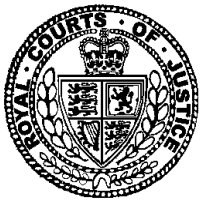

Neutral Citation Number: [2020] EWHC 1588 (Admin)

Case No: CO/3245/2019

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 June 2020

Before :

LADY JUSTICE SIMLER DBE
And
MRS JUSTICE WHIPPLE DBE

- -

Between :

ANTHONY ASHBOLT and SIMON ARUNDELL	**Claimant**
- and -	
(1) HER MAJESTYS REVENUE & CUSTOMS	**Defendant**
(2) THE CROWN COURT SITTING AT LEEDS	

- -
- -

Mr Jonathan Fisher QC and Mr James Lake (instructed by **Bird & Bird LLP**) for the **Claimants**
Mr Andrew Bird (instructed by **HMRC Solicitors Office and Legal Services**) for the **Defendants**
The Second Defendant did not appear and was not represented

Hearing dates: 6 May 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

LADY JUSTICE SIMLER DBE

Lady Justice Simler and Mrs Justice Whipple:

Introduction

1. Her Majesty's Revenue and Customs (referred to below as "HMRC") have been conducting a criminal investigation (known as Operation Skeet) into suspected offences of fraud by false representation and cheating the public revenue. Anthony Ashbolt and Simon Arundell (together referred to as "the claimants") were among a number of individuals suspected of having submitted documents to HMRC which were and were known by each of them to be false. The criminal investigation into Mr Ashbolt commenced on 11 January 2018 and in relation to Mr Arundell commenced on 16 March 2018.

2. The claimants' application for judicial review concerns the lawfulness of the issue of search and seizure warrants by the Crown Court sitting at Leeds on 15 March 2019 in respect of both of their home addresses and the business address of Simon Arundell ("the Warrants") as part of that criminal investigation. The Warrants were executed on 14 May 2019 and the claimants were each arrested and interviewed. There is no challenge to their arrests and interviews. Warrants were issued and executed in respect of home and/or business addresses of other individuals in Operation Skeet but they have not been challenged.

3. The application for search warrants was prepared by an HMRC officer, Philip Hirst, pursuant to section 114(2)(a) of the Police and Criminal Evidence Act 1984 (PACE"). The application itself was made pursuant to section 9 of PACE. Mr Hirst gave evidence in support of the application to His Honour Judge Mairs at the hearing on 15 March 2019, and the judge acceded to the application and made the orders sought.

4. By their grounds of claim, the claimants contended that the Warrants were unlawfully issued and executed. Permission to challenge the lawfulness of the execution of the Warrants (insofar as it was an independent challenge to that relating to their issue) was refused by Sir Duncan Ouseley, who otherwise granted permission to apply for judicial review. Further, although it appeared that the challenge extended to the decision of HMRC to apply for search warrants, that challenge has not been pursued, and the application accordingly proceeds as a challenge to the lawfulness of the issue of the Warrants.

5. Mr Jonathan Fisher QC with Mr James Lake, who appear for the claimants, advance two principal grounds in support of the claim. First, they submit the Warrants could (and should) not have been issued unless the judge was satisfied that there were reasonable grounds for believing that an indictable offence had been committed and there were no such grounds. The evidence before the judge demonstrated only that the claimants had engaged in lawful tax avoidance, and not evasion, and there were no reasonable grounds for believing they had acted dishonestly. Secondly, the Warrants were neither necessary nor proportionate. In particular there were other less invasive methods by which the material could have been obtained. It was open to HMRC to obtain production orders instead and insufficient material was placed before the judge to explain why service of production orders would have been bound to fail. There was no sufficient basis for thinking that the investigation may be seriously prejudiced if the claimants were put on notice of an application for a production order. The claimants accordingly invite the court to quash the Warrants and require HMRC to

return all material (including copies of any such material) seized when the Warrants were executed and to undertake that no use shall be made of any knowledge gained from any unlawfully seized material.

6. The application is resisted. Mr Andrew Bird who appears on behalf of HMRC, contends in summary that offences of fraud by false representation contrary to sections 1 and 2 of the Fraud Act 2006 and cheating the public revenue contrary to common law were being investigated and there were ample grounds for believing that one or both of those offences had been committed by the claimants. Secondly, Mr Hirst's evidence before HHJ Mairs was that alerting the claimants to the existence of a criminal investigation "would give rise to the risk that relevant evidence may be destroyed, concealed, or fabricated, or that collusion [might take] place between the suspects and/or the scheme promoters". In other words, his evidence was that other methods of obtaining the material were bound to fail. The judge was entitled to accept that evidence and to conclude in consequence, that the purpose of the search might be frustrated or seriously prejudiced if notice were to be given. Accordingly, HMRC submit that the Warrants were both necessary and proportionate. Mr Bird submits in the alternative, that if for any reason the court concludes that the Warrants should be quashed, the terms of the relief granted should permit HMRC to retain digital images and copy material to be used in the event of future criminal proceedings in accordance with the approach of the Divisional Court in *Cook v SOCA* [2011] 1 WLR 144 and *R (Cummins) v SOCA* [2010] EWHC 2111 (Admin). It will be open to the claimants to apply under section 78 PACE to exclude any such material relied on, on grounds of unfairness, in any subsequent criminal proceedings.

7. The issues for determination are accordingly as follows;

   i) Issue 1: whether the judge was entitled to find that the "first set of access conditions" in Schedule 1 paragraph 2 of PACE were satisfied, and in particular that there were reasonable grounds for believing that an indictable offence had been committed: paragraph 2(b).

   ii) Issue 2: If so, whether the judge was entitled to find (a) that other methods of obtaining the material had not been tried because it appeared to HMRC they were bound to fail; and (b) the additional criterion in Schedule 1 paragraph 12 and 14(d) was satisfied, namely that service of notice of an application for a production order "may seriously prejudice the investigation".

   iii) Issue 3: what if any relief should be granted in the event of any finding of unlawfulness?

8. Before dealing with the facts it is convenient to set out the legislative framework and the legal principles applicable to this application.

The Legal Framework

9. Section 9(1) PACE provides for "a constable" to obtain access to certain material for the purposes of a criminal investigation by making an application under Schedule 1 of PACE. Although not a constable, it is common ground that Mr Hirst is entitled to make an application for a search warrant to obtain access to material pursuant to section 9 and Schedule 1 of PACE.

10. Schedule 1 makes provision for a circuit judge to issue three types of order: a production or access order pursuant to paragraph 4 of Schedule 1; or a search warrant pursuant to paragraph 12. There are access conditions that must be fulfilled before any such order can be made. These are set out at paragraphs 2 and 3 of the Schedule. The necessary conditions may be fulfilled by satisfaction of the first or second set of access conditions in the case of all three orders; but for a search warrant, in addition, one of the additional conditions set out in paragraph 14 must be fulfilled.

11. Here, in support of the application for search warrants, HMRC relied on fulfilment of the first set of access conditions at paragraph 2, together with the additional conditions set out at paragraph 14 (d) of Schedule 1.

12. So far as relevant, schedule 1 provides:

> "1. If on an application made by a constable a judge is satisfied that one or other of the sets of access conditions is fulfilled, he may make an order under paragraph 4 below.
>
> 2. The first set of access conditions is fulfilled if—
> (a) there are reasonable grounds for believing—
> (i) that an indictable offence has been committed;
> (ii) that there is material which consists of special procedure material or includes special procedure material and does not also include excluded material on premises specified in the application, or on premises occupied or controlled by a person specified in the application (including all such premises on which there are reasonable grounds for believing that there is such material as it is reasonably practicable so to specify);
> (iii) that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made; and
> (iv) that the material is likely to be relevant evidence;
>
> (b) other methods of obtaining the material—
> (i) have been tried without success; or
> (ii) have not been tried because it appeared that they were bound to fail; and
>
> (c) it is in the public interest, having regard—
> (i) to the benefit likely to accrue to the investigation if the material is obtained; and
> (ii) to the circumstances under which the person in possession of the material holds it, that the material should be produced or that access to it should be given.
> 3. …
>
> 4. An order under this paragraph is an order that the person who appears to the judge to be in possession of the material to which the application relates shall—
> (a) produce it to a constable for him to take away; or
> (b) give a constable access to it,
> not later than the end of the period of seven days from the date of the order or the end of such longer period as the order may specify.
>
> …
> 12. If on an application made by a constable a circuit judge—
>
> (a) is satisfied—
> (i) that either set of access conditions is fulfilled; and
> (ii) that any of the further conditions set out in paragraph 14 below is also fulfilled in relation to each set of premises specified in the application; or
> (b) …
> he may issue a warrant authorising a constable to enter and search the premises …

> …
> 14. The further conditions mentioned in paragraph 12(a)(ii) above are—
> (a) …;
> (b) …;
> (c) …;
> (d) that service of notice of an application for an order under paragraph 4 above may seriously prejudice the investigation."

13. As is clear, there are a series of increasingly stringent safeguards that must be satisfied depending on the intrusive nature of the order applied for by HMRC. The more intrusive the order, the more exacting are the safeguards. Because intrusive search warrants were sought here, before he could issue the Warrants, the judge had to be *satisfied* of each of the following:

a) there were reasonable grounds for believing (i) that an indictable offence had been committed; (ii) there was material which consisted of or included special procedure material … on premises specified in the application, or on premises occupied or controlled by a person specified in the application….; (iii) the material was likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made; and (iv) the material was likely to be relevant evidence; and

b) other methods of obtaining the material had not been tried because it appeared they were bound to fail; and

c) it was in the public interest having regard to the benefit likely to accrue to the investigation if the material was obtained and the circumstances under which the person in possession of the material was holding it, that the material should be produced or that access to it should be given; and

d) in relation to each set of premises specified in the application, that service of notice of an application for an order under paragraph 4 above may seriously prejudice the investigation.

14. The Divisional Court has considered the meaning of the underlined words and phrases in Schedule 1 of PACE in a number of cases. These include *R(S) v Chief Constable of the British Transport Police* [2013] EWHC 2189 (Admin), [2014] 1 WLR 1647, *R (Newcastle United FC) v Leeds Cr Ct and HMRC* [2017] EWHC 2402 (Admin), [2017] 4 WLR 187 and *R (Hart) v HMRC* [2017] EWHC 3091 (Admin). From these cases we extract the following principles of relevance here, all of which were a matter of common ground between the parties:

a) The test of "reasonable grounds for believing" in the first set of access conditions means just that. It does not require proof that any criminal offence has in fact been committed. At the end of the investigation, there may be an innocent explanation for what has happened: see *Newcastle United FC* at [84].

b) In relation to the access condition in paragraph 2(b) (ii) (other methods of obtaining the material not tried because "it appeared that they were bound to fail") the

circuit judge must be satisfied that the reason for not trying to obtain the material by other means was that it appeared to the officer making the application for the warrant that such other means were bound to fail. In other words, what matters is the belief of the officer making the application at the time the application is made. This involves a question of judgment for the officer, based on his or her knowledge of the investigation so far and the evidence available. There must be cogent grounds for the belief; a bare assertion will not do. If the officer has explained the reasons for believing that other methods were bound to fail, in terms that are reasonable and compelling, he or she will have fulfilled the requirement: see *R(S) v Chief Constable* at [34] and *Newcastle United FC* at [92] and [93].

c) In relation to the additional condition in paragraph 14 (d), if a search warrant is to be issued the circuit judge must be *personally satisfied* that the service of notice of an application for a less intrusive measure (a production or access order of which the target will self-evidently have notice and an opportunity to object) "may seriously prejudice the investigation". This additional requirement "of judicial satisfaction" (as Holroyde LJ described it in *Hart*) at the time the order is made provides an additional safeguard for the owner of premises against whom the intrusive measure of a search warrant is sought: see *Newcastle United FC* at [94] and *Hart* at [16].

15. Finally so far as tax law is concerned, it is common ground that in order to address the widespread practice of seeking to disguise taxable income as purported loans to avoid income tax, Parliament introduced legislation (see section 34 and Schedule 11 of Finance (No.2) Act 2017) taxing, by way of a "loan charge", outstanding loan balances if they have not been fully taxed or repaid on or before 5 April 2019. The legislation was foreshadowed in the 2016 Budget. It operates by aggregating all outstanding loans at that date and taxing the aggregate amount as if it were income received in a single year. The effect of this is that a user of loan schemes is likely to pay more tax at higher rates under the loan charge than would have been paid by way of income tax for the year in respect of which taxable income was paid by way of purported loans.

16. The claimants were users of tax schemes promoted by Baxendale Walker LLP (or its successor Buckingham Wealth LLP) that involved the setting up of a remuneration trust known as the Self-employed Remuneration Trust (SERT) and Corporation Remuneration Trust (CRT) respectively. HMRC contend that these schemes involved the use of purported loans to disguise what was in fact taxable income and are caught by the loan charge. Even if that is the case, as HMRC inevitably accept, tax avoidance is not tax evasion. The two are different, and tax avoidance is not itself illegal, and involves no necessary dishonesty. Although Mr Fisher does not accept the Remuneration Trusts are necessarily caught by the loan charge, he does now accept that the claimants used another scheme promoted by Baxendale Walker LLP that sought to "rebrand" the purported loans as something that falls outside the scope of income tax and the new loan charge. It is this "rebranding" as it has been described subsequently that is said to give rise to a belief that criminality has occurred and is central to HMRC's case. The rebranding would not have been necessary if the Remuneration Trust arrangements were not caught by the loan charge, as Mr Fisher was driven to accept.

The written application for search warrants

17. Applications for orders under section 9 and Schedule 1 of PACE are required to be made on a standard form specifically designed to be used for this purpose, with sections that direct the applicant to provide the necessary, specified information. Mr Hirst completed and signed the written application form running to about 30 pages, together with appendices A to F. He identified the two indictable offences he was investigating as fraud by representation and cheating the public revenue, and set out the basis for his belief that both claimants had committed these offences. The basis started with an explanation of the civil enquiries into the use of disguised remuneration tax avoidance schemes, described by him as "not necessarily illegal", and the fact that a criminal investigation commenced only after documents (identified as "Fiduciary Receipts Agreements", or "FRAs") believed to be false and designed to mislead, were submitted by the claimants (and other suspects) and led to an evasion referral.

18. Mr Hirst stated in the application form that the FRAs subsequently submitted to HMRC were documents "*on which they have knowingly made false representations in order to circumvent legislation brought in to make loans received through these types of scheme taxable. The total estimated amount of tax evaded by the suspects [the claimants and other individual taxpayer users] is believed to be £3,018,000*." He explained that "*what is in truth taxable income and was previously mis-described as a purported loan is now being called a "fiduciary arrangement" or similar. This investigation concerns attempts, through the submission of fraudulent documentation [the FRAs and Memorandum of Fiduciary Receipts], to retrospectively re-describe the purported loans as fiduciary receipts, in doing so evading the tax which is to become due under the loan charge."*

19. Mr Hirst then set out the way in which the Baxendale Walker LLP SERT and CRT schemes operate. In summary, a remuneration trust for the user is established by deed with the purpose of providing discretionary benefits to providers of service, products, custom and finances to their business and dependents. The scheme user lends the remuneration trust the sum of £100 per month on an ongoing basis in order to establish himself as a provider of services and a potential beneficiary of the trust. A "personal management company" (PMC) is set up, usually in the UK, of which the scheme user is a director and shareholder. The scheme user makes contributions to the remuneration trust each year under the terms of a written resolution. The amount of contribution is usually equivalent to the profit from their business for that year, and is treated as an expense against the profits of the business, thereby reducing or eliminating the scheme user's liability to pay income or corporation tax and, in the case of self-employed users, national insurance contributions as well. The assets of the remuneration trust are passed (with relevant approvals) to a holding company. All rights to apply and deal with the property, income and capital of the holding company are then given to the scheme user's PMC under the terms of a Fiduciary Services Agreement. The scheme user then takes a loan from the PMC in their capacity as a provider of services or as a beneficiary of the remuneration trust. The claimed position is that, as the loan is taken in the scheme user's capacity as provider of services/beneficiary of the trust and not in their capacity as owner/director of the business, the transaction is not subject to income tax. The loan from the PMC is initially subject to a 10 year term but is renewable at expiry for successive 10 year

periods. HMRC's understanding and belief is that renewals are intended to be repeated indefinitely and that the loans will never be repaid in the scheme user's lifetime. Accordingly it is HMRC's belief that these arrangements are designed to disguise remuneration of the user and avoid tax on that remuneration.

20. Mr Hirst explained that during the course of the civil enquiries (which have been ongoing for a number of years) into the use of Baxendale Walker LLP SERT and CRT schemes, HMRC was provided with copies of finance agreements and/or documents entitled "Memorandum of Further Advances" from all but one of the individuals suspected of these indictable offences. These state that the money received by the users was received in the form of loans from their PMC. In the agreements, the user is specifically described as "borrower" and the PMC as the "lender" and the agreements state "the lender has agreed to provide the borrower with loan finance of [a specified amount]". Mr Hirst annexed a copy of a finance agreement dated 23 July 2012 and a Memorandum of Further Advances, in respect of one of the other taxpayers to whom the application also related, as an example of a typical loan agreement and typical memorandum produced and signed by users of these schemes. The documents were typically signed by the user in their capacity as borrower or as both borrower and lender.

21. In relation to Mr Ashbolt and Mr Arundell, paragraphs 33 to 46 and 65 to 83 respectively of the application relate specifically to their participation in remuneration trust schemes promoted by Baxendale Walker LLP, identifying for example the dates of entry into the scheme, the names of the holding companies and the PMCs in each of their cases. In the case of Mr Ashbolt, the application described copies of Memorandum of Further Advances made to him during the period 10 January 2011 and 14 November 2011, on which his PMC, TAL Management Ltd, is shown as lender and Mr Ashbolt as borrower, and is signed by him both as lender and as borrower. Neither Mr Ashbolt nor Mr Arundell had provided a finance agreement, and Mr Arundell had not provided any Memorandum of Further Advances, but these documents were believed to have been in existence at some time and Mr Hirst expected to find them (or at least secondary evidence of their existence) at their premises if the Warrants were issued.

22. Mr Hirst continued that since about 2017, HMRC had begun to receive FRAs and documents entitled "Memorandum of Fiduciary Receipts" from users of the Baxendale Walker LLP schemes. A copy of a signed FRA from the taxpayer in respect of whom a finance agreement and Memorandum of Further Advances had previously been supplied (see above), is annexed to the application. Mr Hirst stated that the wording on all FRAs seen by HMRC from users of the SERT and CRT schemes was identical. The FRAs claim that the rights of the user's PMC are vested in and assigned to the user as "fiduciary" for the PMC; and that this position was agreed on or before the date of the first loan payment to the user.

23. In the case of Mr Ashbolt, having previously submitted copies of Memorandum of Further Advances (dating from 10 January 2011 and showing TAL Management Ltd as lender and himself as borrower, thereby confirming scheme was originally considered to provide for purported loans) he submitted an FRA in respect of TAL Management Ltd signed by him, stating it was made on 15 March 2017 and claiming to confirm the agreed position as at 18 February 2008. This claimed position is that

the rights of TAL Management Ltd are vested in and assigned to Ashbolt as fiduciary for TAL Management Ltd. Mr Hirst stated,

> "It is believed that submission of the FRA is a deliberate attempt to "re-describe" the loans made by TAL Management Ltd to Ashbolt with the sole purpose of circumventing the loan charge and evading the tax that would become due on those loans at 5 April 2019."

24. In the case of Mr Arundell, his accountant submitted an FRA to HMRC on 5 February 2018, together with a number of copy Memorandum of Fiduciary Receipts for the period 7 April 2015 to 4 January 2016. The FRA is in identical terms to the other FRAs and Mr Hirst made the same points as he made in relation to others. In addition however, he made the point that it did not refer to an agreement made more recently (for example in 2017 around the date of submission). Instead, it states that it is "made on 14th day of January 2011" between Mr Arundell and Simi Management Ltd, claims to confirm the agreed position as at that date, and is signed by Mr Arundell purporting to sign it on 14 January 2011. Mr Hirst explained that the primary issue with this is that the Principal in the FRA dated 14 January 2011 – Simi Management Ltd – did not exist as a company under that name until 25 September 2013 (it was called BriSim Management Ltd from incorporation until that date) and consequently he believed the FRA cannot reflect the accurate position as at 14 January 2011 and is therefore a false document. The same is said to be true of the Memorandum of Fiduciary Receipts provided on his behalf, purporting to record receipts by him as the "Obligated" from Simi Management Ltd, the "Principal", on various dates between 7 April 2015 and 4 January 2016, pursuant to a Fiduciary Receipts Agreement dated 14 January 2011, and signed by him on behalf of both Principal and as Obligated.

25. Furthermore, in his case, bank statements obtained by way of a production order granted in August 2018 against his bank, showed transfers during the period 14 January 2011 to 5 April 2018 from Simi Management Ltd's bank account to Mr Arundell's current account totalling a little over £1.6m. There are a number of occasions when a Memorandum of Fiduciary Receipts disclosed by Mr Arundell's accountant corresponds (both in amount and date) to a transaction shown in the bank statements, but on no occasion is the transaction described as a fiduciary receipt. Moreover the nature of the payments suggested by the bank statement narrative (and no doubt entered contemporaneously by Mr Arundell as sole director of Simi Management Ltd) is either stated to be a "loan from RT" (in other words Remuneration Trust) or appears to be personal expenditure, such as Warwick School fees, and thus in each case is inconsistent with the representation made by the Memorandum that it is evidence of a genuine, contemporaneous fiduciary receipt. Mr Hirst stated,

> "it is therefore believed that the amounts received by Mr Arundell were in fact… loans and that the memorandum of fiduciary receipts and the FRA have been created after the events in order to retrospectively re-describe what were originally loans with the sole purpose of circumventing the loan charge and evading the tax that would become due on those loans at 5 April 2019…."

26. The application also indicated that in the case of Mr Ashbolt, he marketed plans devised by Baxendale Walker LLP in addition to being a user of the SERT/CRT schemes himself; and in the case of Mr Arundell, the website of Foy Wealth Ltd (his company), describes him as an independent financial adviser involved in trust and tax planning, using various schemes and strategies. Mr Hirst refers to material obtained from other sources as confirming that in addition to Mr Arundell being a user of the Baxendale Walker LLP SERT/CRT schemes, Foy Wealth Ltd has acted as an "introducer" for Baxendale Walker LLP schemes and has introduced a number of its own clients to them. Mr Hirst concludes in summary,

> ""… I believe that… Ashbolt …. and Arundell were fully aware that the money they received from their PMCs was in the form of (purported) loans and not in the capacity of fiduciary, as claimed by the submission of the FRAs. All, as well as using the schemes for themselves, are known to have marketed or introduced others to the schemes and therefore have a good understanding of the mechanics of how the schemes operate and would know that the claims made on the Agreements were untrue. I therefore believe that by signing and submitting a FRA, or causing one to be submitted, on which they have claimed to be acting (and long been acting) in a fiduciary capacity for the money received from their PMC, and that this position was agreed on or before the date that the first loan was advanced, they have knowingly and dishonestly made a false representation (of the facts, namely retrospectively re-describing purported loans as fiduciary arrangements) in order to avoid paying the loan charge, thereby causing a loss to the UK Treasury."

27. At section 2 the application specified the material sought, listing it in relation to each individual targeted. It set out why Mr Hirst believed the material to be likely to be of substantial value to the investigation and to be relevant evidence, including that the material if discovered would prove that "*all of the funds transferred from the suspects PMC to their current account are in fact loans or taxable income and are being dishonestly described by the suspects to evade the loan charge that is soon to come into effect."*

28. Mr Hirst ticked "no" to the question "have you tried to obtain the material any other way?" and in answer to what methods he considered trying but rejected as bound to fail, explained,

> "Throughout HMRC's civil investigations, both with the suspects and others, the pattern has been that questions relating to subjects other than the Remuneration Trust have been complied with by either the user or their representatives and relevant information has been supplied to HMRC. In contrast, responses received to questions regarding the Remuneration Trust and associated transactions, whether purportedly from the taxpayer or their agent, are all very similar in style and tone and it is believed that these responses are written/orchestrated by representatives of the scheme promoter. The nature of these

> communications have typically been evasive, uncooperative and obstructive, and information has only been provided to HMRC after protracted correspondence and the issue of Information Notices, which it is believed have not been fully complied with. Requests to meet with users of the schemes to discuss their Remuneration Trusts have consistently been declined. It is, therefore, believed that if the required information were requested from the suspects or their advisers either voluntarily or by means of a production order, it would not be provided expeditiously or completely."

29. Mr Hirst went on to explain that if the individuals became aware of a criminal investigation being conducted, that in turn would give rise to the risk that relevant evidence may be "*destroyed, concealed, or fabricated, or that collusion takes place between the suspects and/or the scheme promoters. This would frustrate further investigation of the offences*." The public interest and proportionality of obtaining warrants for this material was dealt with and Mr Hirst identified arrangements made for dealing with material that might be mixed with items subject to legal privilege.

30. In section 3 of the form, dealing with the specified premises to be searched, Mr Hirst ticked to indicate that he was applying for the issue of warrants in respect of more than one set of specified premises so that the table at the end of the form would be completed instead of that section. The table to be completed has three columns, all of which were completed in relation to each individual target, providing, in column (a) the address of each premises to be searched, and in column (b) the reasons for believing material to be on those premises. The text in the form above the table states "*one of the four further conditions listed in box 3(c) must be fulfilled. In column (c), indicate which applies and explain briefly why*."

31. It is clear from what Mr Hirst said in column (c) that he was relying on condition (iv) listed in box 3(c) "*service of notice of an application for a production order under paragraph 4 of PACE Schedule 1 may seriously prejudice the investigation*" (which corresponds to the condition in paragraph 14(d) of Schedule 1 of PACE). Mr Hirst explained in relation to both claimants that he could not be

> "approached prior to executing the warrant as it is believed that access to the premises would not be immediately and voluntarily granted. This is due to the serious nature and value of the offences being investigated and the possible significant consequences of being prosecuted.
>
> The purpose of the search may be frustrated or seriously prejudiced unless an officer arriving at the premises can secure immediate entry to them. There is the risk that without immediate access, relevant evidence may be concealed, destroyed or even fabricated which would frustrate the purposes of the search and the further investigation of the offences, which include submission of false documentation to HMRC."

32. In section 7 of the application, headed "Duty of disclosure", among other matters Mr Hirst stated that,

> "it could possibly be said that users of the scheme, and the suspects in this investigation, considered the claims made on the FRA is to be legitimate, or alternatively may feel that they have been "duped" as to the legitimacy or legality of any variations to it. However, whilst there may be some merit in such an argument in relation to "ordinary" users of the scheme, due to the fact that… Ashbolt… and Arundell are additionally known or believed to have marketed Baxendale Walker LLP schemes and introduce their own clients to them, it is believed that they have a full understanding of the mechanics of how the schemes operate. They knew therefore that the position claimed by the FRA was not true and that they have signed and submitted the agreement, or caused to be submitted, knowing the information on it to be false."

The hearing before HHJ Mairs

33. This took place at 2pm on 15 March 2019. There is a transcript of the hearing attended by Mr Hirst and counsel instructed for HMRC. The judge asked a number of questions. Two particular exchanges are relevant. First, he said,

> "Now, each of the suspects may say, "well, look, I depend upon advice from Baxendale Walker, you know, in the same way as you depend upon advice from your accountant, Dr or whatever else, therefore, I have no reason to believe that any of this was dishonest or was wrong.… What do you say in relation to that as a submission?"

Mr Hirst answered,

> "Yes. As I have mentioned on the application itself, there may be some argument for that, we think, with ordinary users of the scheme, however, because all of the suspects on the applications are known to be introducers or sub- promoters of the scheme, we believed they have an in-depth knowledge of the way the scheme works and would know that the document that they submitted contained false information."

The second exchange took place after he had given judgment when he said,

> "As a supplementary, I should have asked you, and did not, when you say in your report about answers being evasive or being uncooperative, can you give me an example of that?"

Mr Hirst answered,

> "Yes. There will be several examples, but normally what happens is, whenever they are asked a direct question, they tend

> to reply with another question or ask under what legislation we are allowed to ask that question in the first place. They have made complaints in just about every case that I have seen, groundless, in my opinion, complaints, and just tried to be as obstructive and delay things as much as they possibly can."

34. The judge gave judgment setting out the factual basis for the application and the particular circumstances relevant to each individual. Significantly he held,

> "There are a number of evidential matters I am satisfied of, which form reasonable grounds to believe that these FRAs are a deliberate and dishonest misrepresentation designed to avoid liability. Firstly, the FRAs state that the user has been a fiduciary since at least 2011 and, anachronistically, no agreement was submitted to HMRC prior to 2017 and, importantly, no agreement was signed before the changes in the law making these loans taxable.
>
> Secondly, during civil enquiries into four of the suspects… which has been ongoing for some time, no mention was made of any FRA, but payments were referred to universally as loans. Finance agreements and memoranda [of] further advances detail borrower, lender and loan. They were signed by parties in their capacity as borrower or lender.
>
> Thirdly if the FRA accurately reflects the relationship at the professed time, there would be no requirement in fact for a loan agreement.
>
> [Fourthly] Production orders granted in August 2018 reveal that the money received has not been held in a fiduciary capacity for the benefit of the trust but has been spent on lifestyle expenses and, furthermore, we have the example of Arundell using funds from Simi Management Ltd, it would appear, directly to fund lifestyle expenses.
>
> [Fifthly] An identical template has been used for all of the FRAs and I have considered the example provided at appendix C.
>
> Lastly, and importantly, the knowledge and experience possessed by each of the suspects who held themselves out as experts in the field of tax planning and wealth management indicate that they knew the FRA was a false representation and had a full knowledge of how the system operated. Each of them operated as an introducer to Baxendale Walker in a professional capacity and, therefore, did not solely rely on information from Baxendale Walker as to the nature of the agreement and the nature of their tax liability."

35. It is unnecessary to set out the other findings made by the judge in support of his conclusion that the statutory criteria were met and the Warrants should be issued, save to indicate that the judge expressly addressed paragraph 2(b) of Schedule 1 PACE (but did not separately refer to paragraph 14). He held,

> "Paragraph 2(b), other methods of obtaining the information. Throughout the civil investigation answers in relation to material dealing with the trusts has been broadly identical, evasive and uncooperative. Information notices have not been complied with fully and, given the suspects are unaware of the criminal investigation, there is a real risk that such evidence as is available would be dissipated by them."

Issue (1) – The access conditions (and in particular the "indictable offence" criterion)

36. The central argument advanced on behalf of the claimants is that the evidence placed before the judge demonstrated that the claimants had engaged in lawful tax avoidance, in other words, arrangements reducing their liability to tax which are perfectly lawful, and not evasion or criminality of any kind. The claimants utilised loan agreements to reduce their liability to tax but that involved no question of illegality and was not dishonest. Following the implementation of legislation for the loan charge, Mr Fisher accepts that the claimants changed the nature of the agreement from a loan to an FRA. However the efficacy and legitimacy of the FRA has not been decided as a matter of law and there is no suggestion that it was dishonest to seek to avoid the loan charge nor that the "rebranding" was per se dishonest.

37. In terms of the FRAs, Mr Fisher submits that there was no concealment from HMRC as to what was going on: the claimants were open and transparent about the fact that there was a prior position relating to a debt and an existing loan relationship. They did not conceal the identity of the parties to that prior agreement. Mr Ashbolt's FRA did not seek to disguise or hide the date upon which the agreement was made and to the extent that Mr Arundell's FRA reflected a 2011 date, it was the only one submitted to HMRC to have this discrepancy and it must have been obvious to HMRC that the date of the agreement on the face of his FRA was an accidental slip or mistake. Far from supporting a case of deliberate concealment and/or dishonesty, the terms of the FRA demonstrate transparency and support the proposition that the claimants were seeking to avoid tax due, rather than evade it. Moreover, Mr Fisher relies on the fact that the FRA is plainly a template designed by Baxendale Walker, the architects and promoters of the scheme. The claimants did not hold themselves out to be tax advisers or tax lawyers, and although they may have known more about the scheme than other ordinary users, the mere fact that they introduced other users to the scheme provides no evidential basis for concluding that they acted dishonestly and in agreement with Baxendale Walker. Mr Fisher submits that this last point is underscored by the fact that no criminal investigation has even been opened in relation to Baxendale Walker or Buckingham Wealth as they now are.

38. Drawing the threads together, Mr Fisher submits that the indictable offences relied on require the claimants to have acted dishonestly. That involves subjective knowledge of the material facts (here the submission of the FRAs and Memoranda of Fiduciary Receipts to HMRC) and a requirement that this conduct was dishonest by reference to the objective standards of ordinary decent people (see *Ivey v Genting Casinos (UK)*

Ltd t/a Crockfords [2017]UKSC 67 at [74]). However, this test was not addressed by HMRC in the application and was neither addressed nor considered by the judge. The first five reasons identified by the judge (set out at paragraph 34 above) as a basis for concluding that reasonable grounds were made out, simply addressed the question whether there was a false representation. The only point going to the question of dishonesty is the final point, but the mere fact the claimants acted as intermediaries is not enough and dishonesty does not follow. Had the question of dishonesty been confronted squarely by the judge in accordance with the test set out in *Ivey*, he submits that the judge would inevitably have concluded that there were no reasonable grounds for believing that the claimants were dishonest.

39. Forcefully as those submissions were made we do not accept them. We accept, of course, the well-established distinction between lawful tax avoidance and illegal tax evasion. Whether the schemes used in this case are effective to avoid tax depends on the provisions of the tax legislation in question and is a separate and different question that does not arise for consideration here. Tax avoidance moves from lawful conduct to criminal conduct when it involves the deliberate and dishonest submission of false documents to HMRC with the intent of gain by the taxpayer in question and loss to the public revenue. The question for the judge was whether he could be satisfied there were reasonable grounds for believing that an indictable offence had been committed. In our judgment there were ample and sufficient grounds for him to be so satisfied for the reasons that follow.

40. First, the documents believed by HMRC to be false were the following documents submitted on behalf of the claimants to HMRC under cover of letters from their accountants:

> (i) in Mr Ashbolt's case, the FRA purportedly dated 15 March 2017 and recording the terms of an arrangement between him and TAL management Ltd *as at* 18 February 2008, signed by him both for himself and as director of TAL management Ltd; and
>
> (ii) in Mr Arundell's case, there were two categories of documents submitted to HMRC: the FRA purportedly dated 14 January 2011 recording the terms of an arrangement between him and Simi Management Ltd *as at* that date, signed by him both for himself and as director of Simi Management Ltd; and numerous Memoranda of Fiduciary Receipts purportedly dated between 7 April 2015 and for January 2016.

41. Secondly, and as Mr Bird submits, there were reasonable grounds for HMRC's belief that the FRAs were false documents. Although the claimants now concede that following the implementation of the loan charge legislation they *"changed the nature of the agreement from a loan to a FRA"* this was not admitted in the course of the civil enquiries and the claimants did not themselves refer to this as a rebranding exercise. There were no FRAs submitted to HMRC until 2017, after the announcement of the loan charge legislation in 2016. Moreover, and notwithstanding ongoing civil enquiries for many years, there had been no mention whatever of FRAs or that users were acting in a fiduciary capacity, until users of these schemes (or their advisers) began to submit them in 2017. Instead all correspondence received by HMRC from users or their advisers referred to money received from PMCs as loans.

42. The FRAs state that the user had been a fiduciary from a date on or before the first advance by way of purported loan; in other words, they purport to set out what had always been the position, namely payments having been made on trust when the position represented had always been that the payments were made by way of purported loan, and all the paperwork was consistent with payments having been purported loans. In the case of Mr Ashbolt, the "position as at" date recited in the FRA was 18 February 2008, which coincides with the date he entered into the CRT scheme; in the case of Mr Arundell the "position as at" date recited in the FRA (and the purported date of the FRA itself) was 14 January 2011 which was the date of the first advance to him by way of loan. (In fact we note from the template disclosed by the claimants that the instruction from Buckingham Wealth was to *"insert date of first loan"*.) If there had been a fiduciary agreement as at that date then the payments would not have been described as loans and there would have been no need for a loan agreement if the scheme user was agreed to be acting in a fiduciary capacity.

43. The FRAs did not reveal that they were a re-branding of payments formerly made by way of purported loan. They referred to each claimant as being "indebted" to his company (as at 18 February 2008 in the case of Mr Ashbolt and as at 14 January 2011 in the case of Mr Arundell) whereas the true position was that at those earlier dates the agreement was that payments would be by way of loan (or at least the remuneration would be described as by way of loan). The bank account statements reflecting use of the funds for personal day-to-day living or lifestyle expenses also contradicts the suggestion that the funds were received in a fiduciary capacity.

44. In Mr Arundell's case the FRA was also itself backdated to 14 January 2011. We do not accept Mr Fisher's submission that this was obviously an accidental slip or mistake (save as Mr Bird submits, in the sense that, when completing this paperwork, Mr Arundell or his advisers may have entered the false date in two places rather than one). It seems to us in this regard, that HMRC was entitled to rely on the additional documents submitted on behalf of Mr Arundell to back up the FRA, namely the Memorandum of Fiduciary Receipts. Each had a different date of "further receipt" (of payments at various dates in 2015 and 2016) but all gave the date of 14 January 2011 as the date of the FRA. This repeated conduct is inconsistent with an accidental slip or mistake. Further, given the backdating to January 2011 is said to have been a mistake, each document must have been created after the event, with a false date inserted into it to match the date when a payment (contemporaneously said to have been an advance by way of loan) was made.

45. Moreover, these documents supported HMRC's belief that the FRA was not simply a backdated declaration of trust over an existing (2017) obligation to repay pursuant to a loan, but a representation that each payment (previously termed a loan or advance) was a payment made on trust. The bank statement evidence demonstrated that, on a number of occasions, a Memorandum of Fiduciary Receipts submitted by Mr Arundell's accountant corresponded precisely in amount and date with a transaction reflecting personal expenditure by him (school fees and the like) shown in the bank statements. This is inconsistent with the representation made by the Memorandum that it is evidence of a genuine, contemporaneous fiduciary receipt. Moreover, on a number of occasions, where the narrative in the bank statement reflects a payment as "loan from RT" Simi Management Ltd must have told the bank that the payment to Mr Arundell was being made by way of loan from the remuneration trust in 2015 or

2016, yet the receipt produced describes it as a fiduciary receipt. These matters afford an ample basis for being satisfied there were reasonable grounds for believing these documents too were false.

46. Nor do we accept Mr Fisher's submission that the claimants were transparent in their use of FRAs as lawful replacements to the loan agreements. The FRAs do not refer to a pre-existing "loan" obligation, and do not state that "loans had been made". The reference to an existing "indebtedness" or "Obligation" does not reveal that there was a loan in existence, whether at the date of the FRA or at the inception date referred to in each FRA. Rather, the recital to each FRA sought to represent that a fiduciary agreement had *always* been the arrangement from the outset (2008 or 2011). Far from being transparent, it seems to us that HMRC was entitled to rely on the backdating of documents and the recording of false facts in recitals as a hallmark of dishonesty and to view the submission of these documents as consistent with an intention to evade payment of the loan charge.

47. Thirdly and so far as the important question of dishonesty is concerned, it is true that the judge was not referred to the test set out in *Ivey*. However, we see no material error in that omission. The threshold test was whether there were reasonable grounds for believing an indictable offence had been committed. There was no requirement to prove that any criminal offence had in fact been committed or to prove that the claimants had in fact been dishonest. As Lord Hughes explained in *ARA (ex parte) (Jamaica)* [2015] UKPC 1 at [19] the test is concerned not with proof but the existence of grounds (reasons) for believing (thinking) something, and with the reasonableness of those grounds. The real question was whether there were reasonable grounds for believing that an offence involving dishonesty had been committed, and importantly on this judicial review challenge, whether there was material before the judge upon which he could be satisfied that there were reasonable grounds for believing that deliberate false statements were made (with the requisite intention) and that there was dishonesty.

48. The difference between "avoidance" and "evasion" was drawn to the judge's attention: the written application drew specific attention to the fact that the claimants had entered into a disguised remuneration tax avoidance scheme which was *"not in itself necessarily illegal"* but by contrast, they had *"subsequently submitted a document to HMRC on which they have knowingly made false representations…"* and thereby acted in a way that was criminal.

49. The judge expressly considered whether the claimants might have been innocent dupes (as reflected in the exchange referred to at paragraph 33 above). The evidence given by Mr Hirst in response to the judge was that "ordinary" users of the scheme had not been targeted for criminal action, but the claimants' position as professional advisers was different. They introduced others to the scheme which led HMRC to believe that they would have a good understanding of the mechanics of the scheme and its operation and would know that the claims made on the FRA (and in the memoranda) were false statements. Significantly, there were reasonable grounds to believe that each of the claimants knew of and could be taken to understand the original arrangements (in the CRT/SERT schemes) between him (as an individual taxpayer) and the company (of which the claimant was the director) which was making the payments. In or after 2017 each claimant signed his FRA, on behalf of both the purported trustee and the purported beneficiary. There were reasonable

grounds to believe that each claimant knew that the dates given in the FRA and memoranda, and the statement of the "agreed position" as at that date were false. By objective, ordinary standards, there were reasonable grounds to believe this was a dishonest attempt to rebrand what had previously been described as loans.

50. We agree with Mr Bird that whether there was (additionally) a conspiracy between the claimants (or each of them) and Baxendale Walker LLP (or Buckingham Wealth LLP) was not a matter which the application needed to address. It was sufficient for the purposes of the application simply to demonstrate reasonable grounds for believing that an offence of fraud by making a false representation had taken place, and/or that what was afoot was dishonest conduct to the prejudice of the revenue. We also agree with him that whether the claimants might (honestly) have relied on legal opinions of counsel (subsequently disclosed to HMRC) did not arise on the application, as neither Mr Hirst nor any other HMRC investigator had possession of these documents. They had not been volunteered by the claimants in the course of the civil enquiry, and HMRC would not have been entitled to see them as they would have been subject to legal professional privilege.

51. For the reasons we have given, on the basis of the evidence, as explained to the judge, we are satisfied that HMRC had a coherent case and reasonable grounds for believing that each claimant had been dishonest rather than honest, and so had committed an offence of cheating the public revenue and/or fraud. The judge was entitled on the evidence and as a matter of law to conclude that reasonable grounds had been made out accordingly.

52. This ground of challenge therefore fails.

Issue (2) – Were access condition 2(b) (ii) (other methods not tried because appeared bound to fail) and the additional condition set out at paragraph 14 (d) (service of notice of an application for a production order may seriously prejudice the investigation) fulfilled?

53. On this issue the claimants' essential case is that the Warrants ought not to have been granted since there were other less intrusive methods by which the material could have been obtained. Mr Fisher emphasises the high threshold imposed by the words "bound to fail" in Schedule 1 para 2(b) of PACE, submitting that it is consistent with a warrant being issued only where necessary, for example, where documents/materials are likely to be destroyed. He criticises HMRC's written application for failing to draw the judge's attention to *Hart* (and in particular paragraph 57) and for failing to explain and particularise the basis for concluding other less invasive methods of obtaining the material could not be utilised. Although *Hart* was laced with issues of nondisclosure, he submits that the thrust of the decision is that lack of cooperation or evasiveness is not a sufficient basis for concluding less intrusive methods are bound to fail. Here, he submits, HMRC's decision rested on mere lack of cooperation. There was insufficient material placed before the judge to explain why service of production orders would have been bound to fail. The opinions expressed by Mr Hirst in the written application are no more than bare assertion and not based on any compelling reasoning.

54. Mr Fisher relies on the fact that it was only after giving judgment that HHJ Mairs turned his mind to the issue of obtaining the material by other methods, as

demonstrated by the exchange (see paragraph 33 above) that took place between him and Mr Hirst after he had given judgment.

55. He submits that the claimants had cooperated with HMRC during the civil investigation. The claimants willingly submitted the FRAs, and although he accepts that further questions relating to the FRAs were not answered, he submits there was nonetheless reasonable cooperation. This material would have been disclosed willingly under a production order and there is no reason to think that production orders were bound to fail. Moreover, it was wrong to group the claimants together; they were not known to each other; and this was not a fair reflection on them as individuals.

56. Finally, Mr Fisher submits that even if the judge was entitled to be not satisfied that the claimants cooperation was true cooperation, the material still fell well short of providing a basis to believe that if put on notice of an application for a production order, the claimants might prejudice the investigation by concealment, destruction of documents or computer records, or by improper influence of others in relation to answers given to questions HMRC might ask of them. *Hart* places into sharp focus the requirement that service of notice of an application for a production order "may seriously prejudice the investigation of each suspect" and this was simply not established on the material available to the judge.

57. Mr Bird resists these submissions and contends there was sufficient material before the judge to explain why the access condition and the additional condition were satisfied. In particular he relies on the following:

    i) the extent of the claimants' co-operation with the civil enquiry was set out by Mr Hirst in the written application. In summary, the claimants had *"typically been evasive, uncooperative and obstructive, and information has only been provided to HMRC after protracted correspondence and the issue of Information Notices, which it is believed have not been fully complied with".*

    ii) Mr Hirst expressed the view that alerting the suspects to the existence of a criminal investigation "*would give rise to the risk that that relevant evidence may be destroyed, concealed, or fabricated, or that collusion takes place between the suspects and/or the scheme promoters*."

    iii) In consequence he said, "*The purpose of the search may be frustrated or seriously prejudiced unless an officer arriving at the premises can secure immediate entry to them. There is the risk that without immediate access relevant evidence may be concealed, destroyed or even fabricated which would frustrate the purposes of the search and the further investigation of the offences, which include submission of false documents to HMRC*."

    iv) Against that however, he made clear that there had been partial cooperation by the claimants during the civil enquiry; they were both of good character and each was involved in the provision of tax planning and wealth management solutions and that Mr Ashbolt was an Independent Financial Adviser.

58. The judge was aware of the need to be satisfied that the additional criterion in paragraph 14(d) of Schedule 1 had to be fulfilled. The relevant statutory provisions

were set out in the Notes which accompanied the written application. Mr Bird accepts that despite being represented by counsel at the hearing of the application, HMRC did not draw attention to the case of *Hart.* However, he submits it was not necessary to do so. In *Hart* a warrant was quashed because the officer had not provided the judge with the necessary information. It did not create any new law. In the instant case the necessary information was provided, and the judge was able to reach a fair conclusion. Individual consideration of the position of each individual target was given by HMRC as demonstrated by the entries in the table relating to specified premises to be searched and the "full and frank disclosure" section of the application form. As for the question asked by the judge following his judgment, this was simply a request for an example of answers having been evasive or un-cooperative. It was not a fresh topic upon which there had been no prior evidence. He submits that the judge would no doubt have reversed his decision had the answer given her cause for concern that the statutory criteria were no longer met.

59. We have found resolution of the second issue more difficult than the first, largely because of the way in which the judge expressed his judgment, but ultimately we have concluded that the judicial review challenge on this ground also fails. Our reasons follow.

60. The two safeguards afforded by these conditions (contained in paragraphs 2(b)(ii) and 14(d)) are aimed at the common purpose of ensuring that search warrants are only issued where there is no less intrusive measure which is likely to be effective for the purposes of the investigation. However they are different, separate conditions and should be separately addressed by judges dealing with applications for search warrants.

61. So far as the first is concerned (paragraph 2(b)(ii)), the judge must be satisfied of two things. First that other methods of obtaining the material have not been tried and secondly, that the reason for not trying to obtain the material by other means is that "it appeared" to the officer making the application for the warrant that such other means "were bound to fail". The judge must consider what the investigating officer believed at the time of the application and be satisfied of it.

62. As was made clear by the Divisional Court in *Newcastle United FC* (at [93]), whether or not a less intrusive method appeared bound to fail is a matter of judgment for the investigator based on their knowledge of the investigation and the evidence then available. The investigator must have cogent grounds for his or her belief that there is no less intrusive measure available which is likely to be effective in securing the relevant documents, based on a suspicion that the relevant material will be disposed of or hidden if advance warning is given. A bare assertion of such a belief is insufficient if the basis of that belief is not adequately explained in a focused application dealing with the actual facts of the case.

63. Separately, the second condition (paragraph 14(d)) requires judicial satisfaction that any lesser measure (a production order made on notice thereby putting the target on notice of the investigation) "may seriously prejudice the investigation". In other words, the judge must be satisfied that a search without notice is justified by the potential for serious prejudice to the investigation if notice of it is given. In this way, paragraph 14(d) contains an additional safeguard, above and beyond the condition at paragraph 2(b): see [16] of *Hart,* to which we have already referred.

64. It seems to us that the reasons for believing that an on notice application for production orders would be an ineffective means of pursuing the investigation are explained in clear and compelling terms in the written application. They do not rest on mere lack of cooperation as Mr Fisher contended. The reasons were common to all premises and all suspects, but that was at least in part a result of the fact that (as Mr Hirst explained in the written application) the responses given by the targets (including the claimants) to date had all been similar and appeared to have been *"written/orchestrated by representative(s) of the scheme promoter"*.

65. The reasons given by Mr Hirst were, in broad terms, the following. First, this is a case in which he believed that the claimants' conduct had crossed the line from legitimate tax avoidance and become criminal conduct constituting tax evasion. Like the judge, we have decided that on the material available he had reasonable grounds for this belief. He explained this to the judge in the written application, dealing clearly with the deliberate, knowingly false statements made in the FRAs and memoranda, and why there were reasonable grounds to believe the claimants were dishonestly attempting to "rebrand" historic transactions previously described as loans to evade the loan charge. Secondly, although there had been some reasonable cooperation during the course of the civil enquiry in relation to topics other than the remuneration trusts, questions regarding the remuneration trusts and associated transactions were dealt with in a way that suggested they were orchestrated by the scheme promoter and were typically evasive, obstructive and uncooperative. Information was not provided until the issue of Information Notices and even then, those were not fully complied with. Thirdly, so far as future risk to the investigation was concerned, the targets were unaware that a criminal investigation had been commenced. Given the potentially significant consequences of a criminal investigation of this nature and involving significant value, Mr Hirst believed that if alerted to the fact that a criminal investigation was being conducted (by requests for explanations etc.) there was a risk of relevant evidence (such as documents relating to the original loans) being destroyed and/or minutes of meetings (and/or other documents relevant to the asserted fiduciary arrangements) being fabricated by the claimants who had already engaged, in Mr Hirst's reasonable belief, in fabricating documents submitted to HMRC for tax purposes.

66. The judge conflated the two conditions by dealing with them in a single paragraph of his judgment that referred expressly to paragraph 2(b) but made no express reference to paragraph 14(d) and the additional condition it imposed. It is regrettable that his failure to address these conditions separately was not drawn to his attention immediately after he had given judgment, by HMRC counsel who appeared at the hearing of this application.

67. Nonetheless, in dealing with the question whether there were "other methods of obtaining the information" which were likely to be effective for the purposes of the investigation, having referred to paragraph 2(b), he held (emphasis added):

> "Throughout the civil investigation answers in relation to material dealing with the trusts has been broadly identical, evasive and uncooperative. Information notices have not been complied with fully and, given the suspects are unaware of the criminal investigation, **there is a real risk that such evidence as is available would be dissipated by them**."

68. We have concluded that the judge's conclusion that there was "*a real risk that such evidence as is available would be dissipated by them*" was a finding on the evidence presented that there was a serious risk of prejudice to the investigation if the Warrants were not issued. That being so, the condition in paragraph 14(d) was met, because the judge was satisfied that a warrant was necessary because of the risk of prejudice to the investigation. It is clear to us that in this particular case, the same material supported both conditions. Although the judge did not separately address Mr Hirst's belief that other methods were bound to fail (the paragraph 2(b) condition) before expressing his own view on the evidence (as required to meet the paragraph 14(d) condition), the judge's finding on the evidence effectively dealt with both conditions together: to conclude that there was a risk of dissipation of evidence was to acknowledge a risk of serious prejudice to the investigation; to accept on these facts that there was a risk of serious prejudice to the investigation was to accept, by necessary implication, that Mr Hirst was reasonable in his belief that other methods would be bound to fail.

69. In conclusion, HHJ Mairs was satisfied that the additional condition in paragraph 14 (d) of Schedule 1 was fulfilled because service of notice of an application for a production order might seriously prejudice the investigation. Based on the same reasons, HHJ Mairs also concluded that the condition in paragraph 2(b) was fulfilled: it did appear to Mr Hirst on reasonable grounds that other less intrusive methods for obtaining the documents would be bound to fail. In relation to both conclusions, there was evidence to support these conclusions, and no basis for impugning them on judicial review.

70. In light of our conclusions on the first two issues the question of relief raised by the third issue does not arise and need not be addressed.

Conclusion

71. For the reasons we have given, we reject the challenges to the Warrants. The Warrants were lawfully issued.

72. We are concerned, however, that the judge was not given all the assistance he should have received. He should have been directed to the issues he was being asked to determine, in the context of the legislation. He should have been taken to the case law on that legislation. Specifically, he should have been invited to address paragraph 2(b) separately from paragraph 14(d). This should have been done, ideally, by means of a short skeleton argument filed in advance of the hearing. We hope that HMRC and other public bodies will regard that as standard practice when making similar applications in future. These are invariably *ex parte* applications, where the possibility of appeal is of little comfort to a respondent who may only know of the existence of a warrant after it has been executed. Scrupulous care is required.

73. The application for judicial review is accordingly dismissed and we conclude by expressing our gratitude to all counsel and solicitors involved in this case for the assistance they provided to the court.

ORDER

UPON the application of the Claimants for Judicial Review by a Claim Form issued on 19th August 2019
AND UPON permission to apply for Judicial Review having been granted by Sir Duncan Ouseley dated 27th November 2019
AND UPON hearing leading and junior counsel for the Claimants and counsel for the First Defendant at a remote hearing on 6th May 2020
IT IS ORDERED THAT:

1. The Application for Judicial Review is dismissed.

2. The Claimants shall pay the costs of the First Defendant, summarily assessed in the sum of £25,000.

Signed: Ingrid Simler
Dated: 19 June 2020