients and/or the payment of business expenses. But these were either refused or not responded to.

33. On 19 April 2024 the combined administration office for the Westminster Magistrates Court and the City of London Magistrates' Court confirmed a provisional listing of the application for 19 June 2024. However, that date did not prove to be feasible because it was not possible to assign a judge to deal with it.

34. On 9 May the Magistrates' Court indicated that the matter could be heard on 27 June 2024 provided the parties were available, and this date was confirmed on 10 May. The

emails from the Operations Manager at HMCTS make clear that a District Judge has been assigned to hear the application and has been given a reading day on 25 June to prepare for what will be a one day hearing.

35. HMRC have since served a further statement made by Mr Hughes in the proceedings in the Magistrates' Court. This is dated 30 May 2024. It runs to 28 pages, it responds in detail to Mr James' evidence and it exhibits various documents in support. In summary, HMRC continues to resist the Claimant's application to set aside the AFO and its position is that the continuation of its investigations since February 2024 has resulted in evidence coming to light which serves to strengthen its suspicions that the Claimant has been engaged in fraudulent activities. He asks the Magistrates' Court to leave the AFO in place to allow for HMRC's investigations to continue.

36. By the time of the hearing before me Mr White had submitted a further 25 page statement dated 5 June 2024 which rebuts HMRC's evidence. It is apparent from the materials in the application to set aside that there is a fundamental factual dispute in relation to the question whether there were or are reasonable grounds to suspect that the sums in the Revolut account are the proceeds of fraud. There are also very significant criticisms of the conduct of the 22 February application which will need to be considered as part of the overall circumstances of the case. Moreover, the effect of the AFO on the Claimant's business has been highly damaging, as Mr Swift also confirms in his statement in support of the claim for judicial review.

## The Grounds of Challenge to the decision of the Magistrates' Court

37. The Claim Form pleads two grounds of challenge:

    i) The AFO was unlawful as it was based on an error of law ("Ground 1");

ii) The AFO was unlawful as it was made in breach of natural justice and principles of procedural fairness ("Ground 2").

## The issues at the hearing on 6 June 2024

38. By the time of the hearing before me:

i) Ground 1 had been conceded by HMRC on the basis that, contrary to what Mr Humphreys told the North Somerset Magistrates' Court, it is not the law that a person who is taxed on a Pay As You Earn basis cannot claim reimbursement of expenses incurred in the course of their work or employment provided, of course, that they are not able to recover those expenses from their employer. It therefore would not be necessary for a PAYE employee or worker to pretend that they were self-employed in order to make such a claim, and nor is there evidence that this was happening in relation to the claims which the Claimant made on behalf of its customers.

ii) Ground 2 was contested by HMRC but it was not submitted that this Ground did not cross the threshold of arguability which is required for permission.

iii) HMRC contended, however, that as a matter of discretion I should refuse permission, principally on the basis that there was an adequate alternative remedy available to the Claimant in the form of its application to set aside.

iv) It was also argued by HMRC that if permission was granted, and either or both of the Grounds succeeded, I should refuse relief on the grounds that quashing the AFO would enable the Claimant to pay the funds out of the Revolut account. The matter should therefore be left to the Magistrates' Court to determine, on 27 June 2024, whether the AFO should be continued.

39. At the hearing Mr Talbot made his submissions on these issues and Mr Calzavara began his before the short adjournment. When the hearing resumed at 2pm, however, Mr Calzavara informed the Court that Ground 2 was now conceded by HMRC in the event that permission was granted, and he went on to identify the bases on which this concession was made. However, he maintained the position that permission, alternatively relief, should nevertheless be refused.

**The arguments and concessions under Ground 2**

40. The conceded facts that the Magistrates' Court made the AFO on a legally erroneous basis and in a procedurally unfair matter, largely as a result of failings on the part of HMRC, are relevant to the application to set aside the AFO which is to be determined on 27 June 2024. It is therefore right that I summarise what was argued by Mr Talbot and what was conceded by Mr Calzavara.

41. In outline, Mr Talbot said that Ground 2 was based on two main criticisms of the procedure by which the 22 February application was made and determined. Firstly, there had been a wholesale departure from the principles of fairness where an application is made without notice. The evidence did not include original materials, nor a proper summary of the evidence, nor examples of the alleged fraudulent conduct. The only evidence before the Court was Mr Humphreys' deeply flawed statement. Without proper evidence it was not possible or fair for the Court to be satisfied that there were reasonable grounds to suspect that the monies in the account were recoverable property. The hearing lasted no more than 5 minutes and the Court did not ask any questions about the merits of the application, nor say anything which indicated that it was aware of the test which it was required to apply and had applied it. There was not the sort of scrutiny of the application which the caselaw requires.

Moreover, no thought appears to have been given to the consequences for the Claimant if the AFO was granted. Nor had any reasons for the decision been given.

42. Mr Talbot's second main criticism under Ground 2 was that there had been what he called a "gross and appalling" breach of the duty of full and frank disclosure by Mr Humphreys. There clearly had not been proper inquiries as to the facts. It was accepted by HMRC that key aspects of Mr Humphreys' statement, including important positive statements which he made, were simply wrong. As a consequence, what he told the North Somerset Magistrates' Court was fundamentally flawed and misleading. He had also failed to disclose information to the Magistrates' Court of which HMRC must have been aware, including the fact that the relevant accounts held all of the working capital of the Claimant, so that it would not be able to pay its employees or its suppliers, as well as client money which it would not be able to pay out. In effect, the order would close the Claimant's business down. The consequence of HMRC's failures to discharge its duties to the Court and the Claimant was that the Court had not been in a position to hold a fair hearing of HMRC's application. Moreover, the making of the AFO had had a devastating effect on the Claimant's business.

43. As for Mr Calzavara's concessions, first, he said that HMRC now disavowed the application which was made by Mr Humphreys on 22 February 2024. Mr Calzavara accepted that the application was "woefully inadequate" in respects which he would explain but which, he said, did not reveal systemic failings. This case was, he said, a one off in terms of HMRC's departures from the basic requirements which apply to applications of this sort.

44. Second, the 22 February application was fundamentally flawed because it did not contain sufficient evidence to justify the order i.e. to establish reasonable grounds for suspecting fraud.

45. Third, the Magistrates' Court did not ask questions about the merits of the 22 February application when it ought to have done. The application therefore was not adequately scrutinised.

46. Fourth, no thought appeared to have been given to the potential effect of the proposed order on the Claimant's business. Normally an HMRC officer would address this question in detail as part of such an application.

47. Fifth, the Magistrates' Court gave no reasons for its decision in circumstances where there was, on the face of the application, an error of law. Reasons therefore were required.

48. Sixth, it was accepted that the duty of full and frank disclosure imposes a heavy burden on the applicant. Here the officer made a fundamental error of law in the form of a positive assertion which was false and this arose from a failure to make adequate inquiries. Mr Humphreys ought to have considered the submissions which might have been advanced by Claimant, including as to the effect of the proposed order on its business, and to have drawn to the Court's attention the fact that it was likely that it would no longer be able to conduct its business given that the accounts contained all of its working capital.

49. Mr Calzavara maintained, however, that these flaws were mistakes rather than the result of wilful misconduct. He was asked why the concessions were made so late in the proceedings. No doubt on instructions he had submitted two skeleton arguments,

including one on the day before the hearing, in which HMRC had disputed Ground 2 in full, albeit this Ground had been accepted as being arguable for the purposes of permission. This had been understood to be his position until 2pm on the day of the hearing. Mr Calzavara was only able to say that in the light of Mr Talbot's submissions and exchanges with the court, the matter had been reconsidered and he was now instructed to make the concessions which he had made.

50. Mr Calzavara was asked whether he had instructions to provide any further explanation for what, on his own case, were extraordinary failings on the part of HMRC. In short, he was not able to add to what is said by way of explanation in the statements of Mr Humphreys and Mr Hughes, to which I have referred above.

**Should permission be refused on the grounds that there is a suitable alternative remedy?**

The relevant legal principles

51. In *R (Glencore Energy UK Ltd) v Revenue and Customs Commissioners* [2017] 4 WLR 213 Sales LJ (as he then was) provided the following summary of the principle at [54]-[56]:

*"54. In order to evaluate these submissions, it is necessary to consider the basis for the suitable alternative remedy principle. This principle does not apply as the result of any statutory provision to oust the jurisdiction of the High Court on judicial review. In this case the High Court….has full jurisdiction to review the lawfulness of action by the designated officer and by HMRC. The question is whether the court should exercise its discretion to refuse to proceed to judicial review …..or to grant relief under judicial review at a substantive hearing*

*according to the established principle governing the exercise of its discretion where there is a suitable alternative remedy.*

*55. In my view, the principle is based on the fact that judicial review in the High Court is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective. However, since it is a matter of discretion for the court, where it is clear that a public authority is acting in defiance of the rule of law the High Court will be prepared to exercise its jurisdiction then and there without waiting for some other remedial process to take its course. Also, in considering what should be taken to qualify as a suitable alternative remedy, the court should have regard to the provision which Parliament has made to cater for the usual sort of case in terms of the procedures and remedies which have been established to deal with it. If Parliament has made it clear by its legislation that a particular sort of procedure or remedy is in its view appropriate to deal with a standard case, the court should be slow to conclude in its discretion that the public interest is so pressing that it ought to intervene to exercise its judicial review function of unlawfulness will arise which are not of that standard description, in which case the availability of such a statutory procedure will be less significant as a factor.*

*56. Treating judicial review in ordinary circumstances as a remedy of last resort fulfils a number of objectives. It ensures the courts give priority to statutory procedures as laid down by Parliament, respecting Parliament's judgement about what procedures are appropriate for particular contexts. It avoids expensive duplication of the effort which may be required if two sets of procedures are followed in relation to the same underlying subject matter. It*

*minimises the potential for judicial review to be used to disrupt the smooth operation of statutory procedures which may be adequate to meet the justice of the case. It promotes proportionate allocation of judicial resources for dispute resolution and saves the High Court from undue pressure of work so that it remains available to provide speedy relief in other judicial review cases in fulfilment of its role as protector of the rule of law, where its intervention really is required"*

The Claimant's argument

52. Mr Talbot submitted that I should not exercise my discretion to refuse permission on the basis that the Claimant's application to the Magistrates' Court to set aside the AFO was a suitable alternative remedy. His principal arguments were as follows:

i) Quoting Lord Legatt JSC in *Potanin v Potania* [2024] 2 WLR 540 at [1]:

> *"Rule one for any judge dealing with a case is that, before you make an order requested by one party, you must give the other party a chance to object. Sometimes a decision needs to be made before it is practicable to do this. Then you must do the next best thing, which is – if you make the order sought- to give the other party an opportunity to argue that the order should be set aside or varied."*

ii) Here the opportunity afforded by section 303Z4 POCA to apply to set aside the AFO had proved theoretical. The Claimant's application to the Magistrates' Court had been made promptly and yet, despite the clear need for it to be heard swiftly so as to ensure fairness, it had not proved possible to secure a hearing until more than four months after the original order, during which time the Claimant's business had been devastated.

iii) In the light of the Claimant's experience of listing in the Magistrates' Court, including the facts that the 21 March hearing was ineffective and the 19 June hearing was postponed because of lack of judicial resource, I should not proceed on the basis that the 27 June hearing will be effective. There was a real risk that it would not be.

iv) The abuse of power and procedural unfairness in the present case were so egregious as to create exceptional or special circumstances which would justify the Administrative Court in departing from its usual practice where there is an adequate alternative remedy. Here, submitted Mr Talbot, the AFO was a rubber stamp on false evidence which has *"probably destroyed the Claimant's business and Mr White's financial reputation irretrievably"*. Moreover, HMRC had steadfastly refused to agree to mitigate the AFO's effect.

v) The fact that HMRC continued to defend its actions (at least at the time that Mr Talbot was making his submissions), and to deny any failings other than under Ground 1, was indicative of a systemic failure on the part of HMRC as opposed to this being a particular instance of incompetence. HMRC clearly did not understand what its duties were in this type of situation. Similarly, the way in which the North Somerset Magistrates' Court dealt with the 22 February application was indicative of systemic failings. These failings cried out for the intervention of the Administrative Court which is in a position to deal with points of principle of general application and give guidance.

vi) Even if the application to set aside is successful, the Magistrates' Court has no power to quash the AFO. The Claimant and Mr White have suffered

significant commercial and reputational damage as a result of the AFO, and a quashing order would signal to the Claimant's customers and business connections that it should never have been granted in the first place. This would give the Claimant *"a fighting chance to rehabilitate itself"* and the only adequate remedy is therefore a quashing order.

vii) The failures in this case were in the category *"so appalling that the ultimate sanction of discharge could be justified"*: see *Jennings v Crown Prosecution Service (Practice Note)* [2006] 1 WLR 182 at [64]. Whilst neither side was inviting me to predict or determine the likely outcome of the application to set aside, not least because of the fundamental issue of fact as to whether there were reasonable grounds to suspect that the monies in the Revolut account are the proceeds of fraud, it would be entirely justified for the Administrative Court to quash the AFO.

viii) Mr Talbot accepted that the intention of the Claimant would then be to pay its clients the sums in the Revolut account which were paid to the Claimant by HMRC in respect of their claims, and to meet the expenses of the business including wages which were owed to its workforce. But, he said, HMRC would have other remedies available to them, including further applications to the criminal courts and/or proceedings against individual clients to recover the monies paid out to them. He also questioned how HMRC's overall approach would work in any event: a substantial part of the monies in the Revolut account belong to a total of 318 clients, for each of whom HMRC will be obliged to prove that reimbursement of the relevant expenses had been fraudulently claimed.

ix) In all the circumstances, although the Claimant's business may well have been irretrievably damaged, and Mr White's reputation irreversibly tarnished, I should give them the best possible opportunity to retrieve the position. This could only be achieved by granting permission and proceeding to quash the AFO.

53. As for whether the Claim was brought *"promptly"*, Mr Talbot submitted the Claimant was right to try to resolve the matter by its application to the Magistrates' Court and/or by its proposed variations to the AFO. It was only when it became apparent that neither approach would be effective or, at least, effective within an acceptable timescale, that it was appropriate to trouble the Administrative Court.

## Discussion

54. Given that I have decided to refuse permission I will not determine the claim for judicial review. Nor will I express any view on the underlying merits of the allegations of fraud against Mr White and the Claimant's business, or the likely outcome of the application on 27 June 2024, as these are matters for the Magistrates' Court. However, it is clear that, at least in relation to the conduct of the 22 February application, there have been serious errors on the part of HMRC and significant procedural failings on the part of the Magistrates' Court, largely as a result of HMRC's errors. Indeed, HMRC concedes that the Grounds of challenge are well founded. The delays in the hearing of the Claimant's application to set aside owing to lack of capacity in the Magistrates' Court system are also highly regrettable, and I accept that the Claimant's business and Mr White's reputation have been seriously damaged by the making of the AFO. Their strong sense of grievance is understandable.

55. Having said this, in my view the right to apply to set aside an account freezing order which is provided by section 303Z4 POCA was intended by Parliament to be the remedy available to respondents in the sorts of circumstances which arose in relation to the AFO in this case. Moreover, that remedy is a suitable one. As noted above, it enables the Magistrates' Court to consider whether the statutory test for such an order was or is satisfied as well as all of the other relevant circumstances of the case, including any failings in relation to the original order, and to decide whether to set aside or vary that order.

56. The Magistrates' Court also has certain advantages over the Administrative Court in the present case. It is able to take account of all of the evidence and is better equipped to carry out a fact-finding function. It also has greater flexibility in terms of the orders which it is able to make having regard to the Claimant's interests, but also to the public interest. Although I canvassed the possibility of a conditional or delayed quashing order during the hearing, both parties took the position that the only option which would assist the Claimant was an immediate quashing order which would leave it free to pay out the funds which are currently frozen.

57. I am not persuaded, on the evidence, that the distinction between a quashing order and the setting aside of an order by the Magistrates' Court makes a material difference in terms of the reputational damage which I accept has occurred or, at least, that the difference is of sufficient importance to alter the exercise of my discretion. This so even assuming that the order is set aside on 27 June. If it is not, then the reputational damage will be sustained in any event. Moreover, on the evidence which I have read, and in the circumstances of the hearing on 6 June 2024, although I make no finding one way or the other I am not prepared to assume that the AFO will be set aside.

58. I also accept Mr Calzavara's submission that if the argument based on the distinction between quashing and setting aside was a good point it would mean that all challenges to the type of decision made by the Magistrates' Court in this case could come directly to the Administrative Court by way of a claim for judicial review. I agree with Mr Calzavara that it would follow, in the present case, that the claim was not brought promptly as required by CPR Rule 54.5(1). If the point is a good one the claim could have been brought immediately, and one would have expected it to be given the concern to minimise reputational damage. Yet it was not. Indeed, it is fair to say that all of Mr Talbot's reasons for claiming judicial review, save for the delay in securing a hearing in the Magistrates' Court, were equally applicable at the time when the AFO was made. On this basis the Claim could and should have been brought earlier.

59. Contrary to Mr Talbot's argument, this is not a case in which the intervention of the Administrative Court is warranted because there are issues of principle for it to resolve and/or it ought to give guidance. The legal rules and principles which applied to the 22 February application are clearly set out in POCA and the caselaw to which I have referred. There was and is no dispute about the content of those rules and principles or their application in this context. The problem is that they were not applied.

60. Nor is the Claim about systemic failings which it might be appropriate for the Administrative Court to address. That is not how it is pleaded. HMRC, whose conduct of the application for the AFO and of this litigation was said by Mr Talbot to indicate that it does not understand or accept its duties and responsibilities in making this sort of application, is not the Defendant. And, in any event, the Statement of Facts and

Grounds do not allege systemic failings on its part or call for evidence in response which addresses this issue. Similarly, nor does the pleaded case against the Defendant go wider than to allege that this particular application was dealt with in a procedurally unfair manner. There is no evidence that the approach taken on 22 February 2024 is typical of North Somerset Magistrates' Court, let alone the Magistrates' Court system as a whole. It would therefore be wrong and unfair to deal with the Claim on the basis that it raises systemic issues, and the evidence and arguments in the case do not put the Administrative Court in a position to do so.

61. The reality of this case, at least as pleaded, is that it turns on its facts and is, therefore, just the sort of case which Parliament contemplated would be dealt with by an application pursuant to section 303Z4 POCA. It is not exceptional in the sense that it raises issues which would not normally be considered in the context of such an application or the Magistrates' Court is unable to address. Although the Grounds of challenge are accepted by HMRC to be well founded, and it might be argued, or at least hoped, that the failings in this case were unusually stark, the merits of the underlying claim cannot be a decisive factor. The working assumption, where the issue is the availability of an alternative remedy, is that the grounds of challenge have sufficient merit for judicial review otherwise to be available.

62. It follows from these considerations that the real basis on which it might be said that the Claimant's right to apply to set aside the AFO is inadequate or unsuitable is the delay in obtaining a listing in the Magistrates' Court. But there is now a hearing listed for 27 June 2024 and the parties have filed evidence for the purposes of that hearing. A District Judge has been assigned and a reading day set aside for her. I accept Mr Calzavara's submission that, on the evidence, I should proceed on the basis that the

hearing will be effective. Moreover, Mr Talbot did not express any interest in postponing the application for permission until after 27 June when this possibility was floated by me as a way of dealing with any risk that the hearing may be ineffective.

63. The reality at the hearing before me was therefore that the question was whether the Administrative Court should intervene in order to achieve a determination of the issues in relation to the AFO 3 weeks earlier, and on a narrower and less flexible basis, than would otherwise be the case in the Magistrates' Court. In considering whether this would be an appropriate course, I also took into account Mr Talbot's argument that the Claimant should be given the best possible opportunity to rescue its business, but to a very large extent the damage appeared to have been done. 21 days seemed unlikely to make a material difference.

64. Moreover the possibility that it would make a difference involves assuming that relief would be granted by me, and the AFO quashed. Mr Talbot accepted that a large proportion, if not all, of the sums in the Revolut account would then be paid out. Although HMRC will have to prove its fraud case in relation to each of the 318 clients, the disputed sums are at least held in one account as matters stand. If they were paid out it would remain possible to take steps to claim the sums back from each of the 318 clients directly but there would be very real additional practical difficulties. The process of recovering monies paid out to the Claimant's employees and suppliers would be even more problematic.

65. These considerations would have made me very reluctant to grant relief in any event. But they also reinforced my view that the Administrative Court should not embark on determining a claim which would cut across the process which is currently ongoing and will be determined in the Magistrates' Court shortly.

## Conclusion

66. In the exercise of my discretion I therefore refuse permission.