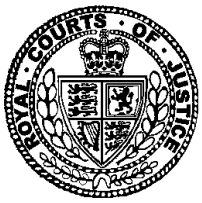

Case No: CO/1270/2023

Neutral Citation Number: [2024] EWHC 1119 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/05/2024

Before :

THE HONOURABLE MRS JUSTICE DIAS DBE

- -

Between :

THE KING **(on the application of SENSOR SOLUTIONS LIMITED)**	**Claimant**
- and –	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Defendant**

- -
- -

Mr Richard Clayton KC and Mr Andrew Thornhill KC (instructed by **Jurit LLP**) for the **Claimant**
Mr Christopher Stone KC and Ms Ishaani Shrivastava (instructed by **HMRC Solicitor's Office and Legal Services**) for the **Defendants**

Hearing date: 23 April 2024

- -

JUDGMENT

Mrs Justice Dias:

1. This is an application for judicial review brought by permission of Sir Duncan Ouseley granted on the papers on 22 January 2024. In giving permission, Sir Duncan made the following observation:

   "Although this claim seems unlikely to succeed, and a rolled up hearing might well have demonstrated that it was unarguable, the full hearing will not be significantly longer, and will permit the full picture to be examined."

2. I have concluded that the claim is indeed unarguable. Judicial review is accordingly refused and the claim is dismissed. My reasons for this conclusion are as follows.

3. The Claimant, Sensor Solutions Ltd ("Sensor") challenges a decision of the Defendants, HMRC, recorded in a letter dated 13 January 2023, not to make payments to the Claimant under the Disguised Remuneration Repayment Scheme (the "DRRS").

4. I was treated in the skeleton arguments and evidence to a detailed explanation of the history and rationale of the DRRS. However, since the only matters in issue in these judicial review proceedings concern the interpretation and application of a particular statutory provision, it is unnecessary to deal with any of this in detail. All that it is necessary to know for the purposes of this judgment is that:

   (a) In 2017, the Government introduced legislation which had the effect of bringing within the scope of tax certain disguised remuneration arrangements, including employee benefit trusts ("EBT"s), employer financed retirement benefit schemes ("EFRBS") and other similar schemes. At the same time, it made provision for a one-off Loan Charge to become payable in 2019 in relation not only to disguised remuneration arrangements entered into *after* the 2017 changes but also in relation to arrangements concluded before those changes came into effect.

   (b) Between 2017 and 2019, HMRC permitted taxpayers to settle their tax affairs in order to avoid the application of the Loan Charge. For this purpose, HMRC required the taxpayer to settle on a 'voluntary' basis, not only open tax years in respect of which a valid tax assessment had been raised, but also years where no tax assessment had been raised within the required time limit.

   (c) The retrospective nature of the Loan Charge gave rise to considerable concern and following an independent review carried out by Sir Amyas Morse in December 2019, the Finance Act 2020 (the "Act") was passed which mandatorily required HMRC to establish a scheme (the

"DRRS") under which all or part of these 'voluntary' payments could be repaid upon application by the taxpayer prior to a certain date.

(d) Thus, section 20(1) of the Act provided that HMRC *"must establish a scheme under which they may on an application made to them before 1 October 2021 – (a) repay the whole or part of a qualifying amount paid or treated as paid to them under a qualifying agreement…"*

(e) Sections 20(2)-(5) of the Act defined what amounted to a "qualifying agreement" and a "qualifying amount". Of particular relevance in this case are sections 20(4) and (5) which provided as follows:

"(4) But an amount that is referable (directly or indirectly) to a qualifying loan or quasi-loan made on or after 9 December 2010 is not a qualifying amount by reason of subsection (3) unless at a time when an officer of Revenue and Customs had power to recover the amount a tax return, or two or more tax returns of the same type taken together, contained a reasonable disclosure of the loan or quasi-loan.

(5) For the purposes of subsection (4), a tax return, or two or more tax returns taken together, contained a reasonable disclosure of the loan or quasi-loan if the return or returns taken together—

(a) identified the qualifying loan or quasi-loan,

(b) identified the person to whom the qualifying loan or quasi-loan was made,

(c) identified any arrangements in pursuance of which, or in connection with which, the qualifying loan or quasi-loan was made, and

(d) provided such other information as was sufficient for it to be apparent that a reasonable case could have been made that the amount concerned was payable to the Commissioners."

(f) "Tax return" was defined in section 20(8) as:

"(a) a return made under section 8 of TMA 1970 and any accompanying accounts, statements or documents, or

(b) a return made under paragraph 3 of Schedule 18 to FA 1998,

and a tax return is of the same type as another if both fall within the same paragraph of this definition."

5. It is common ground that the Claimant had made use of EFRBS which involved loans or quasi-loans within the meaning of the Act and was one of a number of taxpayers who concluded settlements with HMRC on a 'voluntary' basis in relation to these schemes..

6. On 30 April 2021, the Claimant applied under the DRRS for repayment of sums that it had paid in respect of tax years 2012 to 2014. On 15 July 2022, HMRC issued a repayment decision rejecting the application on the grounds that the Claimant had not made reasonable disclosure of the loans

in question. (A claim for repayment of National Insurance contributions was rejected on a different ground but no issue arises as to that in these proceedings.)

7. The Claimant applied for a review of the repayment decision on 6 September 2022 and on 13 January 2023, Mr Richardson of HMRC upheld the decision not to make repayment on the grounds already given. It is this decision which is now the subject of challenge.

Permission to amend

8. The Claimant's original Statement of Facts and Grounds, as clarified by its Reply to HMRC's Summary Grounds of Defence, relied on four grounds of challenge:

   (a) Unfairness;

   (b) Irrationality

   (c) Inadequate and unlawful reasoning;

   (d) Having regard to an irrelevant consideration.

9. By Application Notice dated 8 April 2024, however, the Claimant applied for permission to amend its Statement of Facts and Grounds to advance a new case based on the fact that when conducting his review Mr Richardson apparently relied on unpublished internal guidance. The Claimant asserts that it was unaware of the existence of this guidance until receipt of Mr Richardson's witness statement and that it been unfairly denied the opportunity of making targeted representations addressing it prior to the review being conducted. It therefore seeks to introduce two new grounds of challenge, namely (i) unfairness and (ii) error of law. In this regard, Mr Clayton confirmed that, irrespective of the outcome of the amendment application:

   (a) Original grounds (c) and (d) were no longer pursued;

   (b) The application was now limited to HMRC's decision not to make repayment in respect of the 2012 tax year only.

10. In his written submissions on behalf of HMRC, Mr Christopher Stone KC argued that the principles to be applied to the exercise of the court's discretion to permit amendments were those set out by the Court of Appeal in *CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs,* [2023] EWCA Civ. 480; [2023] 1 WLR 4335 at [66]-[79]. He further submitted that this was a "very late amendment" for the purposes of applying those principles because, if granted, it would necessitate an adjournment of the trial date.

11. I rejected this latter submission, since it seemed to me that the new issues substantially overlapped with the originally pleaded issues and would not therefore materially increase the time needed for the hearing or required additional preparation. In fact, Mr Stone helpfully indicated at the outset of the hearing that HMRC were no longer seeking the adjournment which had been intimated in correspondence and that he was prepared to deal with the amendment if the court were to grant permission. Nevertheless, he submitted that on any view it was still a late amendment and was a relevant factor in the exercise of the court's discretion. As made clear in in *CNM Estates*, an application for permission to amend will be refused if the amendments put forward a new case which would have no real prospect of succeeding within the meaning of CPR Part 24. Beyond that, the court must exercise its discretion with reference to the overriding objective and the need to strike a balance between injustice to the applicant if the amendment is refused and injustice to the opposing party and other litigants in general if it is permitted.

12. By contrast, Mr Richard Clayton KC (who represented the Claimant in relation to public law issues) submitted that it was not appropriate to apply these principles to amendment applications in judicial review proceedings and that the position was governed solely CPR Part 54.15, subject only (as he accepted) to a threshold test of arguability. Relying on *Lewis: Judicial Remedies in Public Law* (6th ed., 2021)(Sweet & Maxwell) at para. 9-105, he argued that a more expansive approach was appropriate in judicial review cases whereby amendments should be allowed relatively freely if the new grounds did not call for further evidence but only involved questions of law. In truth, however, I do not consider that the passage in *Lewis* is in any way inconsistent with the principles set out in *CNM Estates*. To the contrary, it states that amendments should only be allowed if no injustice is caused and that delay is a proper factor for the court to take into account. If there is any distinction between judicial review and other cases, it is only one of nuance, namely that in striking the appropriate balance, the court may require more convincing before it finds injustice in permitting the amendment. I therefore proceed on the basis that the principles articulated in *CNM Estates* apply to this application.

13. The Claimant says that it only became aware of the existence of the unpublished guidance when it was served with the witness statement of Mr Richardson on 27 February 2024. It does indeed appear that there was no reference by HMRC to unpublished guidance prior to this date. In those circumstances, and since the amendments did not require new evidence but essentially only repackaged arguments which were already in play, I was satisfied that it was unnecessary to vacate the hearing date and that no real prejudice would be occasioned to HMRC in allowing them to be made provided I was satisfied that they had a real prospect of success. Since both parties accepted that they effectively stood or fell with the original grounds, I proceeded with the agreement of counsel to hear argument on the entire case *de bene esse*.

The facts

14. The relevant statutory provisions have been set out above. Mention should also, however, be made at this stage to the DOTAS scheme. This was a scheme set up in 2004 for the purpose of providing HMRC with information about structures which they believe are being marketed as tax avoidance schemes. Promoters of such a scheme are required to notify HMRC of the mechanics of the scheme by means of form AAG1, after which they are given a Scheme Reference Number ("SRN"). Each scheme has a single SRN irrespective of the number of individuals or companies using it. The promoter notifies the SRN to each taxpayer using the scheme on form AAG6 and the taxpayer is then obliged to notify HMRC that it is using the scheme and to supply the relevant SRN. In this case that was by means of form AAG4.

15. The underlying facts of the present case were largely uncontentious. It is thus common ground that Sensor participated in an EFRBS for the 2012 tax year in respect of which it concluded a voluntary settlement with HMRC on 20 June 2019. An application for repayment under the DRRS was made on 30 April 2021 which was rejected on 15 July 2022 on the sole ground that reasonable disclosure of the loans had not been made as required by section 20(5) of the Act.

16. By application notice dated 30 August 2022, Sensor formally applied for a review of that decision. The application for review attached a quantity of documentation and submissions as to why reasonable disclosure had indeed been made, including in particular a detailed five-page letter from Sensor's tax advisers which relied, amongst other things, upon the information contained in the AAG forms relating to the scheme.

17. The repayment decision was reviewed on behalf of HMRC by Mr Tim Richardson who issued a decision on 13 January 2023 upholding the original rejection. The decision letter stated that in order to establish whether the criteria for repayment had been met, Mr Richardson had reviewed *"the company's relevant returns for the accounting periods ended 31 March 2011, 2012, 2013, 2014, and 2015. I have also considered all the representations made by the company and its authorised representatives during the course of the application to the scheme."* The letter continued as follows:

> *"(a) Identified the qualifying loan or quasi-loan*
>
> *The company's returns for the accounting periods ended 31 March 2011, 2012, 2013 and 2014 referred to contributions of assets being made into an EFRBS. However, the disclosure must also identify the loan or quasi loan, that is, who was the lender, what amount was loaned and when. This information has not been disclosed in the company returns.*
>
> *(b) Identified the person to whom the qualifying loan or quasi-loan was made*

The disclosure needs to clearly identify the person to whom the loan was made, a class of persons is not sufficient. This information has not been disclosed in the company returns.

(c) Identified any arrangements in pursuance of which, or in connection with which, the qualifying loan or quasi-loan was made, and
(d) provided such other information as was sufficient for it to be apparent that a reasonable case could have been made that the amount concerned was payable to the Commissioners.

To be a reasonable disclosure, the relevant returns need to give enough information, so HMRC know how the arrangement works and have a reasonable awareness that income tax is due on the loan or quasi loan as employment or trading income. This information has not been disclosed in the company returns.

The accounts submitted with the company's returns for the accounting periods ended 31 March 2011, 2012, 2013 and 2014 contain the following statement in relation to the EFRBS arrangement.

'The directors are of the opinion that the Trustees will award most of the benefits in a way that will not result in a PAYE/NIC liability.'

This statement indicates that no amount would be payable to the Commissioners.

The disclosure connected to the scheme references provided in the documents accompanying the company returns do not give full details of the arrangements in connection with the loans, as no loans have been disclosed. Based on the information provided I don't consider that HMRC were told enough to know who in the company received loans nor the full amount of the loan and that the amounts would be liable to income tax."

18. The evidence as to how Mr Richardson conducted his review was amplified in his witness statement dated 27 February 2024. At paragraph 8, he stated that he had considered the applicable statutory provisions (sections 20 and 21 of the Act) and the rules of the DRRS. He further stated that his understanding of how to apply the sections of the DRRS came from an internal DRRS overview meeting in early February 2021, internal guidance notes and publicly available guidance documents.

19. So far as concerned "reasonable disclosure", Mr Richardson stated that his understanding of the test came from reading the legislation, policy documents and internal guidance which he exhibited. He further confirmed that:

"12. ...I understood that the information for satisfying the requirement of reasonable disclosure under section 3.1.27.5 could be provided through the company's Corporation Tax (CT) returns, and associated enclosures. By associated enclosures, I mean any additional documents submitted with the CT return other than the main return itself. In this case, that would be the accounts and computations. I also considered the documents that Sensor submitted along with the request for the review of the repayment decision [Exhibits 35, 35a, 35b, and 35c].

13. If any of the tax avoidance arrangements in the settlement were declared under DOTAS, I would also request and check the associated AAG1 – Disclosure of Avoidance Scheme (Notification by scheme promoter) held by HMRC (AAG1). As such, for each company, I would identify those documents and then look at them to see if the various elements of reasonable disclosure were made out."

20. In relation to Sensor's application specifically, Mr Richardson confirmed that he had considered the following:

    (a) HMRC's internal guidance;

    (b) Sensor's relevant CT returns and all associated enclosures;

    (c) Two AAG1 forms held by HMRC dated 19 July 2011;

    (d) The letter dated 26 August 2022 together with the AAG4 and three AAG6 forms attached;

    (e) Sensor's unaudited financial statements for the 2011, 2012, and 2014 tax years.

21. Having done so:

    "I was of the view that none of the criteria [for reasonable disclosure] were met.

    (1) As to section 20(5)(a), the CT returns referred to contributions of assets being made into an EFRBS. However, I understand that the disclosure must also identify the loan or quasi loan, that is, who was the lender, what amount was loaned, and when it was loaned. This information was not disclosed. The AAG1s did not disclose this either.

    (2) As to section 20(5)(b), I understand that the disclosure needs to clearly identify the person to whom the loan was made; it is insufficient merely to refer to a class of persons such as employee or director. This information was not disclosed in the returns or AAG1s.

    (3) As to section 20(5)(c), and (d), I understand that the relevant returns need to give enough information so HMRC know how the arrangement works and have a reasonable awareness that income tax is due on the loan or quasi-loan as employment or trading income.

        (a) This information was not disclosed in the CT returns. The accounts submitted with the CT returns contained the following statement in relation to the EFRBS arrangement, which clearly indicates that no amount would be payable to HMRC.

            "The directors are of the opinion that the Trustees will award most of the benefits in a way that will not result in a PAYE/NIC liability."

        (b) While I was unsure which exact scheme the AAG1s related to, I could see that they were not capable of satisfying the criteria at section 20(5)(d) because they contained detailed explanation as to why no amount was payable to HMRC."

22. Mr Richardson also explained that he did not review a further AAG1 form dated 12 October 2011. This was in fact the form which was relevant to the claim for repayment in the present case. However, it had not been provided to him by Sensor and had not then been located by HMRC, even though it emerged from their records sometime later. It was in very similar terms to the two AAG1 forms which Mr Richardson did review.

The issues

23. The Claimant was represented by Mr Andrew Thornhill KC in relation to tax issues. He made two important concessions:

    (a) The AAG forms were not part of the Claimant's tax returns as defined in section 20(8) of the Act;[1]

    (b) The Claimant could not claim to have made reasonable disclosure except by reference to the AAG forms.

24. In these circumstances, the following issues fall to be addressed:

    (a) Was it unfair not to take account of the information in the AAG forms in deciding whether reasonable disclosure had been made?

    (b) If that information was taken into account, was reasonable disclosure made?

    (c) Did HMRC's internal guidance apply any different criteria to a review from those set out in its published guidance? If so:

        (i) Did Mr Richardson apply such different criteria when reaching his decision?

        (ii) Was it unfair not to give the Claimant an opportunity to make submissions on the guidance in advance of the decision?

    (d) Assuming no unfairness as alleged by the Claimant, is it highly likely that the same outcome would have been reached in any event?

    (e) Was there a breach of HMRC's duty of candour and, if so, what are the consequences?

The AAG forms

25. The Claimant's overarching submission under this head was that the AAG documents were essential to the correct interpretation of the tax returns. Accordingly, the duty to act fairly which the common law implies into the exercise of every statutory power required HMRC to have regard to them even if they did not strictly form part of the actual tax returns.

26. Mr Thornhill accepted that the Claimant could not rely on the duty of fairness to say that HMRC should have embarked on a massive trawl for additional documents. However, he submitted that the effect of the DOTAS regulations was to divert into the AAG forms certain information which would otherwise have needed to be included in a tax return. Therefore, he argued, the AAG forms

[1] Contrary to the Claimant's originally pleaded case, which was that AAG4 did form part of Sensor's tax returns.

were part and parcel of the system of making tax returns comprehensible and would be looked at when the returns themselves were eventually lodged. Accordingly, the latter could not be interpreted properly without them and basic fairness required HMRC to take them into account. This, he said, was recognised by HMRC themselves as demonstrated by the fact that Mr Richardson took steps to obtain the AAG forms.

27. I accept, of course, that where a statute confers an administrative power on a government body, the exercise of that power is subject at common law to a presumption that the body in question will act fairly unless there is a particular reason why it need not, for example where the statute conferring the power expressly or impliedly excludes the particular aspects of fairness contended for, or where it would be impossible, impractical or pointless to act in that manner. However, the extent of the duty of fairness and what it requires depends on the particular context and the legal and administrative framework within which the relevant decision is being taken: see *Doody,* [1994] 1 AC 531, 650; *Bank Mellat v HM Treasury (No.2),* [2013] UKSC 39; 2014] AC 700 at [30]-[36], [178]-[179]; *R (Timson) v Secretary of State for Work and Pensions,* [2023] EWCA Civ. 656; [2023] PTSR 1616.

28. In the present case, Parliament has expressly prescribed in sections 20(5) and (8) of the Act what is to constitute "reasonable disclosure". In so doing, it has evinced a clear intention that reasonable disclosure for the purposes of the section is only to be found in one or more tax returns as there defined. The underlying rationale is presumably two-fold: (i) to reduce the burden on HMRC by restricting the ambit of the documents it must consider to those which have unarguably been presented to it and which it is likely still to retain in its records and thus avoiding it having to trawl through all of its records for material which may or may not throw light on matters; and (ii) to put the onus firmly on the taxpayer to have made reasonable disclosure in those documents without requiring HMRC to have to spend time trying to join the dots if the picture is not immediately clear.

29. Although Mr Clayton insisted to the contrary, it seems to me that this is the clearest possible exclusion of any power (let alone an obligation) to look outside the four corners of the tax returns in order to find reasonable disclosure. To do so would be effectively to include the AAG forms in the definition of "tax return" notwithstanding the Claimant's concession that they were *not* so included. Section 20(5) defines what amounts to reasonable disclosure and in my judgment that is an exhaustive definition. In other words, there is no scope to go outside the four corners of the sub-section in assessing what does or does not constitute reasonable disclosure. It is not for the courts or HMRC to usurp the legislative function and override the definition of reasonable disclosure which Parliament has chosen to adopt merely because it might be "fair" to do so. The duty of fairness is directed squarely at procedures and the manner in which public bodies reach

their decisions, not at the substance of the law. I can see nothing in the concept of procedural fairness which mandates the wholesale alteration of the substantive law.

30. I therefore hold that fairness did not require Mr Richardson to take the AAG forms into account when conducting the review.

31. This conclusion also disposes of a subsidiary argument advanced by the Claimant under this head, based on the fact that HMRC had opened an enquiry into Sensor for the 2012 tax year. It was submitted that this could only have been on the basis of the material contained in the tax returns and the AAG forms and that, acting fairly, Mr Richardson should have taken steps to locate and consider the enquiry documents before arriving at any decision. In fact, HMRC have disclosed the only documents relating to the enquiry which they hold and while it is not suggested that there was anything of relevance in those documents as such, Mr Clayton submitted that such enquiries would have yielded up the correct AAG1 form. However, if (as I have held) the statute does not authorise HMRC to go outside the ambit of the tax returns for the purpose of assessing reasonable disclosure, then (i) fairness cannot have required Mr Richardson to look for the enquiry documents in the first place; and (ii) even if the relevant AAG1 form had emerged it would not have been permissible to take it into account in any event.

32. Since it conceded that the Claimant has no case unless it can say that the AAG forms should have been taken into account, the claim must fail for this reason alone. However, the other issues were argued at length by Mr Clayton and in deference to his submissions, it is right that I should address them.

Was reasonable disclosure made on the basis of the AAG forms?

33. I have set out above Mr Richardson's reasons for concluding that reasonable disclosure was not made in this case. In reaching that conclusion, he plainly did have regard to the AAG1 forms before him, whether strictly obliged to do so or not. While he did not have the correct AAG1 form before him, this was couched in materially identical terms to the forms that he did review and I am satisfied that his reasoning applies equally to the form dated 12 October 2011 as to the forms dated 19 July 2011. It is common ground that he also reviewed the AAG4 and AAG6 forms attached to Sensor's submissions of 26 August 2022.

34. Accordingly, Mr Thornhill submitted, Mr Richardson had (or should have had) the following information available to him:

    (a) AAG1 contained a detailed description of the precise mechanics of the scheme, albeit not with reference to any particular taxpayer.

(b) While AAG1 itself did not identify the SRN, it disclosed the name of the scheme which could be matched in turn to the SRN and scheme name contained in the AAG4 and AAG6 forms.

(c) Note 1 to both the 2011 and 2012 accounts stated in terms that the company had established an EFRBS for the benefit of employees and persons connected with them and that monies held in the scheme were held by independent trustees and managed at their discretion. The trustees had the power to provide both retirement and other employee benefits.

(d) Note 10 to the 2012 accounts provided under the heading *"Contingent Liabilities"* that the company had appointed assets to an EFRBS and was liable for PAYE/NIC that might arise on awards made by the trustees. It recorded that the directors were *"of the opinion that the Trustees will award most of the benefits in a way that will not result in a PAYE/NIC liability."*

(e) Note 11 to the 2012 accounts disclosed under the hearing *"Related Party Disclosures"* that Sensor had entered into the following transactions with employees:

"Employee Debt (interest free)	*Date of Debt*	*Date repaid*
Mr Richard Anthony Williams £336,601	*30/11/2011*	*5/12/2011*
Mr Kevin Francis Copleston £336,559	*30/11/2011*	*5/12/2011"*

(f) Note 5 to Sensor's Corporation Tax Computation for 2012 provided as follows:

"Wages and Salaries

On 18 November 2011 the company established the Sensor Solutions Limited Employer Financed Retirement Benefit Scheme 2011. On 29 November 2011 the trustees created a sub-fund with the appointment of £10 cash for the benefit of Specified Individuals and is referred to as the 'Subsequent Sub-fund'. On 29 November 2011 the trustees created a sub-fund with the appointment of £10 cash for the benefit of selected individuals and is referred to as the 'initial Sub-fund'. Assets to the value of £680,000 were appointed to the 'initial Sub-Fund' and 'Subsequent Sub-Fund' in the proportions 1 to 99 respectively. Of the total contribution of £680,000, £330,000 represented the maximum amount of awards in respect of services for the year ended 31 March 2011 with £350,000 in respect of the year ending 31 March 2012.

35. Mr Richardson should therefore have been able to satisfy himself that:

(a) The Claimant had instituted an EFRBS;

(b) The EFRBS in question involved the company making what subsequently became categorised as a quasi-loan subject to the Loan Charge to chosen employees, who discharged those loans by undertaking to pay an equivalent amount to the trustees of the scheme;

(c) The amount so loaned was in total £680,000 plus the initial nominal sum of £10;

(d) A purpose of the ERFBS was to benefit the two directors of the company in a way which was thought not to involve tax;

(e) Of the £680,000 contribution, 99% (£673,000) was allocated to the Initial Sub-Fund;

(f) Transactions with the two directors of the company giving rise to debts totalling £673,160 were entered into on 30 November 2011 and the debts were repaid or satisfied on 5 December 2011;

(g) It can safely be inferred that these transactions were loans which were repaid or satisfied via the EFRBS thus giving rise to the quasi-loans in question. The figures are too close for the inference not to be drawn;

(h) The Initial Sub-Fund is virtually equal to the amount of the loans recorded in the 2012 accounts;

(i) The connection between the loans and the EFRBS is clear and the future liability on the part of the directors to pay £673,160 to the EFRBS explains why the benefit was thought to be free of tax and NIC.

36. On this basis, Mr Thornhill submitted that all the requirements of section 20(5) of the Act were met since:

(a) The relevant quasi-loans were identified as the liabilities incurred by the directors to the trustees;

(b) The persons to whom the quasi-loans were made were the two directors;

(c) The arrangement in connection with which the quasi-loans were made was the scheme described in AAG1;

(d) The information in the accounts, AAG1 and AAG4 was sufficient to enable a reasonable casew to be made that income tax was payable to HMRC.

37. Mr Thornhill accepted that this analysis required inferences to be drawn at various stages but argued that this was permissible, not least because HMRC's internal guidance made it clear that obvious inferences could be drawn. I regret that I cannot agree. Even if this is a correct interpretation of HMRC's internal guidance (as to which see below), in my judgment it would only permit truly obvious inferences. As I have said above, it is for the taxpayer to make reasonable disclosure, not for HMRC to have to fill the gaps.

38. In the present case, I am satisfied that no reasonable disclosure was made as required by section 20 and that the deficiencies cannot be made good as a matter of obvious inference. I take each of the requirements in section 20(5) in turn:

(a) The qualifying loan or quasi-loan:

39. The statute calls for identification of the qualifying loan or quasi-loan. A loan or quasi-loan is a qualifying loan or quasi-loan if it is made on or after 6 April 1999 and before 6 April 2016. In my judgment, the effect of the statute is accordingly that the taxpayer must identify a specific amount *which is referable to a loan or quasi-loan* and the date on which it was so constituted.

40. These details are not provided by the AAG1. The AAG1 is a document submitted by the scheme promoter, not by Sensor or any other scheme user, and as such relates to the scheme in general and not to any particular arrangements that may have been made under it. It cannot therefore be said to identify any particular loan or quasi-loan, merely the mechanism by which such loans or quasi-loans might be made in the future.

41. Nor is the required information supplied by any of the notes to the accounts referred to above. Nowhere in them is there any clear statement that there is a specific amount of money which amounts to a loan or quasi-loan. The closest is the Related Party Disclosures note 11 in the 2012 accounts. However, this only refers to unspecified transactions having taken place between Sensor and the directors, the natural inference being that monies were lent to the directors giving rise to a debt from the directors *to the company* which was repaid after a few days. If this was intended to be a description of the quasi-loans in issue here, it was nowhere near complete or accurate since a quasi-loan under the scheme depended on the directors undertaking an obligation to the *trustees*.

42. A further oddity is that note 11 refers to two transactions in specific amounts totalling £673,160 having taken place on 30 November 2011. This on the face of it is inconsistent with note 5 which refers to a maximum amount of only £330,000 have been awarded for the 2011 year and £350,000 for the 2012 year. (The reference to "maximum amount" in itself means that the figures cannot be exact.) Mr Thornhill suggested that the explanation might lie in the fact that the awards were made in the 2012 year but were in part referable to the 2011 year. However, this does not appear on the face of the documents and is no more than speculation. As noted above, the underlying purpose of confining "reasonable disclosure" to information contained in the tax returns was in my judgment precisely to avoid HMRC having to embark on an exercise of joining the dots in this fashion.

(b) The person to whom the qualifying loan or quasi-loan was made

(c) The arrangements in pursuance of which or in connection with which the qualifying loan or quasi-loan was made

43. Had sufficient disclosure of the qualifying loans or quasi-loans been made, I accept that there would have been sufficient disclosure of Mr Williams and Mr Copleston as the recipients and (via the AAG1) of the arrangements in connection with which they were made. Since, however, there was no disclosure of the relevant quasi-loans, it necessarily follows that there cannot have been disclosure of either the persons to whom they were made or the arrangements pursuant to which they were made.

(d) Information sufficient for it to be apparent that a reasonable case could have been made that the amount concerned was payable to HMRC

44. Mr Richardson concluded that this requirement was not satisfied in circumstances where note 10 to the 2012 accounts expressly recorded the directors' belief that awards out of the scheme would not result in any PAYE/NIC liability.

45. I would not have found against the Claimant on this point alone. If the quasi-loans had been disclosed by virtue of AAG1, then it seems to me that the information available would have been sufficient for HMRC reasonably to have concluded that tax was payable even though note 10 did not explicitly state that the avoidance of tax was because of the EFRBS. I accept Mr Thornhill's submission that HMRC had consistently been challenging schemes of this nature and that the mere assertion of the taxpayer that there was no liability could not reasonably have been regarded as conclusive.

46. For the reasons given above, however, I am satisfied that Mr Richardson was entirely correct to conclude that, even taking into account the AAG documents, there was no reasonable disclosure of the quasi-loans and that necessarily none of the other requirements of section 20(5) was satisfied.

The internal guidance

47. It was not in dispute that the existence of unpublished guidance is not itself unlawful. It was likewise uncontentious that there is a well-established body of authority to the effect that it is unlawful and unfair for a decision-maker to have regard to an unpublished policy which is inconsistent with a published policy, at least without giving the target of the decision an opportunity to make submissions on it. This is indeed no more than a particular manifestation of the common law duty of fairness: see *Timson (supra); R (Lumba) v Secretary of State for the Home Department*, [2011] UKSC 12; [2012] 1 AC 245; *R (Lupepe) v Secretary of State for the Home Department*, [2017] EWHC 2690 (Admin).

48. However, Mr Clayton fairly accepted that the Claimant's case under this head did not get off the ground unless he could demonstrate in this case that HMRC's unpublished internal guidance contained different criteria to those set out in its published guidance and that Mr Richardson applied such criteria when reaching his decision.

49. I was referred to a considerable quantity of guidance on the operation of the DRRS, both published and internal. The document on which Mr Clayton principally relied was a three-page note headed *"Reasonable disclosure for the purposes of the loan charge"*. This contained within it an example. The details of the example do not matter for present purposes; what is relied upon is the text which immediately follows:

> *"For the above example, we need to look at whether the criteria stated in the legislation has been met to constitute a reasonable disclosure.*
>
> (a) *It identifies the loan or quasi-loan – yes, the transfer of assets to Mr Smith, as well as Mr Smith undertaking to fulfil obligations to EBTs was set out, so the quasi-loan was identified. N.B. although the information does not specifically mention the terms 'loan' or 'quasi-loan', this can be inferred from the arrangements described."*

50. On the basis of this text, Mr Clayton argued that there was an inconsistency between the internal guidance and the published guidance in that the former indicated that it was permissible to draw inferences and thereby showed that HMRC were prepared to look beyond the words which appeared on the face of the tax returns.

51. I am not persuaded by this submission. Indeed, I cannot see that the document sets out any "policy" at all. Rather, as Mr Stone submitted, it is simply addressing the question of labelling and reflecting HMRC's understanding that precise terminology does not have to be used, provided the substance of what has been done is clear – namely, in the example, that assets had been transferred to Mr Smith and Mr Smith had undertaken obligations to the EBT. As noted in paragraph 41 above, however, not even this information was vouchsafed in the present case.

52. In any event, there is a further problem with reliance on this document which is that it did not in fact apply to section 20 of the Act at all. Rather, as the court was informed by Mr Stone, it was a guidance note addressing section 17 of the Act, which related to different matters, albeit couched in similar terms so far as reasonable disclosure was concerned. In those circumstances, it is far from clear that Mr Richardson actually took this note into account when conducting his review in this case by reference to section 20.

53. In reply, Mr Clayton submitted that Mr Richardson had obviously taken it into account as it was referred to in his witness statement as part of the corpus of documentation to which he had had regard. I note that this was at odds with Mr Clayton's opening submissions in which he expressly

said that it was difficult to see what importance could be attached to it since Mr Richardson did not state what use he made of it. More fundamentally, it seems to me that there is real distinction between (i) acquiring a general understanding of how the legislation worked from reading a variety of policy documents and guidance dealing with different aspects of that legislation on the one hand, and (ii) relying on specific guidance in making a particular decision. There is nothing in Mr Richardson's statement to suggest that he had regard to the document in question for the latter purpose as opposed to the former.

54. In short, the internal guidance relied upon goes no further than – at most - making clear that it is substance rather than labelling which is important and that obvious inferences can be drawn. In that regard, I can discern nothing in this which is in any way inconsistent with HMRC's published guidance. Indeed it is an approach which the courts would undoubtedly say was inherent in any fair approach to decision-making and hardly needed to be spelled out. Even if Mr Richardson did specifically rely on the guidance, therefore, it is difficult to see how this would have resulted in any unfairness.

55. Mr Clayton also relied, albeit with rather less conviction, on a step-by-step guide to conducting reviews under the DRRS. This included a statement that *"Key Documents"* would include any enquiry notices or assessments for the years affected. It also set out a possible template for the review decision which suggested the following wording:

*"**The evidence that I have seen***

I have had access to all the documentation and correspondence relevant to your settlement.

Background

[Include details of the scheme(s) the applicant was involved in, any enquiries opened or assessments issued, any details suggesting they were aware of protected/unprotected years during settlement or have challenged HMRC's power to recover previously etc]"

56. He submitted that this showed that the material relevant to a review went beyond the four corners of any tax returns and that the reference to enquiry notices/assessments in particular went further than the published guidance.

57. I do not accept that any reliance can be placed on the wording of the template letter. Any template plainly needs to be adapted or tailored to fit the facts of the particular decision under review and the suggested wording might or might not be appropriate. In no sense can this be said to amount to an unpublished policy. As for the reference to enquiries, this goes no further than enquiry notices and assessments. It does not purport to suggest that all the documentation generated by an enquiry would be relevant. In so far as it did, it would be contrary to the terms of section 20 beyond which, as I have held above, HMRC had no power to stray. Again, therefore, there can

have been no unfairness to the Claimant in the fact that Mr Richardson did not seek to take account of any documentation relating to the enquiry into the 2012 year.

58. In these circumstances, it is strictly unnecessary to consider whether the Claimant was unfairly denied an opportunity to make submissions on the unpublished guidance as to the appropriate inferences to be drawn and the appropriate documents to be looked at. However, I would not in any event have accepted that there was any unfairness in this case. As discussed in paragraph 27 above, the common law duty of fairness is context sensitive and depends on the facts. The principles of fairness *"are not to be applied by rote identically in every situation"* (*per* Lord Mustill in *R v Secretary of State for the Home Department, ex p. Doody,* [1994] 1 AC 531, 560). The critical consideration in every case is whether a person who is affected by the operation of the policy knows everything he or she needs to know in order to make informed and meaningful representations to the decision-maker before the decision is made.

59. In the present case, all that the Claimant needed to know was the requirements of the statute itself. These were in the public domain and were addressed in detail in the letter of 26 August 2022 which Mr Richardson confirms he took into account. More than that, every single one of the submissions that Mr Clayton suggested in his skeleton argument the Claimant would have wanted to make to Mr Richardson in relation to the unpublished guidance *was in fact made* to him in that letter. *Lumba* and *Lupepe* on which he relied heavily were very different cases, neither of which seems apposite to the present circumstances. In *Lumba*, the applicant was detained pursuant to an unpublished policy which was inconsistent with the defendant's published policy and so had no way of knowing what criteria had been applied. *Lupepe* involved the unilateral imposition of a curfew by the Home Office in the exercise of its discretion to grant bail pursuant to an unpublished departmental policy. The applicant thus had no opportunity to make submissions at any stage. In the present case, by contrast, the decision under challenge was taken following an application *by the Claimant* who was able to make submissions on the only criteria which mattered, namely the statute, and took full advantage of that opportunity.

Section 31(2A)

60. Section 31(2A) of the Senior Courts Act 1981 provides that the court must refuse relief on an application for judicial review if it appears highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

61. It will be apparent from everything that I have said so far that the Claimant faces an impossible task in demonstrating that this hurdle is not met by HMRC. On the basis of my conclusion as to the ambit of the enquiry under section 20(5), the AAG and enquiry documents were wholly

irrelevant to the decision which needed to be made. HMRC were obliged to assess the question of reasonable disclosure by reference to section 20(5) and (8) and had no discretion to go further. Thus, even if there had been some unlawfulness or unfairness in the decision reached by Mr Richardson, the Claimant would still not be entitled to repayment unless it could show that reasonable disclosure had been made within the meaning of the statute. In any event, Mr Richardson did look at the AAG documents and even on that basis he reached the right conclusion which I am satisfied would not have been different had the correct AAG1 been before him. The enquiry documents disclosed by HMRC take the matter no further.

62. For these reasons, I conclude that it is not only highly likely but inevitable that the same decision would have been reached even if the conduct complained of had not occurred. For this reason also, the application must fail.

Duty of candour

63. Finally, I deal briefly with the allegation that HMRC were in breach of their duty of candour in failing to disclose documents relating to the 2012 enquiry. As already stated, HMRC did disclose all the documents which they currently hold. Nothing daunted, Mr Clayton pursued the submission on the basis that the duty was breached because HMRC failed to say what searches they had carried out or how the correct AAG1 form came to be located when it had not previously been found. He submitted that I should infer from this alleged breach that HMRC were in breach of the common law duty of fairness. In circumstances where the only documents in HMRC's possession have been disclosed, I am not persuaded that a failure to specify the searches carried out amounts to a breach of the duty of candour.

64. But even if it did, I have to confess that I struggled to follow the argument. Try as I might, I cannot see how a breach of candour in relation to subsequent judicial review proceedings can possibly have tainted a decision reached by Mr Richardson in 2023. It is clear from Mr Richardson's statement that he did not look for *any* enquiry documents. Either he was under an obligation of fairness to do so and his decision is unfair because he did not, or he was not. Either way, a subsequent breach of the duty of candour would seem to be irrelevant. It certainly cannot justify the inference that Mr Clayton invited me to draw.

Conclusion

65. For all the reasons set out above, permission to amend is refused, the amendments having no real prospect of success. The application for judicial review is likewise refused.