Neutral Citation Number: [2020] EWCA Civ 784

Case No: C1/2019/2379

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
MR JUSTICE NUGEE
[2019] EWHC 2006 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 June 2020

Before :

LADY JUSTICE SIMLER DBE

and

LORD JUSTICE POPPLEWELL

- -

Between :

1. JJ MANAGEMENT CONSULTING LLP **Appellants**
2. BISSON CONSULTANTS LIMITED
3. INTEREUROPE FOODS LIMITED
4. MR BRYN ROBERTSON
5. OVERSEAS IMPORTS SL
6. OVERSEAS SUPERMERCADOS UNIPESSOAL LDA
- and -
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
Respondents

- -

Mr Philip Moser QC and Mr David Bedenham (instructed by **Memery Crystal LLP**) for the **Appellant**
Ms Aparna Nathan QC and Mr Tom Richards (instructed by **HMRC**) for the **Respondents**

Hearing date 9 June 2020

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Approved Judgment

Lady Justice Simler DBE:

Introduction

1. Since 2016, Her Majesty's Revenue and Customs ("HMRC) have been investigating the tax affairs of Mr Bryn Robertson, a successful businessman who is both resident and domiciled in England, and operates a successful chain of supermarkets in Spain and Portugal, through corporate vehicles incorporated both in the UK and in Spain and Portugal.

2. The investigation is not being conducted pursuant to HMRC's enquiry powers provided for in section 9A of the Taxes Management Act 1970 ("TMA 1970"), and indeed, the relevant time limits for opening such enquiries had largely passed when HMRC started the investigation in 2016. Nor have HMRC pursued powers contained in schedule 36 Finance Act 2008 ("FA 2008") to obtain information and/or documents from the appellants. In those circumstances, the appellants challenged the lawfulness of the ongoing investigation by judicial review, contending, among other things, that HMRC had (and have) no power to conduct it so that it has no lawful basis, and further, it is irrational and disproportionate. The appellants invited the court to quash the investigation, order return of material obtained in the course of the investigation (as "fruits of the poisoned tree"), and require HMRC to notify third parties that any documentation/information previously requested pursuant to it is no longer required.

3. The judicial review challenge was rejected by Nugee J on all grounds (which ranged wider than those now pursued on this appeal). The appellants' appeal (with leave granted by the judge) advances three grounds in support of the contention that the judge erred in law:

    i) The judge was wrong to find as he did, that the general power in section 9(1) Commissioners for Revenue and Customs Act 2005 empowers HMRC to conduct "informal investigations".

    ii) The judge was wrong to find that judicial review of HMRC's power to conduct "informal investigations" is only available in wholly exceptional circumstances.

    iii) Even if there is a high (or exceptional) threshold for the court to intervene, the judge was wrong to find that the circumstances of this case did not meet that threshold.

4. The parties to the appeal are represented as follows: Mr Philip Moser QC and Mr David Bedenham for the appellants; and Ms Aparna Nathan QC and Mr Tom Richards for HMRC. I am grateful to them and their legal teams for the clarity and concision of their submissions.

5. For the reasons developed below, I consider that Nugee J was right to dismiss the application for judicial review for the reasons he gave. Accordingly if Popplewell LJ agrees, the appeal should be dismissed.

The Statutory Provisions

6. I start by setting out the relevant statutory provisions in their current version.

7. HMRC were established as the successor body (to the Commissioners of Inland Revenue following the repeal of the Inland Revenue Regulation Act 1890, and to the Commissioners for Customs and Excise) with responsibility for the collection and management of tax, duties and national insurance contributions by the Commissioners for Revenue and Customs Act 2005 ("CRCA 2005"). Section 1 provides for the appointment of the Commissioners by Her Majesty; section 2 for the appointment by the Commissioners of staff known as officers of Revenue and Customs; and section 4 for the Commissioners and the officers together to be referred to as "Her Majesty's Revenue and Customs" or "HMRC".

8. The statutory functions of the Commissioners of HMRC are provided for by section 5 CRCA 2005 as follows:

> "5 **Commissioners' initial functions**
>
> (1) The Commissioners shall be responsible for—
>
> (a) the collection and management of revenue for which the Commissioners of Inland Revenue were responsible before the commencement of this section,
>
> (b) the collection and management of revenue for which the Commissioners of Customs and Excise were responsible before the commencement of this section, and
>
> (c) the payment and management of tax credits for which the Commissioners of Inland Revenue were responsible before the commencement of this section.
>
> (2) The Commissioners shall also have all the other functions which before the commencement of this section vested in—
>
> (a) the Commissioners of Inland Revenue (or in a Commissioner), or
>
> (b) the Commissioners of Customs and Excise (or in a Commissioner).
>
> (3) This section is subject to section 35.
>
> (4) In this Act *"revenue"* includes taxes, duties and national insurance contributions.".

9. Section 5 CRCA 2005 is supplemented by section 9 CRCA 2005 which provides for ancillary powers defined in the following terms:

> "9 **Ancillary powers**
>
> (1) The Commissioners may do anything which they think—
>
> (a) necessary or expedient in connection with the exercise of their functions, or

(b) incidental or conducive to the exercise of their functions.

(2) This section is subject to section 35."

The references to these provisions being subject to section 35 (see section 5(3) and section 9(2) above) can be ignored for present purposes (not least because this section was repealed in 2014).

10. The interpretation provisions in section 51 CRCA 2005 include a definition of "function" in section 51(2)(a) as follows:

"(2) In this Act—

(a) *"function"* means any power or duty (including a power or duty that is ancillary to another power or duty)…"

11. The TMA 1970 (amended following the introduction of self-assessment with effect from tax year 1996/97 consequent on changes introduced by the Finance Act 1994) deals with the processes for self-assessment, assessment and the collection and management of direct taxes such as income tax and capital gains tax. In its current form, section 1 TMA 1970 provides:

"1 **Responsibility for certain taxes**

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

(a) income tax,

(b) corporation tax, and

(c) capital gains tax."

12. Part II TMA 1970 (sections 7 to 12D) deals with tax returns. By section 8 most individual taxpayers are required to submit a tax return together with a self-assessment of the amount chargeable and the amount payable. If HMRC are not satisfied that a self-assessment return under section 8 is correct there is power contained in section 9A to open an enquiry into the return (upon giving notice of an intention to do so). The power can also be (and is also) exercised to conduct random checks on tax returns, and does not require a reasoned basis for its exercise. So far as relevant, section 9A provides:

"9A **Notice of enquiry**

(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ("notice of enquiry")–

(a) to the person whose return it is ("the taxpayer"),

(b) within the time allowed.

> (2) The time allowed is–
>
> (a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the day on which the return was delivered;
>
> (b) if the return was delivered after the filing date, up to and including the quarter day next following the first anniversary of the day on which the return was delivered;
>
> (c) if the return is amended under section 9ZA of this Act, up to and including the quarter day next following the first anniversary of the day on which the amendment was made.
>
> For this purpose the quarter days are 31st January, 30th April, 31st July and 31st October.
>
> (3) A return which has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) of the return under section 9ZA of this Act.
>
> (4) An enquiry extends to—
>
> (a) anything contained in the return, or required to be contained in the return, including any claim or election included in the return,…"

13. Accordingly and as Mr Moser QC for the appellants emphasises, the unrestricted right to open a section 9A enquiry is limited by the strict time-limit within which such an enquiry may be opened (normally up to 12 months from the filing date for the return) and once the period expires, the return is final subject only to a discovery assessment. Moreover, a return which has been the subject of one notice of enquiry within the relevant period, may not generally be the subject of another notice of enquiry under section 9A.

14. Further protection is available to the taxpayer whose return is the subject of an enquiry under section 9A in the provisions relating to closure notices in section 28A TMA 1970. Closure notices bring an enquiry to an end (with a statement of the HMRC officer's conclusions). Sections 28A(4)-(6) permit the taxpayer to apply to the First-tier Tribunal ("the FTT") for a direction requiring the HMRC officer to bring the enquiry to an end within a specified period by issuing a partial or final closure notice. The FTT is required to give the direction applied for "*unless satisfied that there are reasonable grounds for not issuing the … closure notice within a specified period*". Section 28A provides as follows:

> "28A **Completion of enquiry into personal or trustee return**
>
> (1) This section applies in relation to an enquiry under section 9A(1) of this Act.

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

15. Section 29 TMA 1970 deals with "discovery assessments" and applies where HMRC or an officer "discover" that income which ought to have been assessed has not been assessed, or that an assessment to tax is or has become insufficient, or that any relief which has been given is or has become excessive: section 29(1) TMA 1970. Where that occurs, the subsection empowers the making of an assessment in the amount, or

the further amount "*which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax."*

16. Under the self-assessment regime, the general rule is that the officer cannot make a discovery assessment if the taxpayer has delivered a self-assessment return: see section 29 (3). There are two exceptions to that rule which depend on satisfying the conditions in subsections 29 (4) or (5) as follows:

> "29 **Assessment where loss of tax discovered**
>
> (1) …
>
> (2) …
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
>
> (a) in respect of the year of assessment mentioned in that subsection; and
>
> (b) in the same capacity as that in which he made and delivered the return,
>
> unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
>
> (5) The second condition is that at the time when an officer of the Board—
>
> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
>
> (b) in a case where a notice of enquiry into the return was given—
>
> (i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or
>
> (ii) if no such partial closure notice was issued, issued a final closure notice,
>
> the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above."

17. The power to make discovery assessments is also subject to time limits, the details of which it is unnecessary to set out: see sections 34 to 40 TMA 1970. By section 36(1A) TMA 1970 the period can extend to 20 years after the end of the relevant tax year where, for example, a loss of tax has been brought about deliberately (for example by fraud) by the taxpayer or a person acting on his behalf. There are also appeal rights to the FTT (and onwards) available to taxpayers against a discovery assessment.

18. During the course of an ongoing investigation into a taxpayer's tax position or enquiry into a return, HMRC have extensive information gathering powers available to them provided by schedule 36 FA 2008 (given effect to by section 113 FA 2008). HMRC may obtain information and documents from taxpayers and third parties by schedule 36 paragraphs 1 and 2 which deal with "information notices" to the taxpayer and to a third party respectively, and provide:

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

19. The power is circumscribed by paragraph 21 of schedule 36 which provides:

> "21 (1) Where a person has made a tax return in respect of a chargeable period under section 8, 8A or 12AA of TMA 1970 (returns for purpose of income tax and capital gains tax), a taxpayer notice may not be given for the purpose of checking that person's income tax position or capital gains tax position in relation to the chargeable period.
>
> (2) Where a person has made a tax return in respect of a chargeable period under paragraph 3 of Schedule 18 to FA 1998 (company tax returns), a taxpayer notice may not be given for the purpose of

checking that person's corporation tax position in relation to the chargeable period.

(3) Sub-paragraphs (1) and (2) do not apply where, or to the extent that, any of conditions A to D is met.

(4) Condition A is that a notice of enquiry has been given in respect of–

(a) the return, or

(b) a claim or election (or an amendment of a claim or election) made by the person in relation to the chargeable period in respect of the tax (or one of the taxes) to which the return relates ("relevant tax"),

and the enquiry has not been completed [so far as relating to the matters to which the taxpayer notice relates].

(5) In sub-paragraph (4), "notice of enquiry" means a notice under–

(a) section 9A or 12AC of, or paragraph 5 of Schedule 1A to, TMA 1970, or

(b) paragraph 24 of Schedule 18 to FA 1998.

(6) Condition B is that [as regards the person,] an officer of Revenue and Customs has reason to suspect that–

(a) an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed,

(b) an assessment to relevant tax for the chargeable period may be or have become insufficient, or

(c) relief from relevant tax given for the chargeable period may be or have become excessive.

(7) Condition C is that the notice is given for the purpose of obtaining any information or document that is also required for the purpose of checking [the] person's [position as regards any tax other than income tax, capital gains tax or corporation tax].

(8) Condition D is that the notice is given for the purpose of obtaining any information or document that is required (or also required) for the purpose of checking the person's position as regards any deductions or repayments [of tax or withholding of income] referred to in paragraph 64(2) [or (2A)] (PAYE etc).

……."

20. Among the other safeguards for the targets of such notices are the following provisions of schedule 36: paragraph 3(1) provides that the issue of a third party notice requires the agreement of the taxpayer or the approval of the FTT; paragraphs 18 to 28 in Part 4 contain various restrictions on the use of information notices; paragraphs 29 to 33 in Part 5 contain certain rights of appeal to the FTT against information notices; paragraphs 39 to 55 in Part 7 provide that persons who fail to comply with information notices served under it become liable for penalties, including daily default penalties, and in the event of concealment or destruction of documents are guilty of an offence punishable by up to two years' imprisonment.

21. Finally paragraph 58 of schedule 36 contains definitions, including a definition of "checking" as follows:

> "In this Schedule–
>
> *"checking"* includes carrying out an investigation or enquiry of any kind."

Factual Background

22. There is no dispute about the facts. The summary recorded below is taken from the judge's helpful summary of the factual background to this challenge.

23. By letter dated 9 June 2016 from Mr Timothy Brown, an officer of HMRC, Mr Robertson was informed that Mr Brown was "starting an investigation into [his] taxation affairs". The letter is headed as coming from the Criminal Taxes Unit, Civil Compliance, and since its substantive terms are heavily relied on by Mr Moser in advancing his case on all three grounds, I reproduce them here:

> "Information held by HM Revenue & Customs (HMRC) suggests that returns and accounts you have submitted to HMRC may be incorrect. Although this information may be incorrect, or capable of having a satisfactory explanation, it is my duty to pursue the matter further.
>
> The investigation will cover your current business interests but will also cover other businesses which you are or have been connected with and any dealings with companies that may have an effect on your personal tax liability. It will include all sources of income and gains giving rise to any taxes, both direct and indirect. These taxes include Income Tax, VAT, Corporation Tax and Capital Gains Tax.
>
> HMRC welcomes your cooperation with our investigation and in establishing your correct liabilities. The extent to which you cooperate with us and provide us with information is entirely a matter for you.
>
> My investigation is being conducted with the aim of achieving a civil financial settlement of any unpaid tax together with any interest and penalties arising. The penalty is a percentage of the

> tax unpaid, understated or under-assessed. The level of penalty percentage applied will depend upon your behaviour, which led to any errors or omissions, and the extent to which you help us arrive at the correct liability. Full cooperation will ensure that any penalties are reduced to their minimum levels and you may be able to avoid having your details published.
>
> You are entitled to have the matter of penalties dealt with without unreasonable delay. We will normally tell you what penalties are due when we have established the tax unpaid, understated or under-assessed. However, if we cannot agree this figure of tax we may send you an amendment or assessment of the tax we think is due. We may also assess the penalties that are due based on that amount of tax.
>
> If you disagree with either of these assessments you can ask for a review of your case. This will be carried out by someone who has not been involved in the investigation. If you choose not to ask for a review, or if you disagree with the conclusion of the review, you can notify your appeal to the tribunal. Arrangements will then be made for the tribunal to hear both appeals together. You can find more information about the Tribunals Service if you go to www.tribunals.gov.uk.
>
> Publicly funded legal assistance or Legal Aid may be available [details provided] …
>
> I would like to arrange a meeting with you and your accountant to discuss your tax affairs. I would be grateful if you or your accountant would contact me within the next 14 days to arrange a mutually convenient time and venue for the proposed meeting.
>
> I enclose the following HMRC Factsheets which provide further information:
>
> CC/FS7a (Penalties for inaccuracies in returns and documents)
>
> CC/FS9: (Human Rights Act)
>
> CC/FS~3: (Publishing details of deliberate defaulters)
>
> CC/FS 15: Self-Assessment and old penalty rules)…"

24. That the letter was written under the letterhead "Criminal Taxes Unit, Civil Compliance" is something Mr Robertson found alarming and inappropriate, understandably so as the judge found. In his witness statement available to Nugee J (but not provided to the court as part of the material available for this appeal) Mr Brown explained that the Criminal Taxes Unit (now part of Proceeds of Crime in HMRC's Fraud Investigation Service Directorate) in fact carried out both criminal and

civil investigations and HMRC made clear throughout, that the investigation into Mr Robertson was and remains a civil only investigation.

25. The judge described the letter of 9 June 2016 as the beginning of what became a significant investigation. The letter of 9 June 2016, which was admittedly very widely worded, invited Mr Robertson to a meeting and by letter dated 15 July 2016 to Mr Robertson, Mr Brown explained that one of the matters he wished to discuss at the proposed meeting was "*the £3.3 million gain made by Mr Robertson during the 2014/2015 tax year following the sale of goodwill in JJ Management Consulting LLP to Boisson Consultants Ltd. I would be grateful if documentation in relation to this gain was provided at, or prior to the meeting, including details of how the goodwill was valued*." (I note that although the judge received little explanation as to the underlying facts relating to what he described compendiously as "the goodwill issues", he referred to the fact that HMRC subsequently issued a discovery assessment against Boisson Consultants Ltd relating to the goodwill issues, and that assessment has been appealed to the FTT).

26. The meeting took place on 3 November 2016 between Mr Robertson, his advisers and Mr Brown. The judge was provided with a note of the meeting indicating the matters discussed. It was followed up by a letter to Mr Robertson dated 21 November 2016 from Mr Brown in which he referred to his "main concerns" as being Mr Robertson's ability to fund his lifestyle based on his declared income, and issues arising from the sale of the goodwill. It also detailed a number of particular matters on which Mr Robertson was asked for further information, namely an inheritance by his wife used to fund private expenditure, the purchase price of a barn, the sale of a flat, a property in Dubai and the goodwill issues.

27. By letter dated 27 March 2017, Mr Craig Tully of Gilbert Tax, tax consultants who were then advising Mr Robertson, wrote to HMRC querying the statutory basis for the investigation. Mr Brown spoke to Mr Tully by telephone on 6 April 2017 and followed this up with an email dated 11 April 2017 in which he said:

> "As I stated on the telephone on 6 April 2017, I have not opened Section 9A enquiries into Mr Robertson's tax returns. I have information to suggest that Mr Robertson's tax returns are incorrect and, under Section 29, TMA 1970, I could consider raising assessments to charge tax that may be due.
>
> I met with Mr Robertson and his advisors on 3 November 2016 to discuss his tax affairs and I subsequently made informal requests for information and documentation. Most of this information and documentation was requested in my letter dated 21 November 2016 and remains outstanding. I believe this information and documentation is reasonably required for the purpose [of] checking Mr Robertson's tax position as I suspect that an amount that ought to have been assessed to tax may not have been assessed. If the information and documentation is not provided I will have to consider making a formal request to Mr Robertson (FA 2008, Sch 36, para 1/para 21 (6))."

Further requests for information followed.

28. In his witness statement provided to the judge (but again not to this court) Mr Robertson said he provided a large amount of information in December 2016 and thereafter, but that HMRC repeatedly asked for further information.

29. Another meeting (between HMRC and Mr Tully) took place on 11 May 2017. The judge referred to a meeting note detailing the specific matters raised, namely the goodwill issues, the means used to sustain Mr Robertson's expenditure (Mr Brown said that his mortgage payments alone exceeded his declared income), his drawings from JJ Management Consulting LLP which exceeded his share of the profits and raised the question of the Mixed Membership Partnership legislation applying, the reconciliation of his director's remuneration as shown in Boisson Consultants Ltd's accounts and as shown on his tax returns, chargeable gains on the sale of the barn and another property, and the fact that no foreign income had been declared although Mr Robertson had investment and business interests in Dubai, Spain and Portugal.

30. On 4 July 2017 Mr Brown issued Mr Robertson with a formal taxpayer information notice under paragraph 1 of schedule 36 FA 2008, requiring the provision of 24 specific items linked to the matters that had already been raised. The first item for example was bank statements for 2011 to 2016 for all businesses operated by Mr Robertson, whether as director or partner, including the non-UK businesses. Mr Tully provided some (but not all) of the listed items on behalf of Mr Robertson under cover of a letter dated 17 July 2017, and sought a review of the notice (which upheld the original decision), objecting to its width, and later appealed the notice to the FTT.

31. Meanwhile, in January 2018 Mr Brown notified Mr Robertson of his intention to issue third party information notices (schedule 36, paragraph 2) to the bankers to JJ Management Consulting LLP, Boisson Consultants Ltd and Intereurope Foods Ltd, which would require approval of the FTT under schedule 36, paragraph 3(1). In March 2018 HMRC withdrew the taxpayer information notice relating to Mr Robertson and consented to the appeal being allowed. Although Mr Moser sought to suggest this reflected acceptance by HMRC that the notice was unjustified, the appellants' own statement of facts and grounds indicates that the withdrawal of the notice and consent to the appeal being allowed followed from Mr Brown's decision to issue revised third-party notices.

32. By letters dated June 2018 addressed to JJ Management Consulting LLP, Boisson Consultants Ltd and Intereurope Foods Ltd, Mr Brown identified the information that would be required from their respective bankers. Mr Robertson and the three corporate entities objected to such notices being issued and requested an *inter partes* hearing of any application by HMRC under schedule 36, paragraph 3(1) for approval by the FTT of such notices. That was refused. On 28 November 2018, third-party notices were approved by the FTT. However by agreement between the parties, HMRC have agreed not to serve them until the conclusion of these judicial review proceedings and an appeal to the Upper Tribunal has been stayed.

33. In addition HMRC made requests in 2018 of the Spanish and Portuguese tax authorities, but it is unnecessary to address these further.

34. The overall position was described by Nugee J as follows:

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

35. The judge accepted (as do I) that the investigation has had a number of real adverse consequences for Mr Robertson.

The Judicial Review Proceedings

36. The appellants' primary contention before Nugee J was that HMRC, as a creature of statute, are only permitted to do that which they are expressly authorised to do by statute. They have no general powers to do anything not authorised by statute.

37. On the facts of this case Mr Robertson had filed a personal tax return under section 8 TMA 1970 by the relevant filing date for each of the tax years in question. There was therefore a 12-month window running from the day after which each tax return was delivered in which HMRC could open an enquiry ("as of right") into the return under section 9A TMA 1970. The appellants submitted that once that period had expired the only statutory mechanism available to HMRC to carry out an investigation is by use of the information powers in schedule 36 FA 2008, with their inbuilt safeguards. That might (or might not, depending on time limits and other conditions applicable) lead to a discovery assessment under section 29 TMA 1970. However the appellants contended that HMRC are not entitled to conduct a lengthy, wide-ranging investigation, into a personal tax return, outside the terms of section 9A TMA 1970 and schedule 36 FA 2008, and backed-up by sanctions. Such an investigation

(described as an "informal investigation") was said to be ultra vires the statutory powers available to HMRC.

38. Nugee J rejected this argument. He readily accepted (as do HMRC) that as a statutory body, HMRC can only do what statute empowers them to do. However, by section 5(1) CRCA 2005 and section 1 TMA 1970, HMRC's functions include the collection of taxes (and so far as reasonably possible, collecting the correct amount of tax from taxpayers). Conducting an investigation into whether a taxpayer has declared all his income and paid the correct amount of tax is necessary, expedient, incidental or conducive to the exercise of that function and is authorised by the powers in section 9 CRCA 2005. The use of such an "informal investigation" (as the judge termed it) was not inconsistent with the statutory scheme, but was consistent with it. The statutory scheme includes not only opening an enquiry into a return under section 9A TMA 1970 during the enquiry window, but also checking returns without opening a section 9A enquiry, including after the enquiry window has closed, with a view to ascertaining if there is ground to issue a discovery assessment, and that such checking can include not just rereading the file but carrying out investigations and enquiries to see if any further information can be obtained that sheds light on the question. Given that statutory scheme, there is nothing inconsistent in HMRC having power to ask a taxpayer for information and documents on a voluntary basis. Moreover, it would be the very antithesis of good administration for an arm of the state to use compulsory powers as a first step in obtaining information from an individual, rather than resort to them only when all attempts to obtain the information voluntarily had run into the sand. As a matter of common sense, cooperation and collaboration facilitates the collection of the public revenue.

39. In relation to what is now ground two, the appellants contended before Nugee J that the court should exercise a supervisory jurisdiction over HMRC's informal investigation (assuming the vires for it). In oral argument before the judge, Mr Moser accepted that the argument that the investigation was irrational and/or disproportionate amounted to a submission that HMRC should give adequate and intelligible reasons for their investigation: the appellants submitted that HMRC had not stated with appropriate particularity, the scope of their investigation and the basis upon which it was said there were reasonable grounds to justify each part of that investigation. Mr Robertson was in the position of "*not knowing what is being investigated, why it is being investigated and when there might be closure of the investigation*". Further, if HMRC did not have sufficient reasons to start an investigation, then the investigation was unlawful at the outset and it was no answer for them to say they were no longer relying on the same matters to justify continuing the investigation; once unlawful it remained unlawful and HMRC could not justify it by reference to any information they had discovered as these would be "fruits of the poisoned tree".

40. Nugee J held that judicial review in relation to a decision to investigate will only be justified in a wholly exceptional case: applying by analogy the "*Fayed* principle" after *R v Panel of Takeovers and Mergers ex p Fayed* [1992] BCC 524 at 536B-C (Steyn LJ). The judge found that the circumstances of this case did not meet that threshold, concluding, 'there is nothing sufficiently egregious about the present case which would justify taking the wholly exceptional course of reviewing that decision'.

41. Finally so far as what is now ground three, even though in light of his finding that the case did not fall within the exceptional category justifying judicial review of HMRC's decision to investigate, or to continue investigating, it was not strictly necessary to decide the point, Nugee J considered whether the conduct of the investigation was unlawful on public law grounds (essentially because, as the appellants alleged, HMRC had no sufficient reasons to start the investigation). The judge rejected this contention. Having traced the course of the investigation, from the admittedly very widely worded letter of 9 June 2016 to the meetings and correspondence that followed, and then to the witness statements ultimately served in the judicial review proceedings (which included Mr Brown's statement listing outstanding concerns he had in relation to Mr Robertson's tax position and explaining why he had those concerns), he held that Mr Robertson and his advisers knew the gist of HMRC's concerns and were not entitled to further explanation of the basis of these concerns. The concerns were not on the face of it irrational or misconceived. He found it had not been established that HMRC's actions in deciding to carry out the investigation, or in continuing it, involved any breach of public law. In those circumstances it was not for the court by judicial review, to micromanage HMRC's conduct of the continuing investigation.

42. Against that background I turn to consider the appeal.

The Appeal

Ground 1: Nugee J erred in finding that section 9(1) CRCA 2005 empowers HMRC to conduct 'informal investigations'

43. In addressing his main contention (repeating the submissions he made below) that the launch of the informal investigation in this case (by means of a standard template letter exemplified by the letter of 9 June 2016) outside the express powers contained in section 9A TMA 1970 and schedule 36 FA 2008 (thereby avoiding the safeguard afforded by section 28A TMA 1970, the checks and balances in the self-contained code provided by schedule 36, and the FTT's supervisory jurisdiction on appeal) was ultra vires the statutory scheme, Mr Moser nonetheless made a number of concessions. First he accepts that HMRC have power to conduct informal investigations internally; for example, they can look at their files and any documents held on file to check a taxpayer's position. Secondly, he accepts they can contact the taxpayer to seek voluntary assistance by asking questions of the taxpayer, subject to two conditions, namely that HMRC must give reasons for such an informal investigation (identifying their specific concerns and explaining why); and any such informal investigation must be and be seen to be entirely voluntary. To my mind these concessions come close to an acceptance that HMRC have the ancillary powers to conduct informal investigations of a taxpayer's position relied on here.

44. However Mr Moser maintains that the scope of the ancillary power (contained in section 9 CRCA 2005) must be considered in the context of the statutory regime that confers and limits the function to which the power claimed is said to be incidental. Express powers contained in a scheme viewed as a whole, may delimit the scope for implied powers, and the mere fact that an implied power would be convenient or desirable is not sufficient (see *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1 at [31]; *R(OAO ABC Ltd) and Anor v HMRC* [2018] 1 WLR 1205 at [47]-[48]). He contends that Nugee J was wrong to reject the appellants' submission that using the

section 9(1) CRCA 2005 incidental power to conduct an informal investigation is impermissible because it is inconsistent with the wider statutory scheme. The wider statutory scheme envisages that within the enquiry window, HMRC may conduct a section 9A enquiry "as of right" (in other words, without any reason to suspect inaccuracies in the return), but outside the enquiry window (indeed, outside the section 9A procedure), HMRC does not have the ability to conduct an "as of right" investigation. Rather an investigation can only be commenced if there is a (rational) reason to suspect that tax has gone unpaid (which, as he submits, HMRC appeared to concede below) and by use of compulsory powers in schedule 36. He claims support for this contention in section 9A TMA 1970, because if an "as of right" (informal) investigation is permissible at any time, the time limit provision in section 9A(1)(2) TMA 1970 is rendered meaningless; and the fact that where an enquiry is opened under section 9A TMA 1970, the taxpayer can apply to the FTT for a closure notice pursuant to section 28A TMA 1970 (another safeguard that would be avoided).

45. I do not accept these submissions. In my judgment Nugee J was right for the reasons he gave (at paragraphs 36 to 54) to reject the appellants' main contention that outside the power to investigate "as of right" under a section 9A enquiry, HMRC can only use compulsory powers to obtain documents under schedule 36 FA 2008, which require a rational basis for suspecting underpayment of tax. My reasons (which are the same as those given by the judge) follow.

46. First, as section 5 CRCA 2005 and section 1 TMA 1970 make clear, HMRC's primary function is the collection of tax. That involves both a power and a duty to collect tax. The well-established principle of tax law to the effect that there is a public interest in taxpayers paying the correct amount of tax means that the duty to collect tax is to collect, so far as reasonably possible, the correct amount of tax rather than simply the tax that a taxpayer accepts is due (see if necessary, *Tower M Cashback LLP1 v HMRC* [2017] UKSC 19 (Lord Walker at [15])).

47. Conducting an investigation into whether a taxpayer has paid the correct amount of tax is on any reasonable view on the plain meaning of the words, both incidental or conducive to the exercise of that function and necessary or expedient in the exercise of it. The position is all the more clear because the ancillary powers conferred on HMRC by section 9(1) CRCA 2005 are to do anything which "*they think"* necessary, expedient, incidental or conducive to (or in) the exercise of their functions. As the judge said, the question therefore is not strictly whether carrying out an informal investigation is ancillary to another power (or function) but whether it is thought by HMRC to be necessary, expedient, incidental or conducive to that function. Given the wide managerial discretion available to HMRC as to the best means of collecting tax, it cannot possibly be said that it is impermissible or unreasonable for HMRC to hold the view that it is both expedient and conducive to their tax collecting function to conduct informal investigations.

48. Secondly, the use of an informal investigation is not inconsistent with the statutory scheme as Mr Moser submits. Outside the scope of a section 9A enquiry, the statutory scheme confers power by section 29 TMA 1970, on HMRC to collect tax by way of a discovery assessment where HMRC "discover" that there has been a loss of tax consequent on an assessment to tax being insufficient or relief given having become excessive. The power to make a discovery assessment applies outside the section 9A enquiry window in circumstances where there is no such window because

no return has been filed; or where either of the conditions in section 29(4) or (5) are fulfilled (in other words either, the error in the tax return was brought about by deliberate or careless conduct of the taxpayer or his advisers, or a hypothetical officer of HMRC could not reasonably have been expected to have been aware of the error within the section 9A enquiry window from the information provided by the taxpayer).

49. Since it is part of the statutory scheme that HMRC can issue discovery assessments where the relevant conditions are fulfilled, it is necessarily part of HMRC's functions to consider and investigate whether a discovery assessment should be made. As Ms Nathan QC submits the potential for a discovery assessment may be triggered in various ways. For example, knowledge gleaned from a later tax return submitted by a taxpayer may reveal the absence of an earlier return, or the possibility of an insufficiency in an earlier period; information from a third party source may lead to this possibility; and there may be situations where HMRC receive information which, while not revealing an insufficiency of tax, gives cause to investigate whether there is an insufficiency of tax in relation to a particular taxpayer or taxpayers. Investigation is necessarily required to convert a suspicion into an awareness of an insufficiency.

50. One way of doing such an investigation is by use of the compulsory powers to give information notices contained in schedule 36 FA 2008, as is expressly confirmed by the terms of paragraph 21 of schedule 36 itself. Comparison of the terms of paragraph 21(6) and section 29 TMA demonstrates that the three alternative suspicions in paragraph 21 that must be satisfied are the same three discoveries that enable a discovery assessment to be made. But there is nothing in the statutory scheme to suggest that this is the only way.

51. Schedule 36 is not drafted so as to confer power on HMRC to check tax returns by way of conducting investigations or enquiries. Paragraphs 1(1) and 2(1) of schedule 36 make clear, they are not the source of that power: they proceed on the basis that HMRC have power (conferred elsewhere) to check the tax position of the taxpayer, in other words to carry out "an investigation or enquiry of any kind" (see schedule 36, paragraph 58). Schedule 36 confers power to obtain information and documents by compulsion for that purpose. Since the statutory scheme contemplates checks otherwise than pursuant to section 9A, there is nothing inconsistent in HMRC asking a taxpayer for information and documents on a voluntary basis (without compulsion) where they think it necessary or expedient in the exercise of their function of checking a taxpayer's tax position, or incidental or conducive to the exercise of that function.

52. Thirdly, the distinction which the appellants seek to draw between "as of right" checks in section 9A enquiries and "reason to suspect underpayment" enquiries outside the section 9A window is incoherent and unprincipled. The principled position is that all investigations are subject to the public law restriction that powers must only be exercised for a proper purpose. In the same way as a section 9A enquiry could not be launched purely out of malice or on a capricious basis, there is no reason for importing a test from paragraph 21 of schedule 36, which is concerned with powers of compulsion to provide information, to all other aspects of the exercise of functions by HMRC save (on the appellants' case) section 9A enquiries.

53. True it is, as Mr Moser submits, that paragraph 21 precludes the giving of information notices outside a section 9A enquiry unless the HMRC officer "has reason to suspect"

under-assessment of income, capital gains or corporation tax. But this is simply an additional statutory requirement for the exercise of this particular power of compulsion backed by penal sanctions. It does not import a statutory threshold for seeking the voluntary provision of information or documents. Nor does it preclude an informal investigation commenced by a letter in standard terms (as it is accepted the letter of 9 June 2016 was) seeking cooperation by the voluntary provision of information and documents in relation to a taxpayer's tax position.

54. Contrary to the submissions of Mr Moser, an informal investigation, such as the one conducted here, is premised upon consent and cooperation. That was expressly stated in the 9 June letter and is not undermined by the letter's reference to the fact that full cooperation would ensure penalties are reduced to their minimum levels and might avoid publication of the taxpayer's details. As Ms Nathan submits, the letter quite properly refers to the possibility that the information held by HMRC that the taxpayer's returns and accounts may be incorrect, may itself be incorrect or capable of a satisfactory explanation. No assumption is made. Secondly, it refers to the aim of the investigation if founded, namely a financial settlement of the unpaid tax together with any interest and penalties arising. The function of penalties here is very different to that served by the penalty provisions in schedule 36 FA 2008, which are directly linked to non-compliance with the information notice itself. Here, the penalty is linked to the under-stated tax if proved, with the penalty applied as a percentage of the under-paid tax. The detailed statutory provisions (contained in schedule 24 of Finance Act 2007) provide for a discount to be applied to the penalty assessed to reflect a taxpayer's cooperation (see paragraph 10 of schedule 24). Likewise, there are statutory provisions (section 94 Finance Act 2009) dealing with publication of a taxpayer's details following a deliberate under-declaration of tax. In these ways, cooperation and compliance are incentivised, but that does not convert an otherwise voluntary investigation into a compulsory one. The voluntary nature of the exercise means that the taxpayer can (at any time) simply refuse to cooperate or to continue cooperating and can thereby force HMRC to open a section 9A enquiry if the window remains open, or issue a formal information notice pursuant to schedule 36, with the attendant safeguards.

55. Finally and as the judge observed, it would be the very antithesis of good administration for an arm of the state to use compulsory, intrusive powers as a first step in obtaining information from an individual, rather than resort to them only when attempts to obtain the information voluntarily have run into the sand. Section 1 TMA 1970 gives HMRC what Lord Diplock described in *R v Inland Revenue Commissioners, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 636 as:

> "a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection."

It is for HMRC to determine the best way of facilitating collection of the tax they are under a statutory duty to collect, and as HMRC have long acknowledged, the best way is by encouraging cooperation between HMRC and the public (see the statement of Mr Beighton, a member of the Board of Inland Revenue, to this effect, cited by Bingham LJ in *R v IRC ex p MFK Underwriting Agents Ltd* [1990] 1 WLR

1545 at 1568H). A voluntary request is much more likely to promote cooperation and collaboration and increase the possibility of avoiding hostile defensive litigation.

56. For all these reasons, and in agreement with Nugee J, it is in my judgment beyond doubt that HMRC's functions include checking tax returns without opening a section 9A enquiry, including after the enquiry window has closed, with a view to determining if there are grounds for making a discovery assessment, and that such checking can include not just carrying out internal investigations by rereading the file and any documents contained on it, but conducting external enquiries, including contacting the taxpayer, to obtain information and documents on a voluntary basis.

57. This ground accordingly fails.

Ground 2*:* the judge should not have applied a test of exceptional circumstances in relation to the informal investigation

58. On the assumption that an informal investigation is available to HMRC without limitation, Mr Moser submits that judicial review must be available on ordinary principles and there is no warrant for importing a threshold test of exceptionality. He rejects the analogy drawn by the judge between a decision by HMRC to undertake an informal investigation, and a decision by a public body to undertake a criminal or disciplinary investigation; and seeks to distinguish the cases relied on by HMRC and referred to by the judge (*R v Panel on Takeovers and Mergers, ex parte Fayed* [1992] BCC 524; *R (Bermingham) v Director of the SFO* [2006] EWHC 200 (Admin), [2007] QB 727; *Sharma v Browne Antoine* [2007] 1 WLR 780 (PC)). He submits that the criminal context in those cases was different; here we are concerned with a civil enquiry being conducted under the normal administrative powers of a public body. Further, unlike with criminal investigations, here the wider statutory scheme underpinning investigations by HMRC envisages a degree of judicial oversight; the FTT has oversight over section 9A enquiries and the use of schedule 36 FA 2008 powers.

59. There is no dispute that it is in "highly exceptional" cases only that courts will intervene on judicial review to disturb decisions by an independent prosecutor or investigator whether to investigate and prosecute (or discontinue investigations and prosecutions) in criminal or disciplinary proceedings (see *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756 at [30]). *Corner House* was itself a decision to terminate an investigation which had already begun. As Laws LJ explained in *R (Bermingham)* at [63] and [64] in a passage approved in *Corner House:*

> "63. … There is much authority to the effect that the jurisdiction to conduct a judicial review of a public authority's decision to launch or not to launch a prosecution, though it undoubtedly exists, is to be exercised sparingly. Where the decision is to prosecute, this admonition of restraint arises in part at least out of the imperative that criminal proceedings should not be the subject of satellite proceedings which have the effect of delaying the trial: *R v Director of Public*

> *Prosecutions, ex parte C* [1995] 1 Cr App R 136, especially per Kennedy LJ at 141; *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326. Where the decision is not to prosecute, there cannot I think be a different rule; in any event there will have been expert assessments of weight and balance which are so conspicuously within the professional judgment of the statutory decision-maker that there will very rarely be legal space for a reviewing court to interfere.
>
> 64. Here, of course, the decision sought to be reviewed is a decision not to investigate. The position as regards the judicial review jurisdiction is in my judgment a fortiori a decision whether to prosecute. The authority's (here, the Director's) discretion is even more open-ended. It will involve consideration of the manner in which available resources should be deployed and whether particular lines of inquiry should or should not be followed: *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 per Lord Keith of Kinkel at 59 D-F, summarising *R v Commissioner of Police for the Metropolis, Ex parte Blackburn* [1968] 2 QB 118. It is submitted for the Director that absent bad faith or other exceptional circumstances a decision to investigate or not to investigate an allegation of crime is not subject to review. That is not quite right. It looks like an argument to limit the court's jurisdiction of judicial review; but the jurisdiction is as wide or as narrow as the court holds. The true proposition is that it will take a wholly exceptional case on its legal merits to justify a judicial review of a discretionary decision by the Director to investigate or not."

60. As Ms Nathan submits, the authorities show that there are a number of reasons for this reluctance by the courts to interfere with such decisions: first, the powers in question are entrusted to the relevant authority and to no one else; second, such decisions are typically "polycentric" in nature, involving a balance of policy and public interest considerations which are inter-connected; third, the powers are conferred in very broad and non-prescriptive terms; fourth, it is desirable for all challenges to take place in the substantive proceedings, with their procedural safeguards, to which the investigation may lead, and avoid satellite litigation; and fifthly it is desirable to avoid the blurring of roles as between the investigator and the courts. In my judgment, this logic applies with even more force to a decision to investigate, which is even more open-ended in nature.

61. It seems to me that the same logic applies to civil investigative decisions of HMRC, as the judge held by analogy with the decision in *R v Panel on Takeovers and Mergers, ex parte Fayed*. There, Steyn LJ expressly recognised at p.536 that the 'wholly exceptional' threshold was not limited to the criminal or quasi-criminal context and could apply in the civil context as well.

62. HMRC have a statutory duty to collect the public revenue and a broad managerial discretion as to how best to perform their tax collection function. This is reinforced by

the width of their discretion in section 9 CRCA 2005 to do what they think necessary or expedient (etc.) in the exercise of their functions. The power to conduct informal investigations undoubtedly involves a balance of policy and public interest considerations. Satellite litigation in relation to requests by HMRC for voluntary cooperation by a taxpayer is highly undesirable, particularly in circumstances where taxpayers are able to challenge compulsory information notices pursuant to schedule 36 or discovery assessments under section 29 TMA 1970 in proceedings in the FTT. The self-denying ordinance required by the separation of powers is also important given the width of the discretion available to HMRC.

63. That does not mean that the court has no jurisdiction on judicial review. To the contrary, HMRC, like all public authorities must exercise their powers so as to promote the statutory purpose for which they are given; and must act lawfully, exercising their powers in good faith and on a rational basis. However, in light of the features to which I have referred, in practice it will take a wholly exceptional case on its legal merits to justify judicial review of a discretionary decision by HMRC to conduct an informal investigation of the kind conducted here.

64. For these reasons, I can see no error in the approach of the judge. To the contrary, I agree with it. Accordingly, this ground also fails.

Ground 3: Nugee J erred in finding that the circumstances of the case did not meet the threshold for the court to intervene

65. Mr Moser contends that irrespective of the threshold to be applied, whether it is the "wholly exceptional" threshold or the irrationality/illegality threshold, the circumstances of the case were such that Nugee J should have granted judicial review. He relies on paragraph 84 of the judgment where the judge recorded the following,

> "Ms Nathan did not suggest that HMRC could or did open informal investigations without any basis for them at all (unlike the case of a s.9A enquiry where I have accepted that HMRC do not need to have any suspicions before opening an enquiry). She took specific instructions on the basis of which she told me that HMRC investigate where they have a concern; that may be as a result of information received; or it may arise in some other way. She accepted that if an investigation is started without a proper purpose, it may be susceptible to judicial review. But she said there was nothing exceptional about the present case which justify judicial review. I accept the submissions. *Haworth* is not in my judgment of any direct assistance in the present case, and it is not necessary for HMRC to have any particular degree of confidence in the outcome before opening an informal investigation."

Mr Moser submits that this is an acceptance that HMRC must have reason to suspect underpayment of tax for it to be rational to investigate. It follows that it is incumbent on HMRC to demonstrate a rational basis for suspecting that a taxpayer's return is inaccurate before commencing an informal investigation and in order to justify it. However, HMRC refused to explain what led them to suspect that Mr Robertson's tax returns were inaccurate, and they therefore refused to explain the basis for

commencing the informal investigation. He submits that this is a case where the failure to provide any evidence of what led to the initial suspicion that Mr Robertson's returns were inaccurate means that the court should have drawn the inference that there was no rational basis for commencing the informal investigation that is ongoing in this case: *R (OAO Das) v SSHD* [2014] EWCA Civ 45, [2014] 1 WLR 3538 at [80].

66. Mr Moser maintains the submission he made to the judge, that if HMRC did not have sufficient reasons to start the investigation, then the investigation was unlawful at the outset and it is no answer for HMRC to say that they are no longer relying on the same matters to justify continuing the investigation. Once the investigation was unlawful, it remains unlawful, and HMRC cannot justify it by reference to any information they have discovered as a result of the investigation as these are "fruits of the poisoned tree". Even if he is wrong about that, he has a fall-back position: HMRC's investigation should be stopped save for any specific matters where reasons for HMRC's concerns have been provided and it can be seen that there are matters which genuinely remain unresolved.

67. Leaving aside the question whether it is open to the appellants to argue that inferences could or should have been drawn in this way (having not advanced such a case below), I do not consider there is any merit in these submissions.

68. First, it seems to me that, contrary to the submissions made by the appellants, the judge conducted a careful analysis of the course of the investigation and the evidence provided by Mr Brown and concluded that the gist of Mr Brown's concerns were communicated to Mr Robertson. This was done at the meeting on 3 November 2016 and in a follow-up letter of 21 November 2016, on the judge's findings. As the investigation progressed, some concerns were addressed, but others remained outstanding and continue to be live concerns in this case. Those findings leave no room for inferring from the absence of evidence that the decision to start the investigation was irrational and without reasoned foundation.

69. Secondly, this court has not been provided with the underlying material that was available to the judge, and is in no position to go behind any of his findings (even if we wished to do so). The course and conduct of the investigation which emerges from the judge's findings does not on the face of it lead to the conclusion that it was irrational or obviously unfair. The investigation may have been ongoing for a little over two years before it was interrupted by these proceedings, but even that delay is not (on the face of it) so long as to make it unlawful.

70. Thirdly, I do not accept that even if unlawfully started the investigation cannot lawfully be continued. There is no general principle based on "fruits of the poisoned tree" and Mr Moser identified none; instead the general principle is that illegally obtained material remains admissible subject to some particular statutory exceptions. If the investigation can lawfully be continued, HMRC could simply start a new investigation at this point and it is difficult to see what purpose there could be in declaring the investigation to have been unlawfully commenced in these circumstances.

71. As to the fall-back argument maintained by Mr Moser, I agree with the judge that in the absence of any basis for concluding the investigation was being conducted

unlawfully, it is not for the court to dictate the way in which the investigation should proceed or to limit its scope. The judge found that Mr Brown's witness statement indicates what his remaining concerns are and why; and that they are not on the face of it irrational or misconceived. In those circumstances and on the premise that the continuing investigation is lawful, I can see no legitimate basis for the court to step in and micromanage HMRC's conduct of it. Of course, and again as the judge observed, if the appellants and their advisers are confident that they have provided all that HMRC can reasonably require to check Mr Robertson's tax returns, they can decline to provide any more. HMRC may take a different view and resort to compulsory powers under schedule 36, but the use of those powers is subject to the supervision of the FTT and there are remedies available to Mr Robertson in that regard.

72. For these reasons this ground of appeal also fails.

Conclusion

73. For all the reasons given above, in my judgment all three grounds of appeal fail, and if my Lord agrees the appeal should accordingly be dismissed.

74. The judge was correct to hold that section 9 CRCA 2005 gives HMRC the power to conduct informal investigations. Judicial review of the exercise of that power is available on ordinary public law grounds but in practice it will take a wholly exceptional case on its legal merits to justify judicial review of a discretionary decision by HMRC to conduct an informal investigation of the kind conducted here. Finally, the judge was correct to conclude that whatever the test, the circumstances of the appellants' case did not meet the threshold for the court to intervene on judicial review.

Popplewell LJ:

75. I agree.