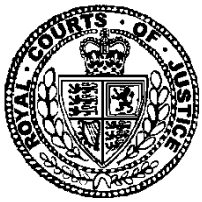

Neutral Citation Number: [2019] EWHC 1327 (Admin)

Case No: CO/4571/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2019

Before :

MRS JUSTICE SIMLER DBE

- -

Between :

ALEXANDER KOTTON	**Claimant**
- and -	
(1) FIRST TIER TRIBUNAL (TAX CHAMBER)	
(2) THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Defendants**
and	
AMERICAN EXPRESS SERVICES EUROPE LIMITED	**Interested Party Defendants**

- -
- -

Mr P Simpson QC (instructed by **Orrick Herrington & Sutcliffe (UK) LLP**) for the **Claimant**
Ms J Anderson (instructed by **HMRC**) for the **Second Defendants**

Hearing dates: 2 May 2019

- -

Judgment Approved

MRS JUSTICE SIMLER:

Introduction

1. The Claimant, a Swedish national and an international businessman with global business ventures, seeks to challenge a third party information notice issued by the Second Defendant, the Commissioners for Her Majesty's Revenue and Customs (referred to as "HMRC") under paragraph 2 of Schedule 36 to the Finance Act 2008. The notice, approved by the First Defendant, the First-Tier Tribunal ("FTT") on 7 November 2018 (and referred to below as "the Notice") requires the Interested Party (American Express Services Europe Ltd, "AMEX") to provide information and documents to HMRC for checking the tax position of the Claimant by way of assistance to the Swedish Tax Authority (the Skatteverket, referred to as "the STA") in accordance with the UK's obligations under Council Directive 2011/16/EU and Article 24 of the UK/Sweden Double Taxation Agreement.

2. The single ground for judicial review pleaded in the judicial review claim form issued on 16 November 2018 contends in short summary that the information required by the Notice is not "reasonably required" (and no reasonable officer could reasonably conclude that it was) by the STA for the purposes of checking whether the Claimant is resident in Sweden for tax purposes, so that the FTT had no power to approve the Notice and HMRC had no power to issue it.

3. Permission to apply for judicial review on that ground was granted by Lang J on 22 January 2019. HMRC served detailed Grounds of Defence with evidence in support on 28 February 2019 in the form of a witness statement from David Jacobs, the HMRC officer with responsibility for giving the Notice in this case. Thereafter, on 26 March 2019, HMRC provided a bundle of documentary evidence not previously disclosed. (A second tranche of documents was disclosed by HMRC on 12 April 2019). In consequence of that disclosure, the Claimant applied to adjourn this hearing. The application was refused but the directions were varied to enable the Claimant to respond to the additional material. The Claimant's response in the form of a further witness statement from Sarah Stockley exhibiting further documents, was lodged on 15 April 2019.

4. I have been provided with (and have considered) the hearing bundle (two lever arch files), which includes a witness statement from the Claimant and documents produced on his behalf during exchanges of correspondence between HMRC and his solicitors, Orrick, Herrington and Sutcliffe UK LLP (referred to as "Orrick"), together with a file containing documents exhibited to Sarah Stockley's third statement. At the hearing a further file containing exhibits to David Jacobs' witness statement was produced.

The application to amend the grounds for judicial review

5. Under cover of a letter dated 24 April 2019 (but without making a formal application) the Claimant lodged a proposed amended Statement of Facts together with a proposed amended Statement of Grounds seeking to raise two new grounds of claim. The amended Skeleton Argument served on 30 April sought to raise a third new ground for judicial review, in two parts. The three new grounds are as follows:

i) the condition for approving the giving of a third party notice in paragraph 3(3)(c) Schedule 36 was not met because the recipient of the notice was not notified of the application and given the opportunity to make representations. The FTT had no jurisdiction to approve the giving of the notice accordingly.

ii) There was a failure to take into account relevant considerations by both HMRC and the FTT, in that a letter from the Claimant's ex-wife's solicitors responding to the original Notice was not considered.

iii) The HMRC officer took account of irrelevant considerations that were material to his decision in that he took account of the fact that the Claimant instructed lawyers to oppose the giving of the Notice, and the perceived failure by the Claimant to comment on what the information and documents produced in response to the Notice might show.

6. Mr Simpson QC, who appears for the Claimant, submitted that points (i) and (ii) arise out of the disclosure given on 26 March 2019 and could not previously have been advanced without sight of that disclosure. The delay of a month in raising them was as a result of other commitments (including the Easter holidays) and the fact that the Claimant was seeking an adjournment of this hearing. Point (iii) arises out of the 12 April disclosure, but Mr Simpson frankly accepts that the point only occurred to him when he was working on the documents over the weekend. All three points are important and raise arguable grounds in his submission. He recognised that in relation to (i) and (ii) HMRC would be entitled to put in further evidence (or at least consider whether further evidence should be adduced) in response. In those circumstances, he invited me to adjourn the substantive hearing so that all grounds for judicial review could be considered together given the overlap between them.

7. The application to amend was opposed by Ms Anderson on behalf of HMRC, contending that it has not been made promptly, and the additional grounds are unarguable as a matter of fact and law. She opposed any adjournment, but said HMRC would wish to consider adducing further evidence if leave was granted.

8. Having heard argument on the application at the beginning of the substantive hearing, I refused permission to amend broadly for the reasons advanced by Ms Anderson. The application is too late, particularly in circumstances where it would have necessitated an adjournment of the substantive hearing on the day, wasting a day of court time and costs. Applications for judicial review require prompt action. The Claimant had the additional documents on 26 March 2019 but made no attempt to apply to amend to raise additional grounds until the hearing. A covering letter enclosing purported amended grounds is inadequate and in any event, that covering letter was not sent until about a month after receipt of the material. There is no good reason for the delay despite the explanation that has been given. In any event, I am satisfied that the additional grounds are not arguable as a matter of fact and law. I deal briefly with the reasons for that conclusion at the end of this judgment.

The issue

9. The only issue for resolution on this application is accordingly whether it was open to the HMRC officer, properly advised on the law, to conclude that the information and documents required by the Notice are reasonably required for the purposes of

checking the Claimant's tax position. Both sides agree that if HMRC's decision was legally flawed the Notice must be set aside and the FTT's decision falls away.

The legal framework

10. The power to obtain information and documents from a third party is given to HMRC by Schedule 36 to the Finance Act 2008, paragraphs 2 and 3. These provide as follows:

> "**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.
>
> **"3 Approval etc of taxpayer notices and third party notices**
>
> (1) An officer of Revenue and Customs may not give a third party notice without –
>
> (a) the agreement of the taxpayer, or
>
> (b) the approval of the [tribunal].
>
> (2) An officer of Revenue and Customs may ask for the approval of the tribunal to the giving of any taxpayer notice or third party notice (and for the effect of obtaining such approval see paragraphs 29, 30 and 53 (appeals against notices and offence)).
>
> (2A) An application for approval under this paragraph may be made without notice (except as required under sub-paragraph (3)).
>
> (3) The tribunal may not approve the giving of a taxpayer notice or third party notice unless –
>
> (a) an application for approval is made by, or with the agreement of, an authorised officer of Revenue and Customs.

> (b) the tribunal is satisfied that, in the circumstances, the officer giving the notice is justified in doing so,
>
> (c) the person to whom the notice is to be addressed has been told that the information or documents referred to in the notice are required and given a reasonable opportunity to make representations to an officer of Revenue and Customs,
>
> (d) the tribunal has been given a summary of any representations made by that person, and
>
> (e) in the case of a third party notice, the taxpayer has been given a summary of the reasons why an officer of Revenue and Customs requires the information and documents.
>
> (4) Paragraphs (c) to (e) of sub-paragraph (3) do not apply to the extent that the tribunal is satisfied that taking the action specified in those paragraphs might prejudice the assessment or collection of tax.
>
> (5) Where the tribunal approves the giving of a third party notice under this paragraph, it may also disapply the requirement to name the taxpayer in the notice if it is satisfied that the officer has reasonable grounds for believing that naming the taxpayer might seriously prejudice the assessment or collection of tax."

11. For the purposes of paragraph 2(1) of Schedule 36 "checking" is widely defined as including "carrying out an investigation or enquiry of any kind" (Schedule 36, paragraph 58) and "tax position" is equally widely defined to include a person's position as regards past, present and future liability to pay any tax (Schedule 36, paragraph 64(1)(a)). This includes "relevant foreign tax" (paragraph 63(1)(m)) which means "a tax of a member State, other than the United Kingdom, which is covered by the provisions for the exchange of information under Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation (as amended from time to time)" (paragraph 63(4)(a)).

12. There is broad agreement between the parties about the way in which the statutory scheme operates and these provisions were carefully examined by the Court of Appeal in R (Derrin Brothers Properties Ltd and others) v HMRC and others [2016] EWCA Civ 15. It is unnecessary in the context of what is in dispute here to set out the guidance given in Derrin Brothers but I have considered it, together with the earlier authorities of R v Inland Revenue Commissioners, ex parte T.C. Coombs [1991] 2 AC 283 and Inland Revenue Commissioners v Rossminster Ltd [1980] AC 952 to which Mr Simpson referred.

The facts

13. On 4 May 2017 HMRC received a request for assistance from the STA under the international mutual assistance regime. It was dealt with by David Jacobs.

14. The request explained that the STA was investigating the tax position of the Claimant during the period 1 January 2012 to 31 December 2015.

15. It said the Claimant had officially emigrated from Sweden to Switzerland in December 2004 and had not declared any income in Sweden since 1 January 2006. Simultaneously he resigned from the board of his Swedish companies, donated his house to his wife and divorced her. It referred to the fact that he had business abroad and said despite all these facts, the STA still considered the Claimant to be liable to tax in Sweden.

16. The request said the Claimant does not officially own any property in Sweden but has access to several properties owned by his former wife and his children, all of whom remain in Sweden. It said large amounts have been transferred from his bank accounts abroad to his family in Sweden for investment in real estate and private living in Sweden, including an investment in a horse farm with a riding school. In this way it said the Claimant is understood to have invested and spent substantial sums in Sweden through his family during the years 2011 to 2015. In those years the Claimant's ex-wife had not reported any income of her own.

17. The request referred to banking information already in the hands of the STA that (in the words of the STA, without correcting grammatical and other errors):

> "is proving that Mr Kotton is resident in Sweden. He also spent some time on his holiday accommodations in Spain and Norway. Mr Kotton is also travelling to other countries on business and/or private trips but no purchases shows that Mr Kotton has stayed in Switzerland during period of investigation. The banking information also shows transactions and large such sums of amounts to other persons than family, living in Sweden. The receivers of the money our persons to whom Mr Kotton has business relations.
>
> We therefore believe that Mr Kotton is still taxable in Sweden through residence in Sweden. In addition, even if he not would be considered as being resident here, Mr Kotton would still be fully liable to tax here because of considerable connection to Sweden i.e. through his economic connection here and lack of residence abroad. To get an accurate taxation in Sweden, your assistance is crucial for our further investigation.
>
> Scandinavian Airlines Systems (SAS) has been requested to provide details of Mr Kotton's travelling. According to the response, Mr Kotton partially has paid with an American Express (AMEX) card [number given]. According to AMEX in Sweden, cards beginning with [number given] are issued in United Kingdom and Amex in Sweden has no further data. Therefore, we turn to your country to get information from customer service for AMEX regarding this card.
>
> The data will be of vital information and needed to obtain evidence to Mr Kotton's stays for the years. Our investigators have strong reasons to believe that Mr Kotton should be taxed for revenues from business abroad. According to our investigation large sum of amount transferred to Swedish bank

> accounts and are available for Mr Kotton's (and the family) disposal…".

18. David Jacobs concluded that insufficient information had been provided to issue a third party information notice at that time. It is clear from the request for further information dated 3 July 2017 he made of the STA, that he required clarification of a number of matters. First he was puzzled by a possible contradiction in the statement that the Claimant had emigrated in December 2004 leaving his wife and children in Sweden, but then had channelled funds through his ex-wife. He asked whether this suggested that the divorce was contrived. Secondly he sought information about what access the STA had to bank accounts in Sweden indicating the payment of large amounts by the Claimant to his family in Sweden. Thirdly he referred to the statement that there was banking information "proving that Mr Kotton is resident in Sweden" and asked about this information and whether he could have copies to use as exhibits to his brief to the FTT. Mr Jacobs followed up with a reminder letter to the STA dated 2 October 2017 about the need for further clarification of these issues.

19. Additional information was provided in response by the STA by letter dated 10 October 2017. As to the first question, the letter recognises the situation is unusual and says that the circumstances of the Claimant's vast spending on behalf of his family, following the divorce and separation, strongly indicates that the divorce was a contrived situation and that the Claimant should be regarded as resident in Sweden. It says:

> "After the divorce Mr Kotton has transferred substantial amounts from bank accounts abroad to his family and persons involved in his business in Sweden. The funds transferred to his family has been used for investments in real estate, for example a riding centre close to the family residence in Billdal. Nevertheless, Mr Kotton has not bought or rented any property for himself to stay at when visiting his family. Mr Kotton is also very involved, both personally and financially, in bowling and owns two bowling teams in Sweden, where the men's team has become Swedish champions".

20. As to question two, the STA said they had obtained "*substantial information from other jurisdictions regarding Mr Kotton and foreign companies in which he is a beneficial owner, including bank statements from bank accounts abroad and some underlying documents".* As to question three, the STA said it had received information that the Claimant was using a bank card issued by one of his companies (Henbury Investment Ltd) showing purchases in the area around Billdal where the Kotton family lives. The transactions suggested he was spending a lot of time in Sweden, but also in Spain and Norway. There were no transactions or purchases indicating that he was staying in Switzerland during the period of investigation. Comments from the bank (Jyske Bank, Gibtraltar) regarding withdrawals from one of his accounts suggested he had a *"large house in Sweden and family"* and was a high net worth client *"visiting Spain and he has a very large property in Sweden with high expenses"*.

21. The STA stated that the Claimant had bank accounts with Jyske Bank for approximately 30 companies, mainly registered in Gibraltar, BVI, Cyprus, Belize and

a Knightsbridge company in the UK. It set out estimated taxes and social security contributions as a percentage of income from business activities, totalling 18,500,000 SEK.

22. The additional information was considered by David Jacobs. There was some follow-up correspondence concerning the Claimant's date of birth and his address for correspondence. In light of the additional information David Jacobs concluded that the information to be requested from AMEX was reasonably required for checking the Claimant's tax position and in particular his residence status.

23. A formal letter setting out summary reasons for seeking permission to issue a notice was sent to the Claimant dated 6 November 2017 at Swedish and Swiss addresses that had been provided to HMRC. The letter explained that the STA was checking the Claimant's income tax and social security contribution positions and to help with their check, needed some documents. It explained that the officer intended to issue an information notice to AMEX requiring them to provide information and documents and listing the documents required in an attached schedule. The letter said that the STA needed the documents listed on the schedule because they believe that for the period from 1 January 2012 to 31 December 2015 the Claimant was tax resident in Sweden despite claiming to be tax resident in Switzerland and as such, liable to tax in Sweden on his worldwide income. It continued that the STA had pointed to numerous factors which suggest that the Claimant maintains strong connections with Sweden despite his claimed official move to Switzerland. The letter explained that approval from the FTT, an independent tribunal dealing with tax matters, was necessary before the officer could issue a notice. It said that if the FTT approved the issue of a notice, a copy would be sent to the Claimant when the officer issued it.

24. By a letter dated 21 November 2017 Mr Jacobs informed AMEX that an application to the FTT for approval of a third party notice to them under paragraph 2 of Schedule 36 Finance Act 2008 was under consideration. The letter identified the taxpayer and indicated the understanding that he is a customer of AMEX. It offered AMEX a reasonable opportunity to make representations about the issuing of such a notice and the information/documents AMEX would be required to provide. AMEX acknowledged receipt of the request by email dated 28 November 2017 to David Jacobs but raised no apparent objections. Thereafter AMEX was asked whether they intended to make representations and confirmed by email on the same day that they would not be making any representations. Mr Jacobs responded to AMEX by email dated 29 November that he would now move the case forward as necessary.

25. By letter dated 21 November 2017, Mr Jacobs re-sent the formal summary letters to the Claimant correcting his date of birth in the information schedules but otherwise repeating the information previously provided about the proposed notice.

26. By letter dated 13 December 2017 Orrick, acting on the Claimant's behalf, set out detailed concerns regarding the approach taken by the STA and objecting to the issue of the Notice. The letter referred to the historic background to the STA's investigation into the Claimant and set out reasons, in view of this background, why the information requested from AMEX is not "reasonably required". It challenged the grounds for the STA to assert that the Claimant was resident in Sweden over the relevant periods as vague, incorrect, unproven and/or contradictory, drawing attention to claims made previously by the STA in relation to the Claimant that were proven to

be wrong. Concerns regarding the STA's earlier conduct of investigations into the Claimant's tax affairs were identified and it was suggested that the requests were merely speculative and could not be objectively considered to be required for the purposes of checking his tax affairs.

27. By letter dated 15 December 2017 HMRC sent a copy of Orrick's letter to the STA, explaining that at any future FTT hearing HMRC would make the Judge aware of the representations received in that letter and offering the STA an opportunity to comment on the points made.

28. The STA responded by letter dated 19 January 2018. They pointed out that the Claimant had not cooperated with their investigation into his residence status. They said "*the fact that Mr Kotton was considered as tax resident in Switzerland during the current period does not exclude the possibility that he was unlimited liable to tax in Sweden as well*". Mr Simpson is critical of this sentence given the double tax treaty between Sweden and Switzerland which would prevent unlimited tax liability from arising in both territories. He submits that this should have been made clear.

29. The STA repeated the points identified in relation to his believed presence in Sweden. In addition they gave by way of example from his use of the Henbury bank card, use of that card during 2012 on 77 occasions in Sweden and said that in most cases there was a one to four day period between purchases in Sweden without any use of the card elsewhere suggesting that the Claimant remained in Sweden during this intervening period. They explained that according to Swedish case law on tax liability based on presence in Sweden, where there are no transactions abroad or other proof of presence elsewhere, those days can be interpreted as days of presence in Sweden. They also referred to the fact that the Claimant only used the Henbury bankcard in Switzerland on one occasion in 2011 and one in 2012 but did not use it at all for purchases during 2013. Nothing was said about use or otherwise of the bank card in 2014 and 2015.

30. Mr Jacobs received a letter dated 22 December 2017 on 1 January 2018 from lawyers acting on behalf of the Claimant's former wife, Mrs Camilla Kotton (Wistrand Advokatbyra). They returned the summary of reasons letter sent to the Claimant via her address and advised that the couple divorced many years earlier and the address was no longer the Claimant's legal residence. Mr Jacobs acknowledged receipt of this letter on 3 January 2018.

31. Thereafter, on 23 January 2018, Mr Jacobs issued the Notice and made an application to the FTT for approval. The application was made with the agreement of Tom Gardiner, an authorised officer of HMRC for this purpose. A hearing before the FTT took place on 19 March 2018. It seems there was some confusion about the precise outcome of that hearing. It is clear from a letter dated 20 March 2018 (the following day) (and other contemporaneous documents) written by Mr Gardiner and addressed to the STA, that Mr Jacobs left the hearing with the understanding and belief that the application had been adjourned pending provision of further detailed information sought by Judge Richards (as particularised in the letter) from the STA. Moreover it is clear from this letter that the Notice was amended on the Judge's suggestion in order to make it clearer for AMEX to interpret it, suggesting that the Judge anticipated that the hearing would be restored for further consideration of the Notice on receipt of the further information he had requested. However, subsequently, when

Mr Jacobs sought a further hearing of his application for approval of the Notice following what he believed was simply a short adjournment, he was told by FTT staff that the application had been dismissed rather than adjourned. His email dated 18 May 2018 addressed to the FTT shows his surprise at this turn of events.

32. The STA responded to Mr Gardiner's letter of 20 March 2018 by letter dated 11 April 2018. This broadly repeated the information previously provided and expanded on the way in which the Claimant could be liable for tax in Sweden, whether resident or not. Under the heading "CFC taxation" it said:

> "Under certain conditions, owners of companies in low-tax countries can be taxed for their income in Sweden (chapter 39a, the ITA) so-called CFC Rules (Controlled Foreign Company). Briefly it means that a partner in a foreign legal person with low tax income is taxed continuously for his share of the surplus arising from the foreign legal entity."

The letter continued that large sums had been transferred from the Claimant's bank accounts abroad to his family in Sweden for investments there and that he had invested and spent over 50 million SEK in Sweden during the relevant years. The letter stated that:

> "our investigation strongly indicates that Mr Kotton is still fully taxable in Sweden **through residence in Sweden**. Even if he would not be considered as being resident here he would still be fully liable to tax here because of considerable connection to Sweden, i.e. through his economic connection to Sweden and lack of resident abroad."

33. Reference was made to the double taxation agreements available to avoid double taxation where a person is taxable in several countries according to their respective laws. The letter also states (with a small correction to enable understanding), "*The STA has not been able to obtain information on which grounds Mr Kotton is liable to tax in Switzerland…".* Mr Simpson is critical of that sentence given the clearly stated position of the Swiss tax authority.

34. Mr Jacobs sent a copy of the STA letter of 11 April 2018 to the Claimant care of Orrick for comment under cover of a letter dated 18 April 2018, stating in accordance with his understanding, that the hearing on 19 March 2018 led to the Judge requesting additional details to assist his further consideration.

35. Orrick responded by letter dated 24 April 2018 and advised they would be submitting further representations. Those representations, dated 8 May 2018, invited Mr Jacobs to arrange for the representations to be put before the Judge at the FTT to be considered as part of the hearing.

36. The letter of 8 May 2018 presents a detailed and coherent response to points raised in the STA letter, concluding that the STA letter did not establish "*any reasonable grounds to suspect that Mr Kotton could be considered to be tax resident in Sweden*" in the relevant years. On that basis, the letter contends the information from AMEX could not be considered to be reasonably required for determining whether the

Claimant is tax resident in Sweden. The letter addresses in detail (and considerably more coherently than the STA had done) the three circumstances under Swedish law in which an individual can be treated as tax resident in Sweden, namely where the individual is actually living in Sweden as his domicile or residence; where the individual has his habitual abode in Sweden; or where the individual has previously lived in Sweden and has considerable connections to Sweden. The letter provides a more detailed analysis of the three circumstances than that provided by the STA and makes detailed factual representations (for example, regarding the bowling clubs, the ownership of real estate by Mrs Kotton and the children, the payment of large sums to Mrs Kotton and/or the children and/or to others in Sweden) directed at showing that the Claimant was not resident under any of these circumstances.

37. In relation to CFC taxation the letter explains that the "*rules described in the STA letter are relevant only if Mr Kotton's tax residence in Sweden can be established. Accordingly, this should not change the basis upon which the STA may "reasonably require" information (which is limited to the STA's case to seek to establish that Mr Kotton is tax resident in Sweden).*" It also challenges the basis on which the STA had estimated the Claimant's tax liability and the asserted relevance of the fact that the Claimant had transferred money to his ex-wife and children which it said did not mean that the CFC rules were engaged.

38. The letter concludes with a reference to the Swedish Constitution and the requirement for public authorities to observe objectivity and impartiality. In that context it asserts that the STA had violated that provision by providing inaccurate and/or misleading information regarding the claimed ownership by the Claimant of bowling clubs, in relation to the Gibraltar court cases, the Spanish NIE number and the absence of filed Spanish declarations. It says that the STA had invoked circumstances that are irrelevant for tax purposes without explaining that and the STA's request is not in line with the laws and administrative practices in Sweden. The letter exhibits a large number of supporting documents, all of which I have seen.

39. By letter dated 5 June 2018 (following Mr Jacobs' discussion with FTT staff about re-listing his application), Mr Gardiner informed the STA that the first application to the FTT for approval had been dismissed and invited detailed responses to the points raised by Orrick's letter of 8 May with enclosures. Among other things he sought details concerning the Claimant's involvement in the Swedish bowling teams in light of the information provided by Orrick, which he said was at odds with what had previously been stated by the STA. He also said that the letter raised some serious points concerning the Swedish Constitution and invited responses.

40. The STA responded by letter dated 11 July 2018 together with a number of enclosures emailed on 12 July 2018. So far as the bowling teams are concerned, it provided newspaper articles tending to support the argument that the Claimant had a significant connection with (albeit not ownership of) Pergamon bowling team. The letter refuted the suggestion that inaccurate or misleading information had been provided by the STA. It concluded with a summary of the importance and relevance of the requested information, including the following:

> "Last, I will conclude this letter by summarizing the importance and relevance of the requested information held by American Express. The requested information could reinforce the

> existing details about Mr Kotton presence in Sweden, including flights to and from Sweden and are therefore essential facts for us to be able to proceed in our investigation.
>
> According to the Scandinavian airline company SAS, Mr Kotton has paid flight tickets with his AMEX card. Our theory is that Mr Kotton has paid additional flight tickets with other airline companies (except SAS) by the AMEX card. The bank statements and invoice copies from AMEX are therefore of great importance in order to map his travels to and from Sweden and thus his stay in Sweden.
>
> Furthermore, we expect that there could be information, made clear by invoice copies, about when and where Mr Kotton has used the AMEX card for purchases during the requested period.
>
> Where Mr Kotton has been staying is of great importance in determining his tax liability in Sweden. We do not have a complete picture of where Mr Kotton has been staying over the years 2013-2015. The requested AMEX information could reinforce the existing details about Mr Kotton's presence in Sweden, including flights, and are therefore essential for us to proceed in our investigation and to our aim to complete the picture of Mr Kotton's whereabouts for the current years."

41. Mr Jacobs obtained translations of the attachments and on 15 August 2018, applied for authorisation from Mr Gardiner of a fresh information notice. Authorisation was received on 16 August 2018. On 10 October 2018, following a period of sickness absence, he requested a date from the FTT for a fresh approval hearing (the application having been issued on 16 August 2018). It is common ground that the further application dated 16 August 2018 is in almost identical terms to the original application (save for the clarifications made by the Judge) and the information/documents requested are identical. Mr Jacobs sent a bundle of relevant documents relating to the application to the FTT, including copies of representations made by Orrick opposing approval. A hearing was listed for 7 November 2018.

42. The hearing on 7 November 2018 took place before Judge Jonathan Richards as before. Mr Jacobs had prepared a fresh brief for the hearing. The brief highlights the statutory requirements for approving a third party notice under Schedule 36 to the Finance Act 2008. In particular it makes clear that the FTT may not approve the giving of a third party notice unless satisfied that:

    i) the HMRC officer is justified in concluding that information/documents required by the notice are reasonably required for the purposes of checking the tax position of the relevant taxpayer (paragraph 2(1));

    ii) the third party to whom the notice is addressed has been told that the information or documents referred to in the Notice are required and given a reasonable opportunity to make representations (paragraph 3(3)(c));

iii) the FTT has been given a summary of any representations made by the third party recipient (paragraph 3(3)(d));

iv) the taxpayer concerned has been given a summary of the reasons why an officer of HMRC requires the information and documents (unless paragraph 3(4) applies) (paragraph 3(3)(e)). There is no suggestion that paragraph 3(4) applies in this case.

43. So far as conditions (ii), (iii) and (iv) are concerned, the brief exhibits the letter to AMEX of 21 November 2017 and the AMEX confirmation by email dated 28 November 2017 that it would not be making any representations. The brief exhibits the letter dated 21 November 2017 to the Claimant providing him with a summary of reasons why the information and documents are required and explains how the letter was communicated to the Claimant.

44. The brief also sets out a summary of the facts. It refers to the earlier hearing on 19 March 2018 and exhibits a note setting out the views expressed by the FTT Judge at that time. It describes the action taken since 19 March 2018, exhibiting copies of all letters from the STA and the letters containing representations made by Orrick, described as setting out their counter views to those of the Swedish tax authorities. It exhibits (with English translations) the newspaper articles referred to above stating:

> "3.8 These newspaper articles, whilst not providing proof of Mr Kotton's ownership of the bowling team and residency in Sweden, suggest that he did have significant links to the bowling team and this was an interest likely to lead him to spending time in Sweden, playing for them/coaching them/following them. The articles also suggest that Mr Kotton is a highly secretive individual, and arranges his affairs in a like manner. Faced with these articles, the existence of the property in Billdal surrounded by high walls and family factors, the Swedish tax authorities would argue that they are entitled to look into Mr Kotton's tax affairs and pursue more concrete information that they hope is available to them to form a more precise picture."

45. Mr Jacobs continued:

> "3.9 In a nutshell, the representatives of Mr Kotton are arguing that the information sought is not reasonably required because the Swedish Tax Agency should not have opened an enquiry into their client because the risks (Swedish residency) are not strong enough. Despite their voluminous correspondence they have not commented in any shape or form concerning what the American Express information may contain. On the other hand, the Swedish tax authorities have opened an enquiry based upon genuine risks. They accept that as things stand their case is not perhaps strong enough to win all the residency arguments, but they are still in the information gathering phase with further avenues to pursue. They see the UK American Express information as crucial, as it could potentially throw

> considerable light on Mr Kotton's spending/presence in Sweden.
>
> 3.10 The fact that Mr Kotton has refused to provide this information to the Swedish tax authorities, and has instead gone to the expense of engaging legal representation to oppose the Swedish tax authorities is likely to suggest to the foreign tax authority that this information is likely to be highly revealing.
>
> 3.11 Whilst HMRC acknowledges that the reasonably required wording contained in paragraph 2(1)(b) of the Schedule 36 legislation can be interpreted by the Judge as widely as they choose, we believe that a more narrow interpretation would be more helpful. The narrow focus should be more accepting that the foreign tax authority has an enquiry, but instead critical consideration should be focussed on whether the information sought is likely to have any value in terms of what they are trying to establish. Therefore in this case the focus should be on whether the information sought is reasonably required to help determine Mr Kotton's residency status. I believe that the answer to this is a clear "Yes"."

46. Mr Jacobs made a short note of the hearing on 7 November 2018. The note records that Judge Richard said he had read Mr Jacobs' brief beforehand and in view of what the STA had provided since the first hearing and the points Mr Jacobs had made, he was now content that the STA were entitled to review the Claimant's residency position and the information from AMEX was reasonably required. Judge Richards asked whether Mr Jacobs had taken on board his suggested amendments to the notice itself. Mr Jacobs said he had. Judge Richards asked whether these had been sent to AMEX and the Claimant. Mr Jacobs said they had not as the changes were not considered material enough to require that. Judge Richards accepted that and subject to two further amendments to the schedule to the proposed notice, gave his approval.

47. Following the hearing, also on 7 November 2018, Mr Jacobs wrote to AMEX enclosing the approved Notice. He also emailed Orrick attaching a copy of the Notice as approved by the FTT Judge. He informed the STA of the outcome of the hearing and that the FTT had approved the giving of the Notice which had been sent to AMEX.

48. On 9 November 2018 Mr Jacobs spoke with Paul Shingles of AMEX who explained that he had been passed a copy of the Notice by Orrick and asked by them not to action it until the end of the stated period, no doubt because of their intention to challenge it.

49. These proceedings were issued on 16 November 2018 and no action has been taken on the Notice pending the outcome of this challenge.

The judicial review challenge

50. Against that background I turn to consider the claim for judicial review.

51. Before addressing his principal submissions on the issue in this case, Mr Simpson contended for a very limited scope for operation of the presumption of regularity in this case. He submits that this presumption applies where (i) a decision-maker is not obliged to give any reasons for his decision (and does not in fact give reasons), and (ii) the whole of the material available to the decision-maker when the decision was made is not known or disclosed. In those circumstances, the decision-maker gets the benefit of the presumption that the material that was before him (whatever it may have been) justified his reasons (whatever they may have been) for the decision made. He relies, by way of example, on Inland Revenue Commissioners v Rossminster Limited [1980] AC 952, which concerned a warrant to enter premises, where Goff LJ stated (at 981):

> "We do not know what was the evidence on oath on which the circuit judge authorised the issue of the warrants in this case, and, therefore, in my judgment we cannot consider whether it was sufficient, and we must I think proceed upon the assumption that it was and that he acted regularly."

In the House of Lords, Lord Diplock stated (at 1014):

> "[The court] must proceed on the presumption omnia praesumuntur rite esse acta until that presumption can be displaced by the applicant for review – upon whom the onus lies of doing so. Since no reasons have been given by the decision-maker and no unfavourable inference can be drawn for this fact because there is obvious justification for his failure to do so, the presumption that he acted intra vires can only be displaced by evidence of facts which cannot be reconciled with there having been reasonable cause for his belief that the documents might be required as evidence or alternatively which cannot be reconciled with his having held such belief at all."

52. Further, in R v Inland Revenue Commissioners, ex parte T.C.Coombs [1991] 2 AC 283 which concerned an application for a notice under the predecessor scheme, s.20 Taxes Management Act 1970, the House of Lords (Lord Lowry) described the presumption as follows:

> "The commissioner must be taken to be satisfied that the inspector was justified in proceeding under section 20 and hence that the inspector held, and reasonably held, the opinion required by section 20(3). The presumption that that opinion was reasonable and that the commissioner was right to be satisfied can be displaced only by evidence showing that at the time of giving the second notice the inspector could not reasonably have held that opinion. In order to decide whether the applicants succeed in this task, the court must consider all the evidence on both sides and all the available facts, one of which is that the commissioner, having heard an application, consented to the giving of the notice."

53. Mr Simpson submits that if all the material that was before the decision-maker is available to the court, there is no room for any presumption to operate. If, on the basis of the available material, no reasonable decision-maker could have reached the decision in question, then the presumption of regularity cannot reverse that conclusion.

54. I consider there is force in Mr Simpson's submission about the role of the presumption of regularity in a case where all the material available to the decision maker is available to the court. The submission is not undermined by the judgment of the Court of Appeal in Derrin Brothers which affirms the approach set out in TC Coombs in a context where there was limited disclosure and significantly, no disclosure of the request for assistance or the supporting information provided by the foreign tax authority. In my judgment, in a case where all the material before the decision-maker is available to the court, the presumption of regularity has a limited (rather than no) function: the officer is presumed to have acted honestly and in good faith in exercising his or her judgment as a specialist and experienced HMRC tax officer; and it is for a claimant to prove otherwise.

55. Mr Simpson makes the following further submissions on the operation of the statutory scheme:

    i) in the present context "reasonably required… for the purpose of checking" the Claimant's tax position means for the purpose of checking whether the Claimant was resident for tax purposes in Sweden in the period 1 January 2012 to 31 December 2015 so that he was liable to Swedish income tax and social security contributions charged in respect of profits of controlled foreign companies. He contends that if the documents could have no relevance to that issue, the test cannot be met. Here he submits that the documents could have no relevance to the question whether the Claimant is liable to tax on CFC profits.

    ii) As to relevance, that is not the test. Even if relevant, material might not be reasonably required because it is agreed or admitted. That is important here because the STA has stated repeatedly that it is already of the view that the Claimant is resident in Sweden for tax purposes and has sufficient evidence of Swedish residence so that the documents sought could only reinforce the existing position. That suggests the information is not "required" for checking the Claimant's residence.

    iii) Further, if it was not reasonable for the STA to have opened an enquiry into the Claimant's tax residence in the first place, then it follows that the information cannot be reasonably required for the purpose of checking whether the Claimant is resident in Sweden.

    iv) That is because part of the assessment of whether documents are "reasonably required" involves consideration of the reasonableness of the underlying tax enquiry itself. To put it another way, the underlying tax enquiry must be reasonable in all the circumstances otherwise the documents required for that purpose cannot be reasonably required. That means that in every case in order to be satisfied of the statutory condition, the officer must satisfy himself of the reasonableness of the underlying enquiry. Here, the fact that the STA took no

steps to enquire into the Claimant's tax residence until the present enquiry in 2016 and has given no reason for its decision to enquire into his residence from 2012 to 2015, both serve to undermine the credibility and validity of the enquiry.

56. Applying those principles to the facts of this case, Mr Simpson submits that no reasonable officer of HMRC could have concluded that the information sought by the STA was reasonably required for the purposes of checking the Claimant's tax position and residence status because, in summary:

i) The basis of taxation is not clearly set out: the STA has asserted that the Claimant may be resident in Sweden and liable to income tax but this appears to be under CFC rules and the conditions for the application of these rules is inadequately set out by the STA whose position is confused.

ii) The information provided by the STA is contradictory, wrong and implausible: for example, the STA has said it cannot state how the Swiss tax authority would or has considered the Claimant's tax situation but that is wrong since the Swiss tax authority has told the STA it regarded the Claimant as resident in Switzerland from 2012 to 2014. The STA has referred to the Claimant being registered in Spain since 2015 but documents provided by the Claimant show that he was registered as a foreigner. The STA has implied that the Claimant's divorce was a sham entered into for the purposes of obtaining a tax advantage but has not provided any supporting evidence of this. The STA has said that the Claimant owns bowling teams in Sweden but not provided any evidence of ownership, and the assertion is simply wrong.

iii) The STA has failed to mention a number of important points in correspondence, including that according to information obtained by the Swiss tax authority the Claimant was subject to unlimited tax in Switzerland from 1 January 2012 to 31 December 2014, and that the STA had previously been criticised by the Swedish Ombudsman for deficiencies and delay in an earlier enquiry into the Claimant's tax position.

iv) The STA has failed to state its position in a number of respects, suggesting it has no plausible answer to important points made by Orrick. These include failing to address whether it considers the Claimant was resident in Sweden between 2005 and 2011 and failing to identify any change in circumstances that has led it now to enquire into whether the Claimant was resident in Sweden from 2012 onwards. These points, and others, are said to undermine the credibility and reliability of the STA.

57. Accordingly, (and in light of other detailed points made both orally and in writing by Mr Simpson highlighting deficiencies in the material provided by the STA) he submits that any reasonable consideration of what was put forward by the STA, taking into account only incontrovertible evidence provided by the Claimant, is not sufficient to allow the conclusion that the information sought was reasonably required for the purpose of checking the Claimant's tax position and his residence status in the relevant period.

58. Clearly as those submissions are made by Mr Simpson, I do not accept them for the reasons that follow.

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

60. Secondly, the question for the HMRC officer (and therefore the FTT judge) is an expressly limited one: the officer must be satisfied that the information or documents to be sought by a third party notice are "reasonably required" for the purpose of "checking" the tax position of the taxpayer. It is not for the officer to investigate the merits of the underlying tax investigation, or whether the investigation is itself reasonably required or justified as a precondition for the giving of a notice. That is unsurprising given that the scheme is directed at an early investigatory stage and in any investigation some lines of enquiry may prove more fruitful than others but nevertheless may need to be pursued. As the Court of Appeal observed in Derrin Brothers,

> "68. …it is inevitable in many cases, particularly where there are complex arrangements designed to evade tax, that at the investigatory stage it will be difficult, if not impossible, for HMRC to be definitive as to the precise way in which particular documents will establish tax liability. It is also clear that in many cases disclosure of HMRC's emerging analysis and strategy and of sources of information to the taxpayer or those associated with the taxpayer may endanger the investigation by forewarning them."

Thus, provided there is a genuine and legitimate investigation or enquiry of any kind into the tax position of a taxpayer that is neither irrational nor in bad faith, that is sufficient. The challenge is not to the lawfulness of the investigation, but is limited to the rationality of the conclusion that the information/documents are reasonably required for checking the taxpayer's tax.

61. Nor is it necessary (as Mr Simpson submits) as a precondition for giving a third party notice to show that a positive liability to tax will arise or that liability will arise in a particular way. A valid investigation may result in no tax charge at all.

62. Thirdly and for the same reasons, the question for the FTT in relation to the information and documents sought by a third party notice is also expressly limited: the FTT must be satisfied that in all the circumstances, the officer giving the notice is justified in concluding that the information or documents are reasonably required for

checking the tax position of the taxpayer. Again, that does not require any examination of the nature and extent of the underlying tax investigation, but rather a focus on whether there is a rational connection between the information and documents sought and the underlying investigation. The very purpose of the investigation is to establish the correct position by reference to all the evidence gathered and it is therefore unsurprising that the legislation does not make the approval of a notice conditional on the tax investigation itself being reasonably required.

63. Fourthly and in light of those conclusions, I do not agree with Mr Simpson that the facts support a conclusion that no reasonable officer could have concluded that the information and documents are reasonably required in this case. That the STA may already have evidence that leads it to believe the Claimant was resident in Sweden for tax purposes does not mean that the AMEX information is not reasonably required. This further information may add support to the STA's case and be required for that reason, or alternatively it may undermine the evidence so far available leading to the conclusion that the Claimant is not tax resident in Sweden. On either basis that there is existing evidence pointing in one direction does not mean that additional evidence that may shed light on this very question is not reasonably required.

64. The submissions made by Mr Simpson on the facts seem to me to underscore that there is a real dispute as to the Claimant's correct tax residence status and that the information sought is, at least potentially, directly relevant to that dispute. In particular, I do not accept the submission by Mr Simpson that all the credit card statements could show is that purchases were made from a particular retailer but saying very little about whether the Claimant was at any particular shop or retailer when the purchase was made. If the statements reveal spending necessarily linked to a geographical area, for example relating to meals or other consumables, accommodation or even transport, they are likely to support an inference that the purchase was made by the Claimant in a particular geographical area (here, in or near Billdal in Sweden) and to be relevant to the tax residence question.

65. It is therefore irrelevant that the STA has not explained why it is now enquiring into the Claimant's residence status or said what has changed. Similarly, although the operation of the relevant CFC rules is not clearly explained by the STA in its correspondence, that too is irrelevant: as Orrick said in the 8 May 2018 letter, those rules are relevant only if the Claimant's tax residence in Sweden can be established. That is what is being checked at this stage of the investigation. In any event, the CFC rules may ultimately have no relevance at all because if the Claimant is liable to income tax in Sweden as tax resident there, he may have unlimited liability to tax on a worldwide basis (subject to double taxation issues) as Mr Simpson accepted. None of the factual points raised are knock-out blows that establish beyond dispute that the Claimant is not or cannot be tax resident in Sweden in the relevant period. Nor do the points raised on behalf of the Claimant show the investigation to be a sham or pursued in bad faith. Mr Simpson expressly disavowed any allegation of bad faith and the arguments advanced do not begin to displace the presumption that both the STA and HMRC (in providing assistance) are conducting a genuine investigation and exercising their investigation powers honestly and in good faith.

66. Mr Simpson is also critical of aspects of the information provided by the STA, both as to failures to mention certain matters and asserted inaccuracies. Some of those

criticisms may well be justified but I do not regard them as material in the circumstances. For example, the newspaper articles do not support a conclusion that the Claimant owns the Swedish bowling teams discussed. Nevertheless, the articles do support significant links between the Claimant and the Swedish teams, suggesting he is likely to spend time in Sweden in connection with those links. That is how the evidence was viewed by Mr Jacobs and presented to the FTT.

67. Moreover, whatever the view of the Swiss tax authorities, Mr Jacobs expressly said in his brief to the FTT that despite the Claimant's "official residence" being in Switzerland, the evidence so far obtained by the STA in its investigations supported an inference of time spent in Sweden, and also Spain and Norway, but not in Switzerland. The point was clearly in issue and the correspondence as a whole makes clear that everyone was aware that Switzerland regarded the Claimant as resident in Switzerland. The Orrick representations made this clear if it was unclear before. It seems to me however, to have little bearing on the question to be addressed by HMRC and the FTT pursuant to Schedule 36. Even if dual residence only can be established, the information and documents sought remain relevant.

68. The inaccuracies and errors relied on by Mr Simpson do not render Wednesbury unreasonable the officer's opinion (or the FTT's conclusion that the officer was justified in being satisfied) that the documents are reasonably required for checking the Claimant's tax residence status. It seems to me that on any reasonable consideration of the information provided by the STA a question is raised as to the Claimant's residence status that the STA is entitled to investigate. There is a rational connection between the AMEX documents and that investigation. When the correct statutory question is asked and answered, the points relied on by the Claimant do not begin to show that Mr Jacobs' conclusion was irrational. The AMEX documents may ultimately undermine the STA's investigation but that is nothing to the point. I agree with Ms Anderson that whatever the merits and demerits of the way the STA presented the evidence and information it had, there is a core basis on which Mr Jacobs (and the Judge) could rationally be satisfied that the information was reasonably required to check the Claimant's tax position.

The proposed new grounds

69. I return shortly to the question of the arguability (both as a matter of fact and law) of the proposed additional grounds sought to be raised by way of amendment (but refused). As to point (i) there is no doubt that a mandatory condition for approval of a third party notice contained in paragraph 3 of Schedule 36 is the requirement for the recipient of the notice to be "told that the information or documents referred to in the notice are required and given a reasonable opportunity to make representations to an officer of Revenue and Customs". Although it is true that Mr Jacobs did not serve the further application dated 16 August 2018 on AMEX or give AMEX a further opportunity to make representations, this was not arguably required. AMEX had earlier been told that the information and documents set out in the Notice were required and had been offered the opportunity to make representations but declined to do so. The further application dated 16 August 2018 was a repeat application seeking approval of the original notice in almost identical terms as Mr Simpson conceded. The same documents and information were required, again as Mr Simpson agreed in the course of argument. The point was raised at the FTT hearing on 7 November 2018 and Judge Richards proceeded on this basis, no doubt because he was satisfied

that AMEX was told about what the Notice required and given the opportunity to make representations. The condition was plainly and unarguably satisfied.

70. Point (ii) sought to argue that there was a failure to take account of a relevant consideration in that the letter from Mrs Kotton's lawyers was not placed before the FTT Judge. This is not arguable as a matter of fact and law. There can be no doubt that Mr Jacobs was well aware of the letter and the information contained within it, having received and acknowledged its receipt. Furthermore, the fact of the Kotton divorce was well known and discussed in the STA material, and the Claimant's position in that regard was also clear. In any event, there was no obligation on Mr Jacobs to put the letter (or any other letter) before the FTT Judge. Indeed the taxpayer had no right to insist on any material objecting to the Notice going before the Judge, or to challenge the Notice on its merits or on any other basis.

71. Point (iii) sought to challenge the Notice as invalid because Mr Jacobs took account of irrelevant matters in deciding it should be issued. Mr Simpson relies on the memorandum written by Mr Jacobs to Mr Gardiner dated 10 October 2018 in which Mr Jacobs says:

> "The fact that the taxpayer has engaged assistance on the scale he has, rather than just handing the information over, tends to suggest that the UK American Express information will strengthen the STA's case. This, to my mind, is the elephant in the room. The UK legal representative has written extensively, but not once commented concerning what the UK American Express information will contain"

He submitted that Mr Jacobs regarded these as important considerations indicating that the material in question was 'reasonably required' whereas both are plainly irrelevant. As regards the former, a person is entitled to a defence, and no inference can be drawn from the fact of the defence. As regards the latter, he submitted that it is inappropriate to require a taxpayer to disclose the contents of material being sought under Schedule 36. To do so defeats the purpose of any protection that Schedule 36 is intended to confer on the taxpayer. In these circumstances Mr Simpson submitted that the Notice is invalid.

72. This too is not arguable. It is clear from the memorandum and other material viewed as a whole that Mr Jacobs asked himself the right question and answered it by reference to all the information available, making clear why the information could throw light on the enquiry at stake. He expressly took an "overall approach" without relying on a single factor to the exclusion of others. The contents of the AMEX material was plainly relevant and he was entitled to observe that the Claimant had not really engaged with what it might show. At an investigatory stage, it was open to him to make the observation he did, both in that regard and in relation to the scale of the opposition mounted against the Notice. It was not obviously irrelevant and in any event it was merely added as tending to support his earlier conclusion.

Conclusion

73. I have dealt above with the principal arguments advanced on the Claimant's behalf. I have however considered carefully all the points raised both orally and in writing, and

I am quite satisfied that it was open to Mr Jacobs, acting lawfully, to conclude that the information and documents required by the Notice are reasonably required for checking his tax position. Mr Jacobs' decision was neither irrational, nor Wednesbury unreasonable, nor legally flawed.

74. For all these reasons, the application for judicial review fails and is dismissed. The Notice stands, and may now be enforced.