Neutral Citation: [2024] UKFTT 00869 (TC)

Case Number: TC09299

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

By remote video hearing

Appeal references: **TC/2020/04309; TC/2020/04310 TC/2020/04311; TC/2020/04312; TC/2020/04313; TC/2020/04314; TC/2020/04315; TC/2020/04316; TC/2020/04317; TC/2020/04318; TC/2020/04319; TC/2020/04321; TC/2020/04529; TC/2020/04531; TC/2020/04532; TC/2020/04533;TC/2022/11529**

*PROCEDURE – Information Notice issued after opening of enquiry – Schedule 36 to the Finance Act 2008 – participants in Mark II Flip Flop arrangements for trust settlements – whether requests are 'reasonably required' – whether documents in the taxpayer's 'power and possession' to produce – whether legal professional privilege applies –* ***appeal allowed in part***

**Heard on:** 23 to 27 January 2023
**Submissions in writing on:** 17 February 2023
& 24 February 2023
**Judgment date:** 20 September 2024

**Before**

**TRIBUNAL JUDGE HEIDI POON**

**Between**

**SARAH JANE TURCAN**
**DAVID C TURCAN**
**GEORGE H DRAFFAN**
**CHLOE M V TURCAN**
**OLIVIA CAMPBELL-SLIGHT**
**KATHERINE L CROFTON -ATKINS**
**RALPH CLARK (EXECUTOR FOR THE LATE MRS ELIZABETH THOMSON)**
**JOHN W TURCAN**
**JAMES H M TURCAN**
**EDWARD H S INGLEFIELD**
**FREDERICK T C INGLEFIELD**
**HENRY J A TURCAN**

**DIANA M TURCAN**
**WILLIAM J C TURCAN**
**GEORGINA L C WOODS**
**JOHN C TURCAN**
**COLIN WISEMAN**

**Appellants**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellants: Aparna Nathan KC and Joshua Carey of Counsel, instructed by Mazars LLP

For the Respondents: Harry Dixon, litigator of HM Revenue and Customs' Solicitor's Office

## DECISION

### INTRODUCTION

1. The appeal proceedings are brought jointly by 17 Appellants, who have in common as beneficiaries having received capital payments from trusts that formed part of the tax arrangements known as the Mark II Flip-Flop Scheme ('**MIIFF**' or the 'Scheme'). The capital payments from the relevant trusts were all made in the year 2002-03. The respondents, HM Revenue & Customs ('HMRC') opened enquiry into each of the Appellants' self-assessment returns for 2002-03 a beneficiary in receipt of a capital payment might be liable.

2. Information requests were made in the process of the enquiry, including Information Notices ('Notices') issued under Schedule 36 to the Finance Act 2008 ('Sch 36') to the Appellants. The subject matter of the joined appeals is the Notices issued to the Appellants on 21 November 2019, which contained a list of items, each of which referred to one or more documents (the 'Items' and the 'Required Documents' respectively).

3. The Appellants appeal against the Notices with the main grounds of appeal being that certain Items/Required Documents sought by HMRC are (a) not 'reasonably required' for checking their tax position, or (b) not in their power and possession to produce, or (c) subject to a claim to legal professional privilege ('LPP') under para 23 of Sch 36.

### Appellants as beneficiaries of related trusts

4. The appeals covered by this decision is set out below in the order of the appeal references. There are five transferor trusts involved in these appeals, namely (i) Turcan 1968 Trust; (ii) Turcan 1972 No.1 Trust; (iii) Draffan 1988 Trust; (iv) Thomson 1988 Trust; and (v) Wiseman 1988 Trust. The Appellants are beneficiaries of the transferee trusts which were linked with the trustee borrowing of the respective transferor trusts detailed as follows.

| | Appeal reference | Appellant as beneficiary of Transferee trust | Related Transferor trusts |
|---|---|---|---|
| 1 | TC/2020/04309 | Sarah Jane Turcan | Turcan 1968 & Turcan1972 No.1 |
| 2 | TC/2020/04310 | David C Turcan | ditto |
| 3 | TC/2020/04311 | George H Draffan | Draffan 1988 Trust |
| 4 | TC/2020/04312 | Chloe M V Turcan | Turcan 1968 & Turcan1972 No.1 |
| 5 | TC/2020/04313 | Olivia Campbell-Slight | ditto |
| 6 | TC/2020/04314 | Katherine L Crofton-Atkins | ditto |
| 7 | TC/2020/04315 | Ralph Clark (Executor for the late Mrs Elizabeth Thomson) | Thomson 1988 Trust |
| 8 | TC/2020/04316 | John William Turcan | Turcan 1968 & Turcan1972 No.1 |
| 9 | TC/2020/04317 | James Henry Turcan | ditto |
| 10 | TC/2020/04318 | Edward H S Inglefield | ditto |
| 11 | TC/2020/04319 | Frederick T C Inglefield | ditto |
| 12 | TC/2020/04321 | Henry Arthur J Turcan | ditto |
| 13 | TC/2020/04529 | Diana M Cheyne Turcan | ditto |
| 14 | TC/2020/04531 | William G Cheyne Turcan | ditto |
| 15 | TC/2020/04532 | Georgina L Cheyne Woods | ditto |
| 16 | TC/2020/04533 | John Cheyne Turcan | ditto |
| 17 | TC/2022/11529 | Colin Wiseman | Wiseman 1988 Trust |

| | | | |
|---|---|---|---|

5. In summary, of the 17 Appellants, 14 of whom are beneficiaries of the two Turcan Family Trusts as indicated above in the table. The 14 Turcan trust beneficiaries are grandchildren to the settlors, whose four children are (i) Henry Turcan (father to Chloe and Henry Turcan); (ii) William Turcan (father to Sarah Jane, James Henry, David Chalres, and John William Turcan); (iii) Lady Inkin (mother to Olivia, Edward, Katherine, and Frederick Inglefield); and (iv) Robert Cheyne Turcan (father to Georgina, John, Diana and William Cheyne Turcan).

6. At the material times, Robert Cheyne Turcan was a partner of Turcan Connell, and acted as a family adviser to the trustees of the Turcan Family Trusts. While there are 17 Appellants in these conjoined proceedings, the children of Robert Cheyne Turcan have waived privilege.

## RELATED SETS OF PROCEEDINGS

### Wiseman's LPP application

7. It is the Appellants' case that some of the Required Documents are privileged and fall within Sch 36, para 23. Most, or all, of the Appellants' appeals were previously stayed behind the final decision in (TC/2020/01360) and the onward appeal from that judgment to the Upper Tribunal under reference UT/2020/000345. Judge Bailey who determined the application on the papers at first instance granted Mr Wiseman's application as respects 10 of the 12 documents for which LPP was claimed, and permission to appeal against the refusal decision over the remaining two documents. Mr Wiseman withdrew his appeal to the Upper Tribunal, and Judge Bailey's decision was published as *Wiseman v HMRC* [2022] UKFTT 0075 (TC).

8. Most, or all, of the Appellants' appeals were previously stayed behind the final decision of Mr Wiseman's LPP application in *Wiseman v HMRC* (TC/2020/01360) and the onward appeal to the Upper Tribunal under reference UT/2020/000345.

### *Interlocutory Decision on other Appellants' LLP applications*

9. In common with Mr Wiseman, Mazars represented the 16 other Appellants in relation to their appeals against the Notices. Mazars is of the view that some of the Required Documents for its clients are privileged and fall within Sch 36, para 23. An outline description of these documents had been provided to HMRC. On the basis of that description, HMRC did not agree that the LPP Documents were privileged, as evidenced by HMRC's letter of 4 October 2019. The parties were therefore in dispute over the LPP Documents before the contended Notices were issued in November 2019.

10. To resolve the dispute as to the status of the LPP Documents, the first 12 Appellants in these proceedings (as tabulated above) applied to the Tribunal on 3 December 2020 (the 'LPP Applications') under the procedure as set out in *Information Notice: Resolution of Disputes as the Privileged Communications Regulations 2009*, SI 2009/1916 (the '**LPP Regulations**'). In response, HMRC made a strike-out application on the grounds that the LPP Applications were out of time for the Tribunal to determine the dispute under the LPP Regulations.

11. The interlocutory matter was heard by Judge Redston, who agreed with HMRC that the LPP Applications were out of time by the strict time limit set out in the LPP Regulations, and the Tribunal has no jurisdiction to hold a separate hearing for determining the LPP Documents for which privilege was asserted for the 12 Applicants, (being the same as the Appellants in these conjoined proceedings, and excepting the 4 Appellants who have waived

privilege and Mr Wiseman whose LPP application was separately made as determined by Judge Bailey).

12. Nevertheless, Judge Redston concluded that 'the issue whether the LPP Documents are privileged must be decided as part of the hearing of the appeals against the Notices', and issued directions that gave rise to the current proceedings.

**Directions for the current proceedings**

13. Judge Redston's directions issued on 28 February 2022 concerned the first 16 Appellants, and lifted the stay of their appeals behind *Wiseman v HMRC*, and for their appeals to be joined and heard together. The directions relevant to setting out the background and the file management of these proceedings are the following (all emphasis original):

(1) In relation to documents for which privilege is asserted:

> **10**. By the same date [ie. not later than 28 March 2022], the Appellants shall serve on HMRC and file with the Tribunal a list of the LPP Documents ("**the LPP List**"), setting out for each Appellant the date of the document, the sender of the document and a brief description (but that description is not to breach the LPP which is asserted to exist).
>
> **14**. The hearing judge will first consider the LPP Documents and related submissions on the papers, without the attendance of the parties or their Counsel. …

(2) In terms of the 'Documents Lists', Direction 17(4)(c) states as follows:

> **17**(c) documents on the Documents Lists which are to be referred to in the hearing on the following bases:
>
> (i) where another Appellant has been required by the Notice **exactly the same document** as that which Dr Draffan has been required to provide, no further copy of that document is to be provided.
>
> (ii) where the document requested of another Appellant is **in any way different** to the similar document which Dr Draffan has been required to provide, a copy of that document must be listed in the Index; and
>
> (iii) for those purposes, a document which is identical in all respects to that provided by Dr Draffan other than the name and address of the recipient and the date of issue is to be treated for the purposes of 17(4)(c)(i) as a document which is exactly the same as the provided by Dr Draffan.

(3) As regards lodgement of the core hearing bundle, the direction is:

> **21**. Not later than 28 days before the hearing the Appellants shall provide to HMRC and the Tribunal by email or electronic transfer a PDF indexed, paginated and bound Documents Bundle in accordance with the draft Index …

(4) The specific directions in respect of the compilation and lodgement of the LPP Bundle are as follows:

> **23**. By the same date, being not later than 28 days before the hearing, the Appellants shall provide the Tribunal with a copy of a bundle including all the LPP Documents ("the **LPP Documents Bundle**"). The LPP Documents Bundle is to be sent by email or electronic transfer …
>
> **24**. The LPP Documents Bundle is to be organised as follows:
>
> (1) The LPP List is to serve as an index, with each document for reach Appellant hyperlinked to its place in the Bundle;

(2) each Appellant is to be identified by a separate tab;

(3) within each of those tabs, each document is to be identified by its own tab;

(4) the documents are to be set out in the same order as the LPP List, so beginning with those for Dr Draffan;

(5) where another Appellant has been required by the Notice to provide **exactly the same document** as that which Dr Draffan has been required to provide, no further copy of that document is to be provided. In such a case, the hyperlink form the index will be to the copy of that document in Dr Draffan's tab;

(6) where the document requested of another Appellant is **in any way different** to the similar document which Dr Draffan has been required to provide, a copy of that document must be included in the LPP Bundle; and

(7) a document which is identical in all respects to that provided by Dr Draffan other than the name and address of the recipient and the date of issue is to be treated as a document which is exactly the same as that provided by Dr Draffan. (Emphasis original)

(5) Listing of documents dispensed with production in reliance of direction 24(5):

**25**. At the same time as filing the LPP Bundle with the Tribunal, the Appellants are to provide:

(1) a list of the documents that have not been provided in reliance on 24(5) above. This list is to take each Appellant in turn, in the same order as used for LPP Documents Bundle;

(2) a submission setting out:

(a) their reasons for considering that each of the LPP Documents are privileged;

(b) the extent of overlap or duplication as between the LPP Documents, so as to provide assistance for the hearing judge in dealing efficiently with the LPP Bundle; and

(3) a bundle of authorities to support their submissions, …

**26**. The LPP Bundle, the related submission and the authorities bundle are not to be filed with the same covering email as the Documents Bundle [for the Sch 36 appeal proceedings]. Instead, they are to be sent under cover of a separate email to the Tribunal, and the text of that email is to state clearly, by reference to these Directions, that the attached LPP related material is to be provided only to the hearing judge and not to HMRC.

(6) As to the Appellants' skeleton argument, Directions 27 and 28 state as follows:

**27**. Not later than 21 days before the hearing the Appellants shall send to HMRC a skeleton argument … and a copy to the Tribunal.

**28**. [Appellants'] skeleton argument is:

(1) first to make submissions about the position of Dr Draffan;

(2) then make submissions about each of the other Appellants, identifying any differences between their position and that of Dr Draffan;

(3) not to include submissions about why a particular document is subject to LPP, but only to the name of that document on the LPP List.

(7) In relation to HMRC's skeleton argument, Direction 29 states as follows:

> **29**. Not later than 14 days before the hearing HMRC shall send to the Appellants and the Tribunal … a skeleton argument … is:
>
> (1) first to make submissions about the position of Dr Draffan;
>
> (2) then make submissions about each of the other Appellants, identifying any differences between their position and that of Dr Draffan.

**Wiseman joining the proceedings**

14. Judge Redston's Directions of 28 February 2024 were concerned with the first 16 appeals that have been joined. Mazars applied for Mr Wiseman's appeal to be joined with the 16 appeals, and the Tribunal granted the application on 5 December 2022 to add Mr Wiseman as the seventeenth Appellant in the current proceedings.

15. A listing (pp43-68 of HB) of 501 documents as concerns the other Appellants which are not produced in the hearing bundle in reliance on Direction 17(4)(c)(i) as related above.

## BACKGROUND TO THE HEARING

**Application to extend time to comply with Directions**

16. By email dated 6 January 2023, Mr Lewis of Mazars wrote to the Tribunal to state that it was a 'joint application with the Respondent' to vary the directions in relation to the dates for lodging the parties' skeleton argument to be lodged simultaneously on Friday 13 January 2023, and for the Authorities Bundle to be lodged on 18 January 2023. The application was granted on referral to me on 9 January 2023, on the basis that it was 'joint' as agreed by both parties, The extension of time was granted without me having any prior knowledge of Judge Redston's Directions to realise the extent of the complexity in the number of bundles to be lodged, and the file management aspects peculiar to these proceedings, and that the Directions had built in the reasonable (and very necessary) provision for the lead-in time for the sequential and orderly lodgement of bundles and various documents relating to these proceedings.

17. Following the grant of the extension of time, the parties provided their respective skeleton arguments as follows:

(1) Appellants' skeleton argument of 15 pages dated 13 January 2023 ('ASA1');

(2) HMRC's skeleton argument of 19 pages dated 13 January 2023 ('RSA');

(3) Appellants' reply to HMRC's skeleton of 6 pages dated 18 January 2023 ('ASA2').

**Bundle errors and corrections**

18. The reading day for pre-hearing application was set to be Friday 20 January 2023, and on 19 January 2023, in reply to my chasing for the Hearing Bundle, the tribunal clerk informed me that the Bundle did not appear to have been uploaded to the Tribunal. The clerk chased HMRC to send through the Bundle, perhaps without realising that it was the Appellants who had been directed to produce the Bundle.

19. The email correspondence of 19 January 2023, Mr Dixon for HMRC wrote to the Tribunal and the Appellants' representative was marked 'Urgent', and was under the subject heading of '*Request for documents and Bundle errors*', attaching documents which were noted to be missing in the hearing bundle lodged by Mazars. There were points being raised

in Mr Dixon's email in response to the Appellants' skeleton argument. Of substance, it is noted that:

(1) At para 20 of ASA2, the Appellants have stated that 'where documents have been requested and been refused', the Appellants 'are content to provide evidence of this at the hearing'. HMRC requested copies of this evidence to be provided prior to the hearing; that the evidence would appear to be readily available to the Appellants, and 'it is not in line with the overriding objective' to withhold this evidence, only to ambush the Respondents with it on the day of the hearing'.

(2) Further, and to the extent that the Appellants do not seek to rely on any documents evidencing the request and refusal, HMRC request that the Appellants confirm this in writing. (In response to this, the Appellants produced a bundle of 53 pages, which was lodged when the hearing was underway.)

(3) Four documents omitted in the Bundle are attached to Mr Dixon's email:

(a) *20150817 Note of telephone conference*, which has consistently been included on the List of Documents and included in the Appellants' Combined List of Documents;

(b) *20160422 Note of telephone conference*, that the one being included on file was produced by Mazars, and is not the one referred to in Mr Bentley's witness statement;

(c) Omission of inclusion of Mr Mackenzie's witness statement;

(d) Mr Bentley's witness statement of 30 May 2022 was included twice whereas the second witness statement of 7 December 2022 was omitted.

20. The bundle errors highlighted by Mr Dixon were addressed in an Amended Bundle. In summary, the Appellants have lodged the following:

(1) The main hearing bundle comprises 2,657 pages, entitled 'Further amendments 19 January' and was forwarded by the Tribunal centre to me by link on 24 January (the original bundle of 2,607 pages was forwarded to me on 20 January 2023) ('**HB**').

(2) An additional bundle of 53 pages regarding attempts by Mazars to contact Turcan Connell as solicitors and advisers for the five trusts ('**AHB')**;

(3) An agreed bundle of authorities of 418 pages;

(4) An additional bundle of authorities of 123 pages.

**Parallel lodgement of LPP Bundles**

21. In addition to the core hearing bundles for the substantive Schedule 36 appeals, bundles and documents were lodged for the LPP ground of appeal at the same time, which comprise:

(1) Original LPP application of 10 pages dated 13 January 2023;

(2) Amended LPP application of 5 pages dated 19 January 2023 (to adduce additional LPP documents);

(3) Original bundle of 126 pages of LPP documents ('**LPP Bundle**');

(4) Additional bundle of 195 pages of LLP documents ('**Additional LLP Bundle**');

(5) Mr Mackenzie's additional witness statement of 19 January 2023 to adduce further LPP documents and remove other documents;

(6) Authorities bundle of 428 pages.

22. On 16 January 2023, the Tribunal centre forwarded links for uploading (1) to (4) listed above; on 20 January 2023, the email containing the multiple attachments in relation to (5) was forwarded for my receipt, when I was at the same time trying to sort out the core hearing bundles and correspondence notifying bundle errors.

**During hearing lodgement of documents**

***Additional Hearing Bundle* (AHB)**

23. Of relevance to the appeal proceedings is the Additional Hearing Bundle of 53 pages which was lodged by email attachment to the Tribunal on 23 January 2023 *when the hearing was underway*; this bundle was produced consequent on Mr Dixon's challenge of the Appellants' Skeleton Argument (at §20 of ASA2), where counsel stated for the Appellants that 'where documents have been requested and been refused'. Mr Dixon's email correspondence of 19 January 2023 highlighted that it is not in line with the overriding objective' to withhold this evidence, only to ambush the Respondents with it on the day of the hearing'; hence the Additional Bundle being furnished in the course of the hearing.

***Email attachments in 3 tranches between Mazars and HMRC in January 2020***

24. On 24 January 2023 when the hearing was underway, Mr David Lewis of Mazars provided the following by email attachments in 'three tranches', being 'the email correspondence sent to HMRC from Mazars on 29 and 30 January 2020'.

> (1) The first chain of email correspondence started with Mr Mackenzie to Officer Whitehead on 23 December 2019, and carried on into 30 January 2020 with 4 attachments: (i) letter from HMRC dated 17 January 2020 to Mazars relating to a MIIFF participant's Sch 36 Notice appeal (unrelated to these proceedings); (ii) a 5-page letter from Mazars to Officer Whitehead dated 29 January 2020 as respects Mr Wiseman; (iii) the letter of engagement of Tenon Limited (dated 9 September 2002) by the trustees of the Wiseman 1988 trust; and (iv) Turcan Connell's letter (dated 27 November 2002) to Mr Wiseman addressed to Mr Wiseman in relation the Wiseman 2002 Trust, enclosing 'a letter which relates to the insurance cover that has been taken out in connection with the recent payments to you from this [transferee] trust'.
>
> (2) The second chain of email from Mazars (Riddoch, Mackenzie, Lewis) to HMRC (Whitehead and Bentley) with 5 big attachments that appear to be the Lists of Documents in relation to: (i) Insurance documents; (ii) Turcan 1968 Trust; (iii) Turcan 1972 Trust; (iv) Draffan Trust; and (v) Trust for Mrs Thomson.
>
> (3) The third chain of email from Mazars to HMRC was with 4 attachments: (i) Mazars' letter of 29 January 2020 for Mr Whitehead's attention regarding the Wiseman 1988 Trust; (ii) the engagement letter of 9 September 2002 of Tenon Limited to the trustees of Wiseman 1988 Trust (Saltire Trustees (Overseas) Ltd) for 'TAX ADVISORY SERVICES' as the heading; (iii) letter of 27 November 2002 by Turcan Connell to Mr Wiseman relating to insurance cover being taken out in connection with the capital payments made by the Wiseman's 2002 Trust; (iv) a letter from HMRC to Mazars regarding a Ms Woods (which clearly is not one of the Appellants in these proceedings).

25. Keeping track of the multiple email attachments within the parties' email communications forwarded as attachments to the Tribunal is like opening multiple sets of Russian dolls all at once – email attachments attaching emails with attachments, and so on and so forth. For the sake of completeness, I have noted here the email lodgements, the contexts of which and the attachments therein are not immediately obvious, and there is an attachment (regarding Ms Woods) which clearly does not relate to any of the Appellants.

26. I have not sought to address each of the documents in these chains of email attachments in turn. I consider their relevance has been dealt with in the parties' attempt to establish the extent of their agreement of which Items of requests have been fully complied with. The contexts of the email attachments will be more immediately obvious to the parties, and as respects where each document is supposed to sit within the categories of Items on the Information Notices under appeal.

***Draffan's additional documents***

27. Some further documents were provided to HMRC on 20 March 2020 after the appeal against Information Notices were lodged but are not included in the core bundle. These were furnished to the Tribunal in the course of the hearing by email attachments, being Dr Draffan's (a) Columbia Insurance Policy; (b) Lloyds Insurance Policy; (c) Tenon Engagement Letter.

***Turcan family tree***

28. During the hearing, Mazars also forwarded a copy of the Turcan family tree, and diagrams to illustrate the flow of funds from the transferor trusts to transferee trusts associated with the Appellants, which help summarise the trust entities and their respective beneficiaries, the relevant details are tabulated above.

***Post-hearing lodgement of documents***

29. The hearing did not complete within the scheduled time for the Tribunal to hear the Respondents' closing submissions (in part due to connectivity issues). The Tribunal issued Directions on 1 February 2023 for the following to be served on the Tribunal and the opposing party in the post-hearing period. The documents for service pursuant to these Directions are summarised below.

(1) Genealogy of trusts diagrams ('**Diagrams**');

(2) **Categories of items** ('**Categories**') to be served by the Appellants, being a schedule to categorise the items of requests on the representative Information Notice issued to Dr Draffan according to the various grounds of appeal per the Appellants' closing submissions;

(3) **Register of documents provided to date** ('**Register**') to be served by the Respondents, being a register of documents that have been provided to HMRC to date, taking as the starting point the 2017 index and to be updated with 'Post-2017 Documents' for the five sets of transferor-transferee trusts as set out in the Diagrams;

(4) **Whether agreement between the parties on Documents having been provided**: The Respondents' updated 'Register of Documents' provided to date should concur with the Appellants' 'Category of items' claimed to have been provided already. Any discrepancies or omissions that cannot be resolved between the parties should be detailed in the contending party's written submissions. (Underlining original for this direction);

(5) Respondents' closing submissions followed by the Appellants' closing submissions in reply.

30. Apart from directing for the sequential lodgement of closing submissions in writing, (after the Appellants' oral closing submissions at the end of the hearing), the Directions were also issued in part to enable that state of affairs to be set out and for any discrepancies to be particularised by the contending party, as there are Items on the Information Notices that the Appellants contend to be fully complied with, while the Respondents do not agree in every instance that the documents sought had been fully provided.

31. The parties complied with the post-hearing Directions and the closing submissions were furnished to the Tribunal as follows.

(1) HMRC's closing submissions of 15 pages dated 17 February 2023, together with 6 pages of tabulated appendices ('**RCS**');

(2) Appellants' closing submissions of 9 pages dated 23 February 2023 ('**ACS**') with a 'Schedule of Categories' of 3 pages in table form.

***Transcript***

32. The Appellants applied for the production of transcript of the evidence, which was approved by me and the transcript of the hearing on 24, 25 and 26 January 2023 is made available to the Tribunal and the Respondents.

**File management challenge**

33. I have found the file management aspect in these proceedings a huge challenge, due in part to the sheer volume of the multiple Bundles and LPP Bundles being lodged all at once in the run up to the hearing, and the complications in the multiple submissions and applications that had followed in quick succession, not to mention the bundle errors and issue of 'ambush' highlighted by Mr Dixon and brought to my attention on the reading day. Another part of the file management challenge is to ensure that the LPP documents are not inadvertently mistaken to be documents that enter the public domain as part of these proceedings.

34. The file management challenge was compounded by the fact that I was not privy to the set of detailed Directions by Judge Redston that gave rise to the specific file management aspects of these proceedings until Friday of 20 January 2023, being the reading day allotted for the preparation for the 5-day hearing, and without the requisite time to supposedly make determination of the LPP documents on the papers prior to the commencement of the substantive hearing on 23 January 2023 as envisaged by the Case Management Directions.

**Delays in the release of Decision**

35. File management challenges apart, the post-hearing period coincided with family illnesses and bereavements, which necessitated overseas trips and sojourns. My sincere apologies to the parties for the delays in releasing this long overdue Decision, the length of which has also contributed to the delays.

**THE PROCEEDINGS**

36. The hearing followed the order of the parties' opening submissions (Day 1), then the Appellants' witnesses were called (Days 2, 3, and 4) followed by HMRC's witness (Day 4), and finished with the closing submissions for the Appellants on the morning of Day 5, with the respondents' closing commencing scheduled for the afternoon. However, due to technical issues, HMRC's closing submissions did not conclude, and were furnished in writing post-hearing, and the Appellants were given a right of reply to HMRC's closing.

**Witness Evidence**

37. The following witnesses were called for the Appellants, who appeared on:

(a) Day 2: Mr Ross Mackenzie of Mazars LLP; Mr R Clark (Executor of Mrs Thomson's estate);

(b) Day 3: James Turcan; David Turacn; John William Turcan; Henry Turcan; Chloë Turcan; Olivia Campbell-Slight; Katherine Crofton-Atkins; Edward Inglefield; (the rest of the Turcan trust beneficiaries were not called due to time constraint);

(c) Day 4: Dr Draffan; Mr Wiseman.

38. For the Respondents, the evidence of Officer Bentley was called on Day 4 after Dr Draffan and Mr Wiseman.

39. I have no issue with the credibility of any of the witnesses, and accept their evidence as to matters of fact.

## RELEVANT LEGISLATION

40. HMRC's powers to obtain information and documents from a taxpayer are provided under Sch 36 of FA 2008, of which para 1 states as follows:

> **1** (1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer") –
>
> (a) to provide information, or
>
> (b) to provide a document,
>
> if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.

41. Part 4 of Sch 36 provides for the restrictions on powers on HMRC to make information requests; para 18 states, under the heading '*Documents not in person's possession or power*':

> **18** An information notice only requires a person to produce a document if it is in the person's possession or power.'

42. In relation to information requests for production of 'old documents', para 20 provides:

> **20** An information notice may not require a person to produce a document if the whole of the document originates more than 6 years before the date of the notice, unless the notice is given by, or with the agreement of, an authorised officer.

43. Statutory conditions to set limitations on the issue of a notice are provided under para 21, which, so far as relevant, states as follows:

> **21** (1) Where a person has made a tax return in respect of a chargeable period under section 8, 8A or 12 AA of TMA 1970 (returns for the purpose of income tax and capital gains tax), a taxpayer notice may not be given for the purpose of checking that person's income tax position or capital gains tax position in relation to the chargeable period.
>
> (2) […]
>
> (3) Sub-paragraphs (1) and (2) do not apply where, or to the extent that, any of conditions A to D is met.
>
> (4) Condition A is that a notice of enquiry has been given in respect of –
>
> (a) the return, or
>
> (b) a claim or election (or an amendment of a claim or election) …
>
> and the enquiry has not been completed so far as relating to the matters to which the taxpayer notice relates.
>
> (5) In sub-paragraph (4), "notice of enquiry" means a notice under –
>
> (a) Section 9A or 12AC of, … TMA 1970, …

44. Under the heading of 'Privileged communications between professional legal advisers and clients', the scope of HMRC's information powers is restricted in terms as follows:

> **23** (1) An information notice does not require a person –
>
> (a) to provide privileged information, or
>
> (b) to produce any part of a document that is privileged.

(2) For the purpose of this Schedule, information or a document is privileged if it is information or a document in respect of which a claim of legal professional privilege, or (in Scotland) to confidentiality of communications as between client and professional legal adviser, could be maintained in legal proceedings.

(3) The Commissioners may by regulations make provision for the resolution by the tribunal of disputes as to whether any information or document is privileged.

45. The legislation governing appeals against information notices is provided under Part 5 of Sch 36, of which para 29 states:

**29** (1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal to the tribunal against the notice or any requirement in the notice.

(2) Sub-paragraph (1) does not apply to a requirement in a taxpayer notice to provide any information or produce any document, that forms part of the taxpayer's statutory records. …'

46. The provisions in relation to an appeal against an information notice to the Tribunal are under para 32, and under sub-paras 32(3) and (5), it is stated:

**32** (3) On an appeal that is notified to the tribunal, the tribunal may –

(a) confirm the information notice or a requirement in the information notice,

(b) vary the information notice or such a requirement, or

(c) set aside the information notice or such a requirement.

[…]

(5) Notwithstanding the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007 a decision of the tribunal on an appeal under this Part of this Schedule is final.

47. The term 'tax position' for Sch 36 purposes is relevantly defined at para 64 as follows:

**64** (1) In this Schedule, except as otherwise provided, "tax position", in relation to a person, means the person's position as regards any tax, including the person's position as regards –

(a) past, present and future liability to pay any tax,

(b) penalties and other amounts that have been paid, or are or may be payable, by or to the person in connection with any tax, and

(c) claims, elections, applications and notices that have been or may be made or given in connection with the person's liability to pay any tax,

and references to a person's position as regards a particular tax (however expressed) are to be interpreted accordingly. […]

## THE FACTS

### Section 9A TMA enquiries

48. The Appellants' Self-Assessment Tax Returns ('SA returns') for the year ended 5 April 2003 were filed on various dates, 11 of which were filed in January 2004 before the deadline of 31 January 2004, 3 of which in February 2004 (within a month after the deadline), and 3 of which in May and July of 2005.

49. HMRC notified the Appellants of their intention to enquire into their SA returns under section 9 of the Taxes Management Act 1970 ('TMA'). All enquiries were notified in 2005, 14 of which in January of 2005, and for the three returns filed in 2005, enquiries were opened

within days of the return filing. All enquiries were therefore opened within the statutory time limit of 12 months after the date of return filing for s 9A TMA purposes.

50. Mazars had acted as agents to Wiseman and Draffan prior to the tax year 2002-03. As to the other 15 Appellants, Mazars' engagement as their advisers in relation to their HMRC's enquiries into their 2002-03 SA returns commenced in September 2014. The other 15 Appellants were previously represented by RSM Tenon Ltd, which was acquired by Baker Tilly LLP ('Baker Tilly') in August 2013 when Tenon Group PLC, the original proposer of the MIIFF scheme, went into insolvent administration in August 2013. Baker Tilly served notice in September 2014 to terminate the contract which Tenon Ltd had with the 15 Appellants, on ground of a perceived conflict of interest.

51. Mazars, on being instructed by the 15 Appellants in 2014, wrote to Baker Tilly to obtain copies of all correspondence of Tenon/Baker Tilly had had with HMRC, and also to Clyde & Co, solicitors to the two insurers of the Scheme.

**Judicial decisions on Mark II Flip Flop**

52. The judicial decisions on MIIFF which are material to the background of the Information Notices are as follows:

(1) *Herman and another v Revenue and Customs Comrs* [2007] SPC 609; [2007] STC (SCD) 571 ('*Herman*'), in favour of HMRC.

(2) *Clive and Julie Bowring v HMRC* [2013] UKFTT 366 (TC) (*'Bowring FTT*') released on 25 June 2013 in favour of HMRC; and

(3) *Clive & Juliet Bowring v HMRC* [2015] UKUT 550 (TCC) ('*Bowring UT*') which was handed down on 12 October 2015, reversed the first-instance decision and found in favour of the taxpayers.

53. Mazars were advised by Tenon that discussions with HMRC took place in January 2012, with a view of reaching some form of settlement. However, according to Mr Mackenzie, Mazars were given to understand that HMRC would only accept full payment of the tax from the Appellants following the *Herman* decision, and that HMRC were expecting *Bowring FTT* would be upheld by the Upper Tribunal, and to become a binding authority for future cases.

54. Given the *Bowring* case was still being litigated, the settlement discussions that started in January 2012 did not proceed any further. There was little correspondence between Tenon/Baker Tilly and HMRC in 2013 and 2014, until HMRC wrote to the Appellants on 11 August 2014 with a summary of decided cases in their favour (i.e. *Herman* and *Bowring FTT*), and invited the Appellants to make an offer of outstanding tax and interest, stating that:

> 'HMRC's position is quite clear in respect of "Mark II Flip Flop" arrangements; they are not effective. This stance is firmly supported by the decided caselaw referred to above.'

**Communications between Mazars and HMRC August 2014 to April 2016**

55. HMRC's letter of 11 August 2014 was before *Bowring UT* was released. It fell on Mazars to respond on behalf of the Appellants in the ongoing enquiries opened into the Appellants' SA returns for 2002-03. The communications between HMRC and Mazars since HMRC's 11 August 2014 letter are as follows.

(1) By email dated 4 November 2014, Mazars confirmed receipt of documents from Baker Tilly to HMRC, and asked for extension of time to meet the information requests.

> 'I [Mr Mackenzie] mentioned the fact that we were awaiting information from Baker Tilly in relation to correspondence between them and HMRC to enable us to respond to your letters. At 16:18 yesterday afternoon, we received emails from Baker Tilly attaching copies of the documentation which they believe is relevant. You will appreciate that the documentation provided is voluminous and we will require some time to review and digest it. With this in mind, I would ask that you grant a further extension to Monday 8 December.'

(2) On 23 December 2014, Mazars wrote to HMRC (marked for the attention of Officer Rose Noble), stating:

> 'We have now received information from Baker Tilly which we have reviewed but unfortunately, this is incomplete. …
>
> It appears from the information provided, that there have been few developments in terms of liaison with Baker Tilly since … January 2013, but the notes of meeting on 11 January 2013 would indicate that matters were left with Baker tilly to consider [HMRC's] calculations … and to revert to [HMRC] by March, with their thoughts. We understand … that you would only be willing to accept a settlement under the Litigation and Settlement Strategy which would equate to the full amount of tax which would be due … but unfortunately, this is not acceptable to our clients or their insurers.
>
> … the insurers and their advisers remain of the view that there is a reasonable basis for anticipating the success of the [*Bowring*] appeal to the Upper Tier Tribunal.
>
> In the circumstances and until a decision has been reached in the *Bowring* case, our clients are not in a position to enter into a settlement. We have no authority from our clients and our clients have no authority from their insurers to offer a settlement.'

(3) On 12 June 2015, Officer Bentley wrote to Mazars LLP under the heading of 'Mark II Flip Flop Scheme – 2002 Enquiries', and advised that 'HMRC still views the Flip-Flop Mark II scheme as ineffective' (based on *Herman* and *Bowring FTT*), and asked for documents relating to: (a) the Turcan 1968 trust beneficiaries; (b) the Turcan 1972 trust beneficiaries; (c) Mrs E Thompson; (d) Dr G H Draffan; and (e) Mr C H Wiseman. An 'informal request' for the documents on a 'trust-by-trust' basis was made as 'the most efficient way to gather the information still needed'; a schedule of documents was attached to each letter for compliance by 7 August 2015.

(4) In a conference call on 17 August 2015, attended by HMRC (Mr Bentley, Martin Roberts, and Rose Noble), Mazars (Mr Mackenzie and Debbi Riddoch) and Clyde & Co (Chris Waddington); a note of the call was prepared by Mr Roberts of HMRC stating:

> (a) Clyde & Co had joined the conference in its capacity as solicitors to the insurer, and would 'represent interests as necessary'.
>
> (b) Mr Mackenzie referred to the previous agreed approach of selecting a representative case and queried why HMRC were departing from that approach.
>
> (c) Mr Bentley explained that his role as a 'technical lead' is 'to make progress in helping to bring the scheme and followers to a conclusion by providing a clear direction'; that HMRC have changed their approach with this type of tax avoidance cases, and Mr Bentley offered to make lists of documents already held by HMRC to assist in highlighting documents that remain outstanding.

(d) Mr Mackenzie mentioned the *Bowring* appeal heard by the UT in March 2015, and asked why HMRC did not wait for the UT decision because 'if it goes against HMRC then his clients' documents will not be needed'.

(e) Mr Bentley responded by saying that he was aware from the enquiry correspondence that 'it had previously been argued for [Mazars' clients that their cases] are different from the decided case, so HMRC need to be certain whether the facts are different or the same.

(f) Mr Bentley agreed to provide lists of documents already held by HMRC.

(5) On 1 September 2015, Officer Noble provided Mazars the agreed list of all the information in HMRC's possession that had been formerly provided by Tenon. The list included documents for each Appellant (other than Mr Wiseman): Deeds of Trust, Deeds of Appointment, Deeds of Indemnity, and minutes of trustees' meetings. (No copies of the actual documents were provided.) HMRC also extended time for compliance with the information requests to 30 October 2015.

(6) In a conference call on 27 October 2015, *Bowring UT* (newly released) was discussed. Mr Bentley advised that the UT decision did not affect the informal information requests; HMRC still needed to determine if the implementation of the scheme for Mazars' clients were 'on all fours' with that of *Bowring*.

(7) By email dated 28 October 2015, Mr Mackenzie wrote to Officer Bentley to ask for an extension of time by 4 weeks to 27 November 2015 for compliance, stating that:

> 'Whilst we have received a box of papers from Turcan Connell for one individual being representative of all of the individuals for whom we are acting, we have not yet been able to review all of the paperwork which has been provided.
>
> We, and our clients, are mindful of the [*Bowring UT*] decision … and wanted to discuss any potential impact of this decision, and the possibility of HMRC submitting an appeal, on our client's position.'

(8) On 26 November 2015, Mazars wrote to ask for a further extension of time to 11 December 2015, stating:

> 'Ray Smith of Clyde & Co [solicitors] is involved in the matter in that his firm are acting for the two insurers. We are currently awaiting confirmation from Ray Smith that the insurers have no objection to our most recent proposed communication with you which we have sent them in draft. On receipt of their approval we will arrange to email the relevant correspondence to you.'

(9) On 11 December 2015, Mazars wrote for extension to 8 January 2016, stating:

> '… Clyde & Co … have not yet received the approval of the insurers to our proposed correspondence with you. … we are not in a position to respond …'

(10) There would appear to be further extension of time, and on 11 February 2016, Mazars wrote with its analysis of *Bowring UT* and proposed to HMRC the following:

> '… our intention would be to review these factors in [*Bowring UT*] and compare those with our clients' circumstances with a view to evidencing that the steps taken by our clients are on "all fours" with those taken by the trustees of both the [transferor trust and the transferee trust in *Bowring*].'

56. In a conference call on 22 April 2016 chaired by Officer Bentley and attended by Mr Mackenzie with a second attendee on both sides, HMRC's note of the call recorded:

(1) The parties discussed the proposal in further details. Mazars wished to present a single case 'on a cradle to grave basis', using the records of Elizabeth Thompson.

(2) Turcan Connell (as solicitors for all the Appellants in relation to the Scheme) apparently had forwarded Mazars with the records of Mrs Thompson only, and Mazars stated that they did not have the records of the other clients.

(3) Mazars explained the concern over costs of 'going through all the paperwork and drawing it together', and a single representative case would minimise costs.

(4) HMRC acknowledged the concern, but remarked that the proposal 'sounded more work than simply sending the documents held'; that if Mazars 'have the records, they could just be sent'.

(5) Mazars explained that 'there were significant papers to go through and not all may be salient to the point at issue'.

(6) HMRC queried why that work had not commenced, since documents had been requested informally in October 2015; extensions had been provided on the basis that the compilation had commenced; a listing had been sent by HMRC detailing the documents already held in an effort to reduce costs; '6 months on and not one document produced'.

(7) HMRC explained that the relevant facts needed to be established in context, and could not be looked at in isolation. The proposal of a single representative case using Mrs Thompson's records was not acceptable to HMRC, and was 'at odds with what HMRC had previously articulated and agreed'.

(8) Officer Bentley explained that there was no alternative but to issue Sch 36 Notices.

(9) Mazars noted HMRC's decision to issue Sch 36 Notices, and said they would provide what they could from the documents held on Thompson.

(10) Mr Mackenzie asked why HMRC did not appeal *Bowring UT*. Bentley referred to the decision being made at a higher level, and that *Bowring UT* is a 'fact-based decision'.

**First issue of Sch 36 Notices on 7 July 2017**

57. After the conference call of 22 April 2016, there is an absence of correspondence in the hearing bundle until 7 June 2017, and that was when HMRC wrote to the Appellants before the first issue of Sch 36 Notices on 7 July 2017.

58. According to Mr Mackenzie's evidence, between 22 April 2016 and 29 March 2017, Mazars had 'extensive correspondence' with Turcan Connell to obtain on behalf of its clients as much of the information requested by HMRC. Mazars' intention was to provide a full file (being a mixed file of documents for Mrs Thomson and Mr Wiseman) to the insurers 'for approval in accordance with the information requirements', with a view to identify documents that may be (a) legally privileged, or (b) not reasonably required, or (c) not in the Appellants' possession or power to produce. That is to say, the documents so identified by the Insurers in the representative file were then 'extracted', and what was left after the extraction, being 'the balance' as referred to by Mr Mackenzie was sent to Mr Bentley on 4 August 2017, together with the appeals against all the Notices issued on 7 July 2017.

**HMRC's view of matter on insurance planning as part of CGT tax planning**

59. On 13 October 2017, HMRC issued their view of the matter that the Notices had not been complied with, and fixed penalty notices were issued to the Appellants on 3 November 2017, (which were appealed by Mazars on 30 November 2017). HMRC's view of the matter in response to the appeal against the Notices issued on 7 July 2017 stated the reasons for certain Documents being sought as follows.

> 'Specifically the insurance arrangement was required as part of the CGT tax planning. Further the very fact that insurance was required suggests there may be some doubt as to the effectiveness of the planning. It is natural that somebody undertaking such tax planning may seek clarity on component parts such as the insurance arrangement. Correspondence between the relevant parties will provide HMRC understanding as to the role the insurance planning played in pursuance of the tax planning.
>
> Any promotional or illustrative material would demonstrate how the scheme was marketed to you and by whom. Further such documents would provide an insight into your motivation for participating in the scheme.
>
> Finally in the absence of copies of the advice provided, invoices issued by advisors or agents would indicate that advice was sought with respect to your participation in the CGT tax planning. In addition the documents would demonstrate that fees were incurred in respect of the design and implementation of the scheme. …'

60. On 14 December 2017, requests for statutory review of HMRC's view of the matter were lodged in the Appellants' ongoing appeal against the Sch 36 Notices issued on 7 July 2017.

**The Insurers' involvement**

61. In November 2017, the files for the other Appellants were sent to the Insurers for approval, to undergo the same process of identifying documents to be extracted before production to HMRC. Mr Mackenzie stated that 'protracted discussions and correspondence ensued over the following six months with the insurers and their legal advisers', but their approval was not obtained as regards the files for each trust submitted to them.

62. A meeting with the Insurers' legal advisers took place on 30 August 2018, and approval was eventually given on 12 November 2018 to approach HMRC to arrange a meeting. The Appellants' approval was then sought by Mazars to proceed.

63. HMRC were first contacted in February 2019 to arrange a telephone conference on 1 March 2019, followed by a meeting on 24 April 2019.

**The meeting of 24 April 2019 with Insurers' representatives joining**

64. The meeting on 24 April 2019 was held at Mazars' Liverpool Office and chaired by Mr Ross Mackenzie ('RM'); other attendees were: Jon Claypole ('JC' for Mazars); Officers John Bentley ('JB'), Carl Whitehead ('CW') and two others (for HMRC); Ray Smith 'present only as observing' (for Clyde & Co), and Malcolm Frost (legal advisers to Insurers).

65. The note of meeting at pp598-601 was prepared by Mazars, (but wrongly stated in the index as the 'Respondents' note of meeting'; Officer Bentley was cross-examined quite extensively in relation to Mazars' meeting note, excerpts of which are as follows:

> '[33] JB stated that it is unclear why certain documents still have not been provided. JB queried whether this was legal privilege? RM responded that the purpose of this meeting was to go back to HMRC's technical analysis. They cannot understand the context [as] to why information is actually

> required if there is no new argument. What is HMRC's new technical argument as they couldn't find a successful argument in *Bowring*?
>
> [34] CW said HMRC haven't had a case since Bowring. This current case might be part of the next batch taken forward. HMRC need a new argument, no new cases pending at present/maybe new arguments in this case.
>
> [35] JB said HMRC appreciates the s90 point but wants to judge all the relevant factors. This has not been presented to HMRC so they would like all relevant documents as they cannot currently reach a conclusion.
>
> [36] RM said that Mazars can't see why technically any additional documents would assist – no mileage.
>
> [37] JB admitted that HMRC is on the back foot. They would be happy to close the case once they have received the relevant facts.
>
> [38] CW added that they need to establish facts so they can develop their technical argument. The only way to progress the case is to have all the facts.
>
> [39] JC asked what the decision making progress [sic process] was at HMRC. JB said that they have an internal governance system. Once the documents were provided they would then run it pass technical colleagues who would determine whether they shared Mazars' view i.e. there was no prospect of success.'

66. Mazars advised Officers Bentley and Whitehead that some of the documents requested were of their very nature legally privileged and some were already in HMRC's possession. It was agreed that HMRC would review the Sch 36 Notices issued in July 2017 in this context, and if appropriate, issue revised Notices.

**Second issue of Sch 36 Notices on 31 May 2019**

67. To follow up the meeting of 24 April 2019, Officer Whitehead wrote to Mazars with a summary of the meeting, and enclosed a revised schedule of 30 items for Sch 36 FA 2008 purposes, and made the following observation in relation to LPP:

> 'We agree that HMRC cannot legally require LPP information and documents. In the current context this means confidential documents and information between a lawyer and client obtaining or giving legal advice. This does not include tax planning advice between an accountant and client.'

68. During the meeting of 24 April 2019, the parties discussed extensively *Bowring UT* and HMRC asked Mazars to commit in writing their view as regards s 90 TCGA following *Bowring*. This was furnished to HMRC on 4 July 2019, along with the Note of meeting prepared by Mazars for HMRC's comment. The implications of Mazars' view on s 90 TCGA are summarised as follows:

> '… in the [Appellants'] cases, the planning arrangements were conceived by and promoted by Tenon and implemented by Turcan Connell hence all of the implementation documentation in these cases are mirror images of each other. We refer to [HMRC's] letter of 1 September 2015 with which was enclosed lists of documents already in the possession of HMRC at that date in relation to all the participants we are representing other than Colin Wiseman. We understand from this information that you are already in possession of the documents *considered to be relevant* by Justice Barling in enabling him to arrive at this decision for all of the parties for whom we are acting, being deeds in relation to the establishment of the original and new trusts, deeds of advance, deeds of assumption, minutes of trustees meetings

and other relevant legal documents in relation to the implementation of the planning.' (Italics original.)

69. On 2 August 2019, Officer Whitehead responded to Mazars' view on s 90 TCGA, and set out the counter analysis of *Bowring UT* and reiterated the need to review the additional information and documents as requested on the revised Notices of 31 May 2019, noting that:

> 'At para 91 [of *Bowring UT* Barling J] concluded that, on the facts of the Bowring case, he did not consider the trust making the capital payments was a mere intermediary in the sense that it would be necessary if the distributions were to be received from the [transferor] trust. It is clear, therefore, that in his judgment, despite the clear meaning of s90, there could be circumstances where the capital payments could be treated as being paid by the old trust. I believe that this is what Justice Barling means when he says that all the relevant factors in each case must be considered.'

70. Another round of correspondence ensued on interpreting *Bowring UT* whereby:

(1) Mazars' 4-page letter on 17 September 2019 drew the conclusion from *Bowring*:

> 'Therefore where there is an effective appointment to the transferee settlement and a subsequent distribution by the trustees of the transferee settlement we cannot see given the very prescriptive terms of Section 90 and following [*Bowring UT*] … how any documentation over and above the legal documentation (which … you already have in your possession) would change [*Bowring's*] very definitive conclusion.' (Emphasis original.)

(2) Officer Whitehead replied on 27 September 2019, highlighting *Bowring UT* at [89] where Barling J stated:

> '[Para 89] "In my view the issue raised here requires **all relevant factors** to be considered, and each case will depend on its own facts. Relevant facts will no doubt include whether **what is done is pursuant to a plan or understanding or agreement**."' (All emphasis original.)

(3) Officer Whitehead acknowledged that HMRC hold 'documents relating to the mechanics of what happened for some but not all the cases'. However, the documents held do not answer the questions arising from *Bowring UT*, which according to Officer Whitehead, include the following:

- 'Was there any agreement between the trustees of the old and the new trusts concerning the capital payments?
- Did the old trustees have any influence over what the new trustees did with the settled property?
- When the new trustees made the payments did they do so entirely in the exercising of their own discretion?
- Did they alone decide the dates and amounts of the payments?
- Were these decisions made after the assets had been transferred to them?'

(4) On 4 October 2019, Officer Whitehead wrote to Mazars referring to his previous letter of September 2019, and indicated that he would look at the outstanding Notices again, accepting that some of the descriptions on the Notices issued on 7 July 2019 were 'perhaps too vague'. He also determined all the appeals against the penalty notices by agreement under s 54 TMA 1970, and 'as a gesture of goodwill', the penalty for failure to comply with earlier Notices were reduced to nil.

(5) On 11 October 2019, HMRC informed the Appellants that the appeal against the Information Notices issued on 7 July 2017 had been determined on the basis of an agreement set out in the letter of 4 October 2019.

**Old Documents authorisation – 11 November 2019**

71. An HMRC internal memorandum to John Curran of 11 November 2019 to seek authority to request documents in excess of 6 years old was prepared by Officer Whitehead, and on which Officer Bentley was cross-examined. The salient aspects of the memorandum are:

(1) Under the heading of 'Proposed action & why you think this action is appropriate':

> 'The *Bowring* case … was heard at the UTT. The decision was passed down in October 2015 was an adverse decision for HMRC. The decision was not appealed but CTIS are of the view the decision was fact based, and could have been favourable to HMRC, therefore another case within the [MIIFF] pool may be suitable for litigation and endorse the favourable decision HMRC received in *Herman*.
>
> The documents as per the attached have been requested with the purpose of establishing the facts. The documents requested have not been provided; in the light of this I consider that my proposed course of action is the only action HMRC can take to inject momentum.
>
> This is essentially the same authority you provided for Rose Noble in 2017. … issues relating to whether some of the times are covered by legal and professional privilege. … We have now amended the schedules and have procedure in place to deal with any LPP issues.'

(2) Under the heading of 'Brief summary of facts and the compliance check to date':

> '… Despite the *Bowring* decision, HMRC's view is that the [MIIFF] scheme does not work in certain circumstances. HMRC have provided a commitment that any suitable enquiry/appeal will be taken to the Tribunal if a settlement cannot be reached by agreement. HMRC did issue a circular on 11 August 2014 which outlined the effect of … [*Herman*] and invited the taxpayer to make an offer of the outstanding tax and interest. …
>
> In the same letter … [it] was advised that if no offer was forthcoming, HMRC would assume that they wish the matter to proceed to litigation, and that this could include the issue of a notice under Schedule 36 FA 2008 …'

(3) Under the heading 'Why you need to use this particular power?'

> 'The documents as per the attached [Sch 36 Notices] are required so that we may establish the facts and therefore whether the arrangements entered into so that we may establish whether this case is suitable for pursuit to litigation.
>
> … a formal request to supply the outstanding is the only action HMRC can take to obtain them and progress the enquiry.
>
> All of the documents are over six years old and as such authority is required before issuing the Sch 36 Information Power.'

(4) Under the heading 'What action has been taken to obtain the information or carry out the inspection?'

> 'The outstanding documents, that will be needed before the case can progress to Tribunal, have been requested informally during the course of

the enquiry the deadlines set within the informal requests have now passed and I have not received the outstanding documents.'

(5) Authorisation by Officer Curran with his conclusion as follows:

'Following discussion to better understand the difference between the previous failed Bowring case and the circumstances of the Turcan Trusts, I am content to authorise the request. The documents requested are not unreasonable and some failings in the transfer of cases to current agents (Mazars) together with the non-provision of requested information has contributed to the significant delays. Information requested is pivotal to understanding the intent and gain a fuller picture of Trust activity.'

**The Information Notices of 21 November 2019 appealed**

72. A new set of Information Notices were issued on 21 November 2019 to the Appellants. There are 24 items on these Notices, as set out below with Dr Draffan's as representative.

73. The summary of events leading to the lodgement of the appeals with the Tribunal is as follows, during which 3 key documents requested were provided to HMRC.

(1) On 26 November 2019, HMRC and Mazars had a conference call to discuss the information and documents requested on 21 November 2019.

(2) On 23 December 2019, Mazars on behalf of the Appellants, appealed the Notices.

(3) On 20 February 2020, HMRC issued their view of the matter to the Appellants and offered them a review by an independent officer.

(4) On 20 March 2020, the Appellants accepted the offer of a review by an independent officer. The Appellants provided the following documents to HMRC, (which were furnished to the Tribunal in the course of the hearing by email attachments):

(a) Dr Draffan's Columbia Insurance Policy;

(b) Dr Draffan's Lloyds Insurance Policy;

(c) Dr Draffon's Tenon Engagement Letter.

(5) On 27 July 2020, 28 July 2020 and 4 August 2020, Review Conclusion letters were issued to the Appellants, upholding the Respondents' decisions to issue the Information Notices of 21 November 2019.

**Legal privilege asserted for documents**

74. After the lodgement of the appeals with the Tribunal, the Appellants started correspondence with HMRC to assert legal privilege for certain documents.

(1) On 9 November 2020, Mazars provided HMRC with Schedules listing the documents under information request but for which legal privilege is asserted.

(2) In the same email of 9 November 2020, Mazars informed HMRC:

'… we should like to make clear that the following individuals are not claiming legal and professional privilege in relation to any documents and thus have no associated list:

- Georgina Lilias Cheyne Woods
- John Cheyne Turcan
- Diana Mary Cheyne Turcan
- William Giles Cheyne Turcan'

(3) On 21 May 2021, the Tribunal notified HMRC of LPP applications brought by the Appellants under the LPP Regulations.

(4) On 4 June 2021, HMRC issued strike out applications against the LPP applications.

(5) On 10 February 2022, the Tribunal held a case management hearing to determine the strike out application and other interlocutory matters.

75. On 28 February 2022, Judge Redston issued a written decision striking out the applications, and issued directions for the LPP claim to be heard together with other grounds of appeal against the Information Notices.

**Background to Colin Wiseman's appeal in the LPP application proceedings**

76. The background leading up to Mr Wiseman's appeal mirrors that of the other Appellants until 16 January 2020, when Wiseman commenced proceedings under the LPP Regulations 2009, thereby making an in-time LPP application to remove certain documents from disclosure under the Information Notice served on him. The key dates of his appeal progress are:

(1) On 24 August 2020, Judge Bailey issued a decision in relation the LPP application, which was appealed by Mr Wiseman to the Upper Tribunal.

(2) On 13 September 2021, Wiseman withdrew his appeal to the Upper Tribunal against Judge Bailey's determination on his LPP application.

(3) On 21 October 2021, HMRC issued their view of the matter on Wiseman's appeal against the Sch 36 Notice served on him in November 2019.

(4) On 18 March 2022, Mr Wiseman appealed to the Tribunal against the Information Notice issued and stayed, whilst HMRC completed an independent review.

(5) On 26 October 2022, the stay was lifted.

(6) On 19 November 2022, the parties made a joint application for Mr Wiseman's appeal to be heard jointly with the other appeals.

## FACTS AS RESPECTS INFORMATION GATHERING

**Information in HMRC's possession per Listing to Mazars at 1 September 2015**

77. As related earlier, on 1 September 2015, Officer Rose Noble provided Mazars the agreed list of all the information in HMRC's possession that had formerly been provided by Tenon. Under the heading of 'Insurance Arrangements', the descriptions of certain documents carry the reference of correspondence relating to the insurance arrangements as part of the implementation of the Scheme. A cohort of such documents were all dated 22 November 2002:

(1) Filo Number D3: 'Letter [faxed] from Turcan Connell to Sedgwick Detert, Moran and Arnold FAO Jolyon Grey – signed and returned by Heather Thompson';

(2) Filo Number D4: 'Letter to Saltire Trustee from Sedgwick, Detert, Moran & Arnold', (Saltire Trustee (Oversees) Ltd was the trustee of the transferor trusts of the Turcan family);

(3) E3/E4/E7E8/E9: Letter from Ambridge [Insurer] to Global Financial & Executive Risk Practices regarding the Turcan 1968/1972 / Wiseman 1988 Trust/Thompson 1988/ Draffan 1988 Trusts: Proposed Tax Opinion Insurance Policy;

(4) E12: 'Note to DAC re Insurance Arrangements: Len Thompson Trust. Mentions engagement letter from law firm issuing the opinion: No copy attached here';

(5) E16: '2xEmails: First is request from Ambridge for additional documents; 2nd is reply'.

**Correspondence between Mazars and Turcan Connell regarding Information Requests**

78. The Appellants produced an Additional Hearing Bundle ('AHB') of 53 pages documenting the attempts by Mazars to obtain documents from Turcan Connell in relation to the informal information requests, and the formal Notices issued in July 2017, and then November 2019; some of the documents included are redacted.

79. The Additional Bundle was produced when the hearing was underway, and consequent on Mr Dixon's challenge of the lack of evidence to substantiate the Appellants' Skeleton Argument in Reply at paragraph 20, which states that Mazars had made attempts to obtain documents but had been refused. The following excerpts from AHB stand as evidence of the exchanges between Mazars and the Appellants' legal advisers.

***(1) Trust for Mrs Thomson: exchanges in 2017***

80. On 23 March 2017, Mr Mackenzie emailed Heather Thompson, who would be shortly leaving her employment with Turcan Connell, to enquire on any progress made in 'locating the documentation for Mrs Thomson in line with that which discussed in relation to Colin Wiseman'. In June 2017, the email was followed up by Mazars to request Turcan Connell to locate 'the Thomson equivalent of the Wiseman documents', and was responded to by Tom Duguid, partner at Turcan Connell.

81. The documentation for 'the Thomson equivalent of the Wiseman documents' was attached by email on 15 June 2017 by Mr Duguid, noting:

(1) Variants to Wiseman papers, and suggested copies be sent to the insurer as well.

> 'I attach the requested documentation, save for an equivalent of the 19 February 2003 meeting note for the Colin Wiseman trust. There may of course not be an exact equivalent and we are still searching for any documents that are similar to that. I also attach a note of meeting on 25 November 2022 for the Thomson 2002 Family Trust in case you do not already have this.
>
> I suggest that it would be worth sending these to Malcolm Frost at Clyde & Co now while we continue to search. I assume that he [i.e. Frost] will be able to review these rapidly (since they are the same as he seen already for Colin Wiseman). It would be helpful if you could let me know when he has completed his review and when documents are being sent to HMRC so that I know the position in case of the participants call.'

(2) In a later email also on 15 June 2017, Mr Duguid noted:

> 'We have carried out an extensive search for an equivalent of the 19 February 2003 meeting note both in the paper files an electronically based on terms and phrases that we think would have appeared in the note. We can find no trace of an equivalent note for the Len Thomson 88 Trust and, given the extent of our search, have concluded that it does [sic] exist.
>
> I therefore suggest that you should proceed on the basis of the information sent earlier today.' (It is inferred in place of [sic] should be the word 'not'.)

***(2) Trusts for Mr Wiseman and Dr Draffan: exchanges in 2017 regarding***

82. Debbie Riddoch of Mazars wrote to Mr Duguid in December 2017 regarding the information requests in connection with the trusts for Mr Wiseman and Dr Draffan (and a third participant). The timing would appear to be around the period when the first set of Information Notices issued in July 2017 were appealed. In this email, Ms Riddoch noted that:

> 'The participants are all in agreement … that we proceed on the basis that we provide all information to Clyde & Co, allow them to review, and provide documents to HMRC as approved by them together with a list of documents which we have but are not providing giving the reasons for doing so. At the same time, we will make an application to HMRC for review.'

***(3) The Turcan Family Trusts: exchanges on 20 October 2020***

83. Correspondence between Ms Riddoch and Duguid from October 2020 to January 2022 in relation to the beneficiaries of the Turcan Trusts is provided in the additional bundle, and excerpts of the communications material to the substantive grounds of appeal are related below.

*Email exchanges on 22 October 2020*

84. These exchanges were not over the detailed Items but in establishing the basis upon which the beneficiaries of the Turcan Trusts can access the requested documents.

(1) Riddoch to Duguid:

(a) 'Are you able to confirm that the trustees and all of the 14 beneficiaries were engaged with Turcan Connell at that time?'

(b) 'I note that the beneficiaries would not have the power to obtain a copy of the note of 25 July 2002, this is very helpful.'

(c) 'In relation to Robert Turcan's children, we have no communications at all between January 2002, when the planning was first communicated to the parents of the beneficiaries, and September 2002, when it was agreed that the planning would proceed. There are letters and notes between Turcan Connell and Henry Turcan, William Turcan and Lady Inkin in respect of their children but we have nothing in relation to Robert Turcan's children.'

(2) Mr Duguid replied by return on 22 October 2020 to say:

> 'I will see what I can find regarding Robert's children. I suspect it will have been internal communications given Robert's position in the firm.'

***(4) The Turcan Family Trusts: exchanges on 7 October 2020 and 19 January 2022***

85. More substantive email exchanges took place between Ms Riddoch and Mr Duguid in relation to the Turcan Family Trusts documents addressing the information requests as cohorts under different headings as narrated below.

*Heading: 'Items 2,3,5,13,17 & 18 – information not in the possession of the beneficiaries'*

86. Under this heading, Mazars tried to establish (a) the extent of documents that are in existence and in the trustees' files with Turcan Connell, and (b) any restriction on beneficiaries' entitlement to have sight of the said documents.

(1) Riddoch's email on 7 October 2020:

> 'We have had various dialogues with the beneficiaries in relation to documentation which is in their possession. The above items related specifically to documents which, to the extent that they exist, I would expect may be in the

possession of the trustees. The beneficiaries have confirmed that they are not in their possession.

I would be grateful for your own/Donald's comments in terms of the existence or note of these documents and whether any are still in possession of the trustees.

… Carl Whitehead of HMRC had commented on the fact that whilst the documents may not be in the possession of the beneficiaries, he indicated that they have the power to obtain the documents. …

The key word appears to be "if" the items are in the power of the beneficiaries to obtain.

You mentioned that under trust law You mentioned that under trust law the type of documents to which a beneficiary would be entitled to have sight of would be restricted. … We would like to put the argument to HMRC in terms of the power of the beneficiaries in these circumstances …'

(2) There would appear to have no response for over a year from Turcan Connell, in part due to restriction to office access during the Covid pandemic, as evidenced by Riddoch's email to Duguid dated 9 December 2021:

'I appreciate at the time, like us, you had difficulty accessing your office to arrange to retrieve old files from archive and access any files in your office. We do not appear to have had any response to the items detailed in my email of 7 October 2020 in relation to documents which HMRC have requested sight of and which may be in your trustee files …

I understand from Ross [Mackenzie] that in view of matters that have come to light in relation to the late Mrs Thomson that you may currently have access to old files and we would very much appreciate if you/ Donald Simpson could review your files and provide us with your comments in relation to my email of 7 October together with copies of any relevant correspondence that you hold.'

(3) Duguid's reply dated 19 January 2022:

'I have spent hours looking for these documents and have identified some of them. Some will be in the possession of Tenon (e.g. they instructed Sedgwick, Detert, Moran & Arnold in terms of Item 13.)

So some of these are in the possession of Turcan Connell. Is that to be treated as in the possession of the trustee? I should also note that the trustee is no longer the trustee of any of these trusts as they have all been wound up.

Do you want me to send them to you or will that make them in the possession of the beneficiaries?'

(4) Duguid regarding restriction to beneficiaries' right to documents:

'… I obviously cannot provide that advice. It is also a very wide topic which there is not clear case law. But basically it is as I mentioned to you in 2020 i.e. under Scottish trust law, beneficiaries do not have a right to see all trust documentation. They might have a duty to see trust accounts and trust deeds (even that is debatable particularly depending on what type of beneficiary they are) but I do not consider they would have an entitlement to see the type of documents you have asked me to look for.'

*Heading: 'Item 10 – engagement with Tenon'*

87. Item 10 is for documentation relating to the engagement of Tenon to provide tax planning advice, and the exchanges are as follows:

(1) Riddoch on 7 October 2020:

'We believe the above documents are not reasonably required … but it would be helpful if you could let us know to what extent you have copies of these documents in any of your files.'

(2) Duguid on 19 January 2022

> 'I confirm that we have copies of the engagement letters between the trustee and tenon. I have tracked down what I believe to be final versions. There might be signed versions but that will take further hours of searching.
>
> "any documents provided for the trustees either before during or after this [presumably Tenon's engagement?] relating to the proposed tax planning" is incredibly wide. … there would be a question as to whether it is within the beneficiary's power to obtain these if they do not have them already.' (Parenthesis in square brackets original.)

*Heading 'Items 11, 14 & 20 – insurance documents, engagement letters etc'*

88. These Items are related to the insurance cover obtained as part of the planning for entering the MIIFF Scheme, with Item 11 being '*calculation of the level of cover*', Item 14 being '*final offer document*' from insurance providers, and Item 20 being '*engagement letter for advice on the insurance*' forming part of Tenon's tax planning advice.

(1) Riddoch on 7 October 2020:

> 'Again, we believe the above documents are not reasonably required … but it would be helpful if you could let us know to what extent you have copies of these documents in any of your files.'

(2) Duguid on 19 January 2022:

> 'If you do not believe these are reasonably required for the purposes of checking the clients' tax position, I am quite reluctant to go looking for them.
>
> I assume we have copies of 11 (calculation of the liability) and 14 (documentation referred to in call of 22/11/02 with HT [Heather Thompson]. 20 will presumably be covered by 10.

(3) Duguid finished his reply by asking Riddoch to let him know if Mazars wanted him to send what he had located so far.

89. While the correspondence for information gathering for the trusts for Mrs Thomson, Dr Draffan, and Mr Wiseman by Mazars took place in 2017 (before the issue of the Notices under appeal in November 2019), the equivalent correspondence for the Turcan family trusts took place in October 2020 around the time when the appeals were lodged to the Tribunal.

## APPELLANTS' GROUNDS OF APPEAL

90. The ordering of the grounds of appeal below follows the order wherein counsel advanced the Appellants' case, except for transposing Grounds 1 and 2 for the facilitation of their respective consideration. As to the documents for which LPP is asserted, it is set out as the last ground (in the latter part of the Decision) in view of the specificity of each of those documents and the length of that section in itself.

91. The abbreviations given below are by reference to the heading assigned by counsel for the Appellants for each ground.

(1) Ground 1 – *Documents already provided* ('G1'); according to the Appellants, the items have been 'accepted by HMRC as provided'.

(2) Ground 2 – *Not in possession* ('G2-NiP') per category heading 'Documents that do not satisfy the legal test because they are not in the power or possession of the Appellants';

(3) Ground 3 – *Not Reasonably Required* ('G4-NRQ'); category heading 'Documents not reasonably required for the purposes of determining whether the facts of *Bowring UT* regarded as relevant at [90] are on all fours with the facts of this case'.

(4) Ground 4 – *Illegitimate Purpose / Fishing Expedition* ('G3 IP/FE') per category heading 'Documents sought for an illegitimate purpose (looking for a case to take to litigation to overturn *Bowring UT*), or are purely speculative and constitute fishing expeditions';

(5) Ground 5 – *Documents covered by legal privilege* ('G5 LPP).

92. In line with the Judge Redston's Directions, parties have made submissions with reference to the Notice issued to Dr Draffan, which states as follows:

| | The reference below to "trust" and "trustees" mean all and every one of the following settlements and their trustees:<br>**The Dr Draffan 1988 Trust and The Dr Draffan 2002 Trust** | **Ground of appeal** | **Status per HMRC** |
|---|---|---|---|
| 1 | Copies of all correspondence and other documentation of any form including faxes, emails, notes of telephone call and meeting notes etc relating to the offer of tax planning services by Tenon to the clients of Turcan Connell as referred to in Turcan Connell's letter dated 16/01/02. This should include all documentation prepare in connection with the planning and in particular the minutes of the meeting which took place immediately following that letter. | G4 IP/FE + LPP claim | In part |
| 2 | A copy of the meeting minutes along with all other relevant documentation relation to the meeting between H Thompson, Tenon and Willis referred to in H Thompson's (HT) email dated 29/05/02. In particular a copy of the "timetable" referred to in HT's email. | G2 -NiP | |
| 3 | Copies of the step by step plans provided for each trust referred to in HT's email dated 29/05/02 and of any associated correspondence of any kind whatsoever relating to these plans. | G2-NiP | In part |
| 4 | Copies of all documentation of any kind whatsoever relating to the trustees presentation on 31/07/02 including anything prepared for the presentation any documents provided for the trustees either before during or after the presentation in relation to the proposed tax planning. | G2-NiP + LLP | In part |
| 5 | Copies of the engagement letters signed by the trustees/ beneficiaries. | üG1 | Full ü |
| 6 | Copies of any clauses contained in any of the trust deeds relating to the involvement of the trustees in any aspect of tax planning. | G2- NiP | *Agreed |
| 7 | Copies of any correspondence of any kind whatsoever relating to the clause referred to above. | G2- NiP | *Agreed |
| 8 | Copies of any deeds of indemnity entered into relation to these clauses. | G2-NiP | *Agreed |
| 9 | Copies of the final insurance policies for each of the beneficiaries of all the participating trusts. | ü G1 | Fullü |
| 10 | Copies of all documentation of any kind whatsoever relating to the engagement of Tenon to provide tax planning advice including anything prepared for the purposes of the engagement of Tenon and any documents provided for the trustees either before during or after this relating to the proposed tax planning. | G3-NRQ | |
| 11 | Copies of all documentation of any kind whatsoever relating to calculation of the level of insurance cover for each beneficiary as indicated by the letters from the insurers. | G3-NRQ | In part |
| 12 | Copies of all documentation of any kind whatsoever relating to the capital payments for each beneficiary as referred to in the indication letters, in particular in relation to the timing of payments and the amounts paid. | G1 | *In part (HMRC dispute) |
| 13 | Copies of all documentation of any kind whatsoever relating to the engagement of the law firm by the trustees of each trust to provide advice relating to the | G1 & LPP (33 | * In part (HMRC |

| | | | |
|---|---|---|---|
| | insurance policy including anything prepared for the purposes of the engagement and any documents provided for the trustees either before during or after this relating to this advice. | docs) | dispute) |
| 14 | Copies of all documentation of any kind whatsoever relating to the final offer document referred to in the note of call dated 22/11/02 between HT, Justin Astley-Rushton and Willis. | G3-NRQ | In part |
| 15 | Copies of the letter from insurance provided confirming coverage in respect of each participating trust. | G3-NRQ + LPP (7 docs) | |
| 16 | Copies of the confirmation letters dated 27 November 2002 issued to the insurance company on behalf of the beneficiary of each trust. | G4 IP/FE + LPP | |
| 17 | Copies of all documentation of any kind whatsoever relating to the instructions given by the trustees of Turcan Connell, the tax planning proposed by Tenon and the review carried out by Turcan Connell. | LPP Claim | |
| 18 | Copies of all documentation of any kind whatsoever relating to the advice provided to the trustees by Tenon referred to in the meeting minutes of [Draffan 1988] trust dated 7/10/02 | G4 IP/FE | In part |
| 19 | Copies of all the meeting minutes of the trustees for each of the trusts during the period from 01/01/2002 to 31/12/2002. | G4 IP/FE | In part |
| 20 | Copies of the engagement letter for advice on the insurance as part of Tenon's tax planning signed by the trustees of each trust. | G3-NRQ | |
| 21 | Copies of all the Deeds of advance for each of the trusts. | üG1 | Fullü |
| 22 | Copies of all the Deeds of indemnity for each of the trusts. | G2-NiP | *Agreed |
| 23 | Copies of all the minutes for each of the trust re appointment of funds to beneficiaries. | G4 IP/FE | |
| 24 | Copies of the 2002/03 accounts for each of the trusts. | üG1 | Full ü |

**DISCUSSION**

93. In addressing the parties' submissions on the grounds of appeal as advanced for the Appellants, I have followed the order of the relevant provisions in the statutory scheme under Schedule 36, for a proper consideration of the statutory powers conferred on HMRC and the remit of the Tribunal on appeal within the statutory framework. The relevant statuary provisions to be addressed in turn are as follows:

(1) Whether 'reasonably required by the officer for the purpose of checking the taxpayer's tax position': para 1 Sch 36;

(2) Whether 'in the person's possession or power': para 18 Sch 36;

(3) Whether 'privileged information or document': para 23 Sch 36.

94. Before addressing the substantive issues in turn, it is expedient to set out the requisite pre-conditions underpinning the Information Notices, and the agreement between the parties so far as possible as respects the documents provided to date in compliance with the Notices.

## PRELIMINAIRES

### Pre-conditions as concerns validity of the Notices

#### *Paragraph 20: Old Documents*

95. Schedule 36 FA 2008 para 20 sets out that an information notice may not require a person to produce documents originating more than 6 years before the date of the notice, unless issued with the agreement of an authorised officer.

96. The Old Documents authorisation dated 11 November 2019 by Officer John Curran gave the agreement for Notices to be issued for the request of documents in excess of 6 years old. I am satisfied that the pre-condition under paragraph 20 of Schedule 36 is met.

#### *Paragraph 21: Conditions to set limitations on the issue of a notice*

97. Counsel for the Appellants in their skeleton argument raised the issue that the Respondents have not expressly addressed which of the Conditions under para 21 Sch 36 for the Notices to be issued, and submitted that 'this laxity demonstrates the Respondents' general approach in this matter, that of seeking information under Schedule 36 without adequate regard to the requirements of Schedule 36'.

98. Paragraph 21 of Sch 36 requires that where a taxpayer has submitted a tax return an information may not be issued unless one of the four conditions are met. In these appeals, the condition HRMC rely on is Condition A, which requires an open enquiry to be in place. This is evidenced by:

(a) For Dr Draffan, a section 9A enquiry notice dated 25 January 2005;

(b) For Mr Wiseman, a copy of the enquiry notice has not been supplied but a Self-Assessment System Note serves as evidence when the enquiry was opened (on 18 January 2005);

(c) For the remaining Appellants', pursuant to Direction 17(4)(c)(i), their section 9A enquiry notices have not been produced.

99. On the evidence produced and relied on by HMRC, I am satisfied that Condition A pursuant to para 21 of Sch 36 is met for the Notices to be served on all the Appellants.

### Extent of agreement as respects documents provided to date

100. For the Appellants, it is submitted that there are items of information requests have been fully complied with, namely:

(a) Item 5 for Engagement Letters;
(b) Item 9 for Final insurance policies;
(c) Item 12 for Documents relating to capital payments;
(d) Item 13 for Engagement of the law firm by trustees;
(e) Item 21 for Copies of all deeds of advance for each of the trusts,;
(f) Item 24 for Copies of the 2002-03 accounts for each of the trusts.

101. HMRC confirm in closing submissions that the Respondents are content to agree that information requests for Items 5, 9, 21 and 24 have been complied with, but contend against items 12 and 13 as having been fully complied with for the following reasons.

(1) In relation to Item 12, HMRC submit that the request is 'widely drawn covering more than the documents already provided', and consider that it is likely further documents exist as they are referred to in the letters of 22 November 2002 between the US insurance brokers to the UK insurance advisers for each of the five transferor trusts.

(2) In relation to Item 13, HMRC accept that some documents have been provided but the Appellants have stated others are covered by legal professional privilege, so it is difficult to determine whether all the documents requested (and not covered by LLP) have been provided; that the evidence from the Appellants failed to determine that there were no further documents available; that the request is widely drawn to cover more than the engagement letters already provided.

***Agreement on Items 5, 9, 21 and 24 as fully complied with***

102. On the basis of the parties' consensus as to the extent of compliance with respect to Items 5, 9, 21 and 24, these Items no longer form part of the appeal.

***Further Items 6, 7, 8 and 22 accepted by HMRC as fully complied with***

103. Pursuant to the post-hearing Directions, parties have set out their respective lists of documents as having been provided and received, including those documents that had been formerly provided to HMRC by Tenon before Mazars took over the representation

104. In the closing submissions, HMRC have stated their acceptance that Items 6, 7, 8 pertaining to the clauses contained in the trustee deeds and deeds of indemnity entered into in relation to these clauses in the trust deeds have been fully provided. In addition, Item 22 for 'all Deeds of Indemnity for each of the trusts' is also accepted to have been complied with.

105. Consequently, the Items 6, 7, 8 and 22 are not long under appeal.

## WHETHER REASONABLY REQUIRED

### The burden of proof

106. Ms Nathan has made submissions on the burden issue as regards the 'reasonably required' test, and I do not read into the order of the parties' opening and closing submissions whereby counsel for the Appellants preceded the Respondents, as indicative of the issue of burden in establishing whether or not an item on an information notice is reasonably required.

107. Ms Nathan submits that on an appeal against a Schedule 36 notice the burden lies on HMRC to show that all conditions for its imposition are satisfied, including that an item of request is within the person's possession and power (ASA1§37, ASA2§2), citing *Cliftonville* at [39]; *Jenner* at [14] – [16]; and *OneCall* at [6]. The Respondents have not made express submissions on the issue of burden in relation to the reasonably required criterion, but have proceeded by assuming the burden.

108. In *Joshy Mathew*[1] Judge Redston has set out an engaging discussion on the issue of burden in relation to the 'reasonably required' test with a review of case law. Referring to the High Court decision at [14] of *Derrin (HC)*[2] in which Similer J (as she then was) confirmed that the dictum in House of Lords' judgment in *Coombs* on the predecessor s 20 TMA scheme 'applies with equal force to Sch 36 notices', and a presumption of regularity that the statutory authority has acted lawfully and in accordance in its duty, Judge Redston observed at [71] of *Mathew* that if this presumption applies, then the burden is on the other party (i.e. not the issuing officer) to rebut the presumption.

109. However, the notice under appeal in *Mathew* differed in two significant ways from the subject matter in *Derrin* and Coombs. In *Derrin* and *Coombs* the courts were considering applications for judicial review whereas our task is whether or not to allow an appeal against the notices; and secondly, the notices in both *Derrin* and *Coombs* were approved by the tribunal before being issued (see [73] of *Mathew*).

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[1] *Joshy Mathew v HMRC* [2015] UKFTT 0139 (TC).

[2] *R (oao) Derrin Brother Properties Ltd v HMRC* [2014] EWHC 1152 (Admin).

110. In relation to an appeal against an information notice issued without tribunal's prior approval (as in *Mathew* and the present Appellants), Judge Redston posed the question at [76] of *Mathew*: 'Does this mean that our hearing of Mr Mathew's appeal is similar in some ways to the *ex parte* proceedings?' In *Mathew*, Judge Redston went on to answer the question at [78] by reference to *Coombs* where Lord Lowry said: "Parliament designated the inspector as the decision-maker and also designated the commissioner as the monitor of the decision. A presumption of regularity applied to both', and that 'the presumption that the inspector acted *intra vires* when giving the notice can only be displaced by evidence which cannot be reconciled with the inspector's having had the required reasonable opinion'.

111. At [82] of *Mathew* Judge Redston concluded that 'the weight of authority' is that the burden of proof in relation to the 'reasonably required' test in Sch 36 Notices rests on the appellant, and not on HMRC, and that it is consistent with the objective of Sch 36 taken as whole, which is 'to ensure that the information which will ensure that correct amount of tax can be determined' (*Tager*[3] at [16]), as well as the position in substantive tax appeals, citing Goff LJ in *Nicholson v Morris*[4] approving the reason given by Walton J that:

> '… it is the taxpayer who knows and the taxpayer who is in a position (or, if not in a position, who certainly should be in a position), to provide the right answer, and chapter and verse for the right answer.'

112. In *PML Accounting*[5] the Court of Appeal in a judicial review claim stated as follows:

> '[97] … HMRC may therefore be at a very early state of their investigation or enquiry when the notice is given, and the purpose of the notice is to obtain potentially relevant information from the taxpayer which may assist HMRC with the conduct of the investigation or enquiry.
>
> [98] That is the context in which the right of appeal conferred by paragraph 29(1) [Sch 36] has to be considered. The appeal may challenge "the notice or any requirement in the notice", other than a requirement to provide any information, or produce any document, that forms part of the taxpayer's statutory records … On such an appeal, the burden lies upon the taxpayer, in the usual way, to establish his grounds of appeal; and in disposing of the appeal, the FTT has the powers set out in paragraph 32(3).'

113. *PML Accounting* post-dates *Mathew*, and would appear to affirm the conclusion reached in *Mathew* after review of case law that the burden rests on the appellant on an appeal under paragraph 29(1) of Sch 36 to establish that the information and documents sought are not reasonably required.

114. However, the differences between *Derrin* and *Coombs* on the one hand, and Mr Mathew's position on the other, the tribunal in *Mathew* nevertheless acknowledged that 'it remains arguable that the burden is on HMRC' (at [85]). Given the very limited submissions, the tribunal in *Mathew* approached each Item of the Notices under appeal 'on the working assumption that HMRC had the burden of showing that it was reasonable to require the information or documents' (at [86] of *Mathew*).

115. As observed by Judge Cannon in *Holmes*[6] at [20], that although there have been a number of first-instance decisions[7] since *Mathew* which consider the burden of proof as

[3] *HMRC v Tager* [2015] UKUT 0040 (TCC) per Judge Bishopp.
[4] *Nicholson v Morris* [1977] STC 162.
[5] *R(oao) PML Accounting Ltd v HMRC* [2018] EWCA Civ 2231.
[6] *Holmes v HMRC* [2018] UKFTT 0678 (TC).
[7] See for example *Gold Nuts Ltd v HMRC*; *Eudora Thompson v HMRC* [2013] UKFTT 103 (TC); *New Way Cleaning Limited v HMRC* [2017] UKFTT 293 (TC); *Marylin May Phillipou v HMRC* [2017] UKFTT 20 (TC); *Codexe Limited v HMRC* UKFTT 0569 (TC).

respects the 'reasonably required' criterion, 'the absence of authoritative consideration of the issue is no doubt due to the fact there is no appeal from a decision of the First-tier Tribunal in relation to information notices'. The only exception may be the Court of Appeal's decision in *PML Accounting* as noted above, which was made in respect of a para 1(1) Sch 36 Notice and not a third-party notice, although *PML Accounting* concerned a judicial review, and was not directly concerned with an appeal against a para 1(1) notice as such.

116. In *Cliftonville*[8] counsel for the taxpayer asked the Tribunal to take a different view from *Mathew*, for the reason that the authorities relied upon by Judge Redston related to the judicial review of the third party notices that had been approved by the tribunal before their issue, and that it is not appropriate to apply the presumption of regularity to the objective condition for the issue of a notice under Sch 36 para 1(1), and that the burden of proof should be determined in accordance with the general rules of evidence.

117. It is a material difference that *Derrin* and *Coombs* are authorities considering judicial review claims in the context of third-party information requests issued with the prior approval of the tribunal or commissioners. I do not consider that the analysis of burden of proof in *Mathew* based on *Derrin* and *Coombs* can be directly transposed to the issue of burden in an appeal of an information notice issued under para 1(1) Sch 36, which does not require tribunal's approval.

118. In the absence of any express statutory guidance on the burden of proof in relation to the 'reasonably required' test applicable to a notice under para1(1) Sch 36, the working assumption that HMRC bear the burden on this issue is in line with a tenet of civil litigation that the burden rests on the party who asserts the position[9], as discussed in *Cliftonville*. I have adopted the same approach, noting that HMRC in the present case have accepted that the burden lies with them to prove the information and documents sought to be reasonably required to check the Appellants' tax position. Thereafter, I consider that the onus shifts to the Appellants, to demonstrate that the information and documents sought are *not* reasonably required.

119. If there is any parallel to be drawn between an *ex-parte* hearing and an appeal hearing against a notice issued under para 1(1) Sch 36, it is that the tribunal hearing an appeal against an information notice issued to a taxpayer is exercising similar oversight in relation to the 'reasonably required' test as in an *ex parte* hearing to approve a third-party information notice pursuant to the statutory requirement under para 3(3)(b) of Sch 36, in terms that the tribunal must be 'satisfied that, in the circumstances, the officer giving the notice is justified in doing so'. To that end, while the issue of burden differs in a challenge against a third-party notice from an appeal against a para 1(1) notice, the consideration of the 'reasonably required' is substantively the same for the authorities on the judicial review claim against a third-party notice to apply to the reasonably required criterion for the purposes of para 1(1) Sch 36.

120. In this regard, I agree with Judge Bowler's observation in *OneCall* [10] at [65] that the principles as set out by the courts above in cases dealing with the application of the limitation to information or documents 'reasonably required' for the purposes of checking the tax position of the taxpayer at para 2 Sch 36 'which empowers HMRC to issue third party notices

[8] *Cliftonville Consultancy Ltd v HMRC* [2018] UKFTT 0231 (TC).

[9] *Robins v National Trust Co* [1927] AC 515 at 520 is the authority cited in *Phipson on Evidence* (19th edn, 2017) at 6-06, for the general rule that the burden lies upon the party who substantially asserts the affirmative of the issue, and that in deciding which party asserts the affirmative, regard must be had to the substance of the issue ; that is to say, where a given assertion, whether affirmative or negative, forms an essential party of a party's case, the proof of such assertion rests on the party who asserts.

[10] *One Call Insurance Services Ltd v HMRC* [2022] UKFTT 184 (TC).

uses the same "reasonably required for checking" phraseology as paragraph 1 governing taxpayer notices' are 'highly persuasive if not binding on this tribunal'.

**Case law on the 'reasonably required' test**

121. In *R (Derrin Brothers Properties Ltd) v HMRC* [2016] EWCA Civ 15 ('*Derrin CoA*'), Derrin Brothers sought judicial review of the FTT decisions in without notice hearings which approved the issue of notices by HMRC to HSBC Bank plc and a UK firm of accountants, with a ground of claim being breach of the requirements of Sch 36 in approving the third-party notices. Sir Terence Etherton described the purpose of the statutory scheme as follows:

> '[68] The purpose of the statutory scheme is to assist HMRC at the investigatory stage to obtain documents and information without providing an opportunity for those involved in potentially fraudulent or otherwise unlawful arrangements to delay or frustrate the investigation by lengthy or complex adversarial proceedings or otherwise. It is inevitable in many cases, particularly where there are complex arrangements designed to evade tax, that at the investigatory stage *it will be difficult to be definitive as to the precise way in which particular documents will establish tax liability*. It is also clear that in many cases disclosure of HMRC's emerging analysis and strategy and of sources of information to the taxpayer or those associated with the taxpayer may endanger the investigation by forewarning them.' (Emphasis added.)

122. In *R(Kotton) v HMRC* [2019] EWHC 1327 (Admin) ('*Kotton*') the claimant of judicial review (a Swedish national) sought to challenge the FTT's approval of HMRC's issuance of a third-party information notice served on American Express Services Europe Ltd ('AMEX') to provide information and documents for checking the claimant's tax position by way of assistance to the Swedish Tax Authority. Simler J (as she was then) set out the salient aspects of the test for whether documents are reasonably required.

(1) That the test is not one on the 'merits' of the notice:

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

(2) The expressly limited question: 'reasonably required' for checking tax position:

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

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

(3) Not conditional on the tax investigation itself being reasonably required:

> [62] Thirdly and for the same reasons, the question for the FTT in relation to the information and documents sought by a third party notice is also expressly limited: the FTT must be satisfied that in all the circumstances, the officer giving the notice is justified in concluding that the information or documents are reasonably required for checking the tax position of the taxpayer. Again, that does not require any examination of the nature and extent of the underlying tax investigation, but rather *a focus on whether there is a rational connection between the information and documents sought and the underlying investigation*. The very purpose of the investigation is to establish the correct position by reference to all the evidence gathered and it is therefore unsurprising that the *legislation does not make the approval of a notice conditional on the tax investigation itself being reasonably required*. (Emphasis added.)

123. In *Steven Price v HMRC* [2011] UKFTT 624 (TC) ('*Price*'), the taxpayer applied to the FTT for a closure notice to be issued by HMRC under s 28A TMA to close the enquiry into a loss relief claim of £1.5m following the implementation of a tax planning scheme. The taxpayer's case is that HMRC had a broad understanding of the scheme and could form a view on the tax loss claim, and the detailed scheme documents sought could be provided to HMRC under disclosure once an appeal was lodged against the closure notice.

(1) The taxpayer in *Price* relied on *Tower MCashback* [2011] UKSC 19, where Lord Walker observed:

> [18] … In issuing a closure notice an officer is performing an important public function in which fairness to be taxpayer must be matched by a proper regard for the public interest in the recovery of the full amount of tax payable. In a case in which it is clear that only a single, specific point is in issue, that point should be identified in the closure notice. But if, … the facts are complicated and have not been fully investigated, and if their analysis is controversial, the public interest may require the notice to be expressed in more general terms.'

(2) Judge Mosedale in *Price* discussed how Sch 36 is intended to work in relation to the issuance of a closure notice:

> 'Although … where the full facts are not known, HMRC are *entitled* to issue estimated assessments (eg see *T Haythornthwaite & Sons Ltd* CA 1927 11 TC 657) and are, as stated by the Supreme Court [in *Tower MCashback*] entitled to issue closure notices in broad terms, HMRC are not bound to do so. On the contrary HMRC is entitled to know the full facts related to a person's tax position so that they can make an informed decision whether and what to assess. It is clearly inappropriate and a waste of everybody's time if HMRC are forced to make assessments without knowledge of the full facts. The statutory scheme is that HMRC are entitled to full disclosure of the relevant facts: this is why they have a right to issue (and seek the issue of) information notices seeking documents and information reasonably required for the purposes of checking a tax return (see Schedule 36 of Finance Act 2008).'

**HMRC's case on 'reasonably required'**

***The basis for the 'reasonably required' criterion being met***

124. On the working assumption that HMRC bear the burden to establish that the information requests on the Notices are 'reasonably required by the officer for the purpose of checking the taxpayer's position', the Respondents have called the evidence of Officer Bentley.

125. It is submitted that the Information Notices issued met the criteria to be valid as they were issued by Mr Carl Whitehead, an officer of HMRC, in writing and requested that the Appellants provide the Respondents with information and documents, which Mr Whitehead believed to be reasonably required for the purpose of checking the Appellants' tax position. Mr John Bentley, an officer of HMRC, who assisted with the drafting of the Notices also considers the information and documents requested to be reasonably required.

126. Mr Dixon sets out the tax position being checked by the Information Notices as follows:

> 'The tax position being checked is the amount of Capital Gains Tax declared in the Appellants' Self-Assessment Tax Returns for the tax year ended 5 April 2003. Specifically, the Respondents are checking whether the Appellants' involvement in the "Mark II Flip Flop" avoidance scheme, has resulted in an under-declaration of Capital Gains Tax in their Self-Assessment Tax Returns for the tax year ended 5 April 2003.' (RSA§46).

127. The Respondents refer to 'the purpose of the statutory scheme', which is 'to assist HMRC at the investigatory stage to obtain documents and information' without providing an opportunity for those served with a notice 'to delay or frustrate the investigation by lengthy or complex adversarial proceedings or otherwise': *Derrin CoA* at [68]; and that '*the test for whether information or documents are reasonably required does not require an investigation of whether the tax investigation itself is reasonably required*': (*Kotton* at [62]).

128. For the Respondents to understand the Appellants' position, it is necessary to check the documentation produced to implement MIIFF arrangements, and this is in accordance with *Bowring UT*, Barling J stated at [89]: '*the issue raised here requires all relevant factors to be considered, and each case will depend on its own facts. Relevant factors will no doubt include whether what is done is pursuant to a plan or understanding or agreement*'.

129. The Respondents contend that they are entitled 'to know the full facts related to a person's tax position so that they can make an informed decision whether and what to assess': *Price* at [10]. In the present case, the 'full facts' are those relating to the Appellants' implementation of the scheme. Mr Bentley summarises the relevant questions he has distilled from [89] and [90] in *Bowring UT* 'into the relevant tests for any scheme participant that has engaged in transactions pursuant to MIIFF planning' as follows:

(1) Each case will depend on its own facts.

(2) Were the transactions undertaken pursuant to plan, understanding or agreement?

(3) Was there any agreement between the trustees of the old and the new trusts concerning the capital payments?

(4) Did the old trustees have any influence over what the new trustees did with the settled property?

(5) When the new trustees made the payments did they do so entirely in the exercising of their own discretion?

(6) Did the new trustees alone decide the dates and the amounts of the payments?

(7) Were these decisions made after the assets had been transferred to them?

***Basis for disputed Items being reasonably required***

130. Officer Bentley's witness statement sets out in some detail the reasoning behind each Item of requests, and in relation to each of the Items in dispute as whether they are reasonably required, Mr Dixon's submissions are as follows.

(1) **Item 10** – *engagement of Tenon for tax advice* – The documents provided by Tenon will evidently indicate how the Scheme was intended to work and who was party to this information. This is reasonably required when considering the tax position of the Appellants, as it will go to the questions of the level of influence over the transferee trusts and to what extent the transfer of funds to the beneficiaries was preordained. These are part of the questions set out by Mr Bentley in his Annex to the witness statement. (Tom Duguid of Turcan Connell confirmed on 19 January 2022 to Mazars that he believed he had 'tracked down' the 'final versions' of the 'copies of the engagement letters between the trustee and Tenon': *supra* [87](2).)

(2) **Item 11** – *calculation of insurance cover* – the documents created to calculate the level of insurance will help to show whether the transfer of the assets from the 2002 Trust to the Appellants were planned or preordained. Whilst it is accepted that some insurance covers have a maximum cover, the proposed insurance cover for Dr Draffan was £463,318, it seems highly unlikely this was plucked from the ether. There was clear thought on the level of insurance, and it is not unreasonable to consider the insurance providers would have considered how the Scheme would be implemented and the potential tax liability it met. Turcan Connell assumed they would have the documents but did not look for them as Mazars told them they considered the documents were not reasonably required.

(3) **Item 14** – *final insurance offer document referred to in the note of call dated 22/11/02 between Heather Thompson and Justin Astley-Rushton and Willis* – Whilst the note of call does not appear in the bundle, evidence from the Additional Hearing Bundle (AHB/48) suggest that documents are likely to exist, as confirmed by Turcan Connell. The final offer document may set out what was agreed to happen between the parties, and this goes to the question to what extent there was a plan or arrangement in place.

(4) **Item 15** – *insurance providers' letter confirming coverage* – the insurance cover is a difference from the *Bowering* case, and the extent to which this highlights a plan was in place or limited the discretion of the transferee trustees will be important; therefore, knowing who was party to the cover is important. It is no unreasonable to infer that the confirmation of coverage may indicate steps that have to be carried out for the insurance to be valid.

(5) **Item 20** – *Engagement letter for advice on the insurance as part of Tenon's tax planning signed by the trustees of each trust* – knowing who was party to arranging the insurance is an important fact which will assist Mr Bentley in determining to what extent the Appellants' tax position is on all fours with *Bowring*.

**Appellants' contentions on 'reasonably required'**

***Chief tenor – 'on all fours' with Bowring UT***

131. Ms Nathan and Mr Carey submit the following in the Skeleton Argument in chief:

(1) 'Sch 36 notices are to be issued in order to check a taxpayer's position. Given the context in which the information has been sought, in order to determine whether the facts of the Appellants fall squarely on all fours with the facts of *Bowring*, the Respondents have not explained why the further information they seek is not [sic] reasonably required' (ASA1 §45).

(2) Barling J in *Bowring* 'focussed on a small number of factors that he considered relevant to determining whether the arrangement was effective or not'; that the Appellants 'have provided those documents that Barling J relied on to form his view'. 'Reviewing those documents shows clearly that the facts of this case fall squarely within the boundaries of *Bowring*' (ASA1 §46).

(3) The Respondents are 'in as good a position as Barling J was in *Bowring* such that no further information or documents can be said to be reasonably required in order for them to check the tax position' (ASA1 §46).

132. In the Skeleton Argument in Reply (ASA2), and Closing Submissions in Reply (ACS), and in rebuttal to the Respondents' submissions, counsel for the Appellants take issue with:

(1) The statement at RSA§46 stating that the position being check is 'the amount of Capital Gains Tax declared in the Appellants' Self-Assessment Tax Returns for the year ended 5 April 2003', that this statement at RSA§46 'ignore the true position evidenced by the correspondence which is to identify whether the arrangements entered into by the Appellants falls "on all fours" with the position in *Bowring*', referring to the *Note of telephone conference* 22 April 2016, and *Respondents' note of meeting with Mazars* on 24 April 2019; (ASA2 §5).

(2) The Respondents' reference to *Kotton* at [62] 'to refute an argument that forms no part of the Appellants' arguments' and go on to state: 'The issue is more limited, namely to establish that the facts of Appellants' arrangements are materially similar to the facts in *Bowring* that lead Barling J to hold that the arrangements succeeded.

(3) The Respondents' closing submissions in writing (RCS §25) where it states that the current appeal, where the requests for documents are aimed at determining the tax liability and are focused at determining the questions set out by Barling J (at [90] of *Bowring*) as summarised in Officer Bentley's witness statement, in rebuttal, it is submitted that HMRC's is a 'weak stance to adopt', and continues (at ACS §16):

> 'It entirely misses the point that ***the aim is to see if the facts of the instant appeals fall "on all fours"*** with the facts considered to be material in *Bowring UT*. It follows that asking for different information to that considered to be relevant in *Bowring UT* is clearly asking for immaterial facts/ documents and cannot be reasonably required.' (Underlining original; italics in bold added).

***Fishing expedition / illegitimate purpose***

133. In addition to the above, it is submitted that (a) the Respondents have not shown that there is a legitimate purpose in issuing the Notices; (b) there is 'no real evidence or suggestion that the tax has been understated by the Appellants'; and (c) what HMRC do have is 'sufficient information to see that the case is materially similar to *Bowring*'. The submission refers to Judge Hyde in *Marathu* [11] at [40]:

> 'No analysis was put to us as to the meaning of "reasonably required" within paragraph 1 of Schedule 36. However, in our view "reasonably required" must impose a limitation on HMRC's issue of notices to the extent that each

[11] *Marathu Delivery Service Ltd v HMRC* [2019] UKFTT 553 (TC).

> item of information requested must be required for the purposes of an enquiry into the taxpayer's tax affairs and that is objectively reasonable for HRMC to do so. If HMRC had the information already it would not be required nor would it be reasonable for HMRC to ask for it again. Similarly, HMRC must be pursuing a legitimate purpose in issuing the notice, so HMRC cannot undertake a fishing exercise where HMRC have no reason to believe tax has been understated.'

134. In a similar vein, Ms Nathan and Mr Carey submit that it is 'immaterial that the Respondents may want more information', that 'the Respondents' desire for information is not a legally relevant consideration'. It is reiterated that given 'the context in which the information has been sought, in order to determine whether the facts of the Appellants fall squarely on all fours with the facts of *Bowring*', the Respondents 'have not explained why the further information they seek is not [sic] reasonably required'.

135. The Appellants contend that far from being 'reasonably required' for the purpose of checking whether the arrangements entered into by the Appellants fall squarely in line with *Bowring*, the challenged Sch 36 requests are 'little more than a fishing expedition' where despite having received 'significant amounts of information from 2005 onwards', HMRC continue to seek further documents 'in order to see if, like Mr Micawber, something might turn up. This is not a permissible way to proceed' (citing *Derrin HC* at [20]; *Jenner*[12] at [22]-[25]).

136. The Respondents' internal memo for Old Documents Authorisation, and the Note of meeting of 24 April 2019 are the basis for the Appellants' submission that 'it appears that HMRC are looking for evidence that may allow them to bring a case to counter *Bowring* rather than simply seeking to under the arrangements'.

137. Further, it is submitted that 'it is implicit in HMRC's approach they consider that there are documents that show that the trustees of the transferee trust behaved in a different way to the trustees of the transferee trust in *Bowring*'; that 'it is unclear why HMRC assume that this should be the case or that such documents exist'; and that 'HMRC have provided no evidence to justify such assumptions'.

138. It is argued that HMRC have issued 'widely drawn information requests in order to elicit as much documentation such that they can see what, if anything, allows them to argue that the Appellants' facts are materially different to the facts in *Bowring*, and is 'a clear "fishing" exercise'.

***The Items disputed as reasonably required***

139. The Items contended by the Appellants as 'not reasonably required' in those specific terms are the following:

(1) **Item 10** – *engagement of Tenon for tax planning advice* – All this request can possibly elicit, even if such documents exist, of which there is no evidence before the FTT, is that there may have been a plan. But the existence of a plan is not conclusive of the taxability of the capital payments –*Bowring UT* [89], [90].

(2) **Items 11, 14, and 15** – *calculation of insurance cover*, *final insurance offer document; and letter from insurance providers confirming cover* – HMRC have copies of the insurance policies and can see they have a maximum policy limit and cover a long period. Accordingly, calculation of the level of insurance cover can give no relevant indication of when capital payments were made (if made),

[12] *Jenner v HMRC* [2022] UKFTT 203 (TC).

and the amounts of any such payments. It cannot therefore assist in determining the taxability of those capital payments.

(3) **Item 20** – *Engagement letter for advice on the insurance as part of Tenon's tax planning signed by the trustees of each trust* – the existence of such documents has not been proven; it is unclear what light they can shed on the factors found to be relevant in *Bowring UT*.

140. In relation to Items 11, 14 and 15, it is submitted that several documents relating to the calculation of insurance cover have been provided to HMRC by Tenon between March 2005 and November 2006; that it is clear from those documents that there is nothing to support HMRC's submission that 'The documents created to calculate the level of insurance will help to show whether the transfer of the assets from the 2002 Trust to the Appellants were preordained' or 'potentially evidence whether these were preordained'. It is argued that HMRC provide 'no concrete support for their view' that 'insurance calculations can shed any light on preordination of steps'.

141. The Appellants submit that Item 20 should be regarded as satisfied by Appendix 2(a) attached to Draffan's witness statement, which is the Listing of documents provided by HMRC for Mazars on 1 September 2015, being the list of documents provided by Tenon to HMRC on behalf of all participants under the heading of 'Insurance Arrangements'. HMRC do not accept that the Listing of documents provided to them by Tenon means that Item 20 has been satisfied.

**Discussion on 'Reasonably Required'**

142. The Respondents rely on *Bowring UT* where Barling J's observation at [89] of that the issue requires 'all relevant factors to be considered', and 'each case will depend on its own facts'. The Appellants also rely on *Bowring UT* and contend that the Appellants' arrangements 'are materially similar to the facts in *Bowring* ("on all fours")' – they say, which led Barling J to hold that the arrangements in *Bowring* succeeded.

143. The Appellants submit that the reasonably required criterion 'cannot be undertaken in a vacuum' and that the tribunal 'must consider whether the documents are reasonable required to check the Appellants' tax position in the context of the CGT liability in respect of the capital payments received from the transferee trust, 'the analysis of which necessarily needs to take into account the UT's decision in *Bowring*.

144. I note that the Appellants have urged on the tribunal to consider (indeed '*must* consider'[13]) the 'reasonably required' criterion with reference to *Bowring UT*. In this respect, I agree with Ms Nathan that a proper consideration of the 'reasonably required' criterion cannot be undertaken 'in a vacuum', and requires an understanding of the MIIFF arrangements in the context of the *Bowring* decision.

***Consideration of the judicial decisions on Mark II Flip Flop***

145. As stated earlier, the judicial decisions on MIIFF which are material to these appeals are *Herman* (2007, by Sir Stephen Oliver as Special Commissioner); *Bowring FTT* (2013, by Judge Mosedale); and *Bowring UT* (2015, by Baling J).

146. The issue in *Herman* was whether the 'trust gains' accumulated in an offshore transferor settlement were to be treated as chargeable on Mr and Mrs Herman as beneficiaries of capital payments made by an onshore transferee settlement, pursuant to s 87 of the Taxation of Chargeable Gains Act 1992 ('TCGA'), which relevantly provides as follows:

**87 Attribution of gains to beneficiaries**

[13] Appellants' Closing Submissions in Reply at paragraph 7.

(1) This section applies to a settlement for any year of assessment during which the trustees are at no time resident or ordinarily resident in the United Kingdom.

(2) There shall be computed in respect of every year of assessment for which this section applies the amount on which the trustees would have been chargeable to tax under section 2(2) if they had been resident or ordinarily resident in the UK in the year; and that amount, together with the corresponding amount in respect of any earlier such year so far as not already treated under subsection (4) below … as chargeable gains accruing to beneficiaries under the settlement, is in this section and section … 90 referred to as the trust gains for the year.

(3) […]

(4) Subject to the following provisions of this section, the trust gains for a year of assessment shall be treated as chargeable gains accruing in that year to beneficiaries of the settlement who receive capital payments from the trustees in that year or have received such payments in any earlier year.

(5) The attribution of chargeable gains to beneficiaries under subsection (4) above shall be made in proportion to, but shall not exceed, the amounts of the capital payments received by them.

(6) […]

147. Where trust gains fell to be taxable under s 87 as attributed gains of the beneficiary on the receipt of a capital payment, the tax payable was subject to the addition of a 'supplement' under s 91, making the effective rate of tax for s 87 TCGA purposes at about 58% in the case of *Herman*, and at 64% in the case of *Bowring*.

148. Subsection 87(2) of TCGA refers to section 90, which was the focus of the operation of MIIFF, and at the time when MIIFF was being promoted, section 90 provided as follows:

**90 (Transfers between settlements)**

(1) If in a year of assessment for which section 87 applies to a settlement ("the transferor settlement") the trustees transfer all or part of the settled property to the trustees of another settlement ("the transferee settlement") then, subject to the following provisions –

(a) if section 87 applies to the transferee settlement for the year, its trust gains for the year shall be treated as increased by an amount equal to the outstanding trust gains for the year of the transferor settlement or, where part only of the transferor settlement is transferred, to a proportionate part of those gains;

[…]

(2) Subject to …, the reference in subsection (1)(a) above to the outstanding trust gains of the settlement is a reference to the amount of its trust gains for the year so far as they are not treated under section 87(4) as chargeable gains accruing to beneficiaries in that year.

(3) […]

(4) This section shall not apply to a transfer so far as it is made for consideration in money or money's worth.

(5) This section shall not apply–

(a) to a transfer to the extent that it is in accordance with schedule 4B treated as linked with trustee borrowing; or

(b) to any chargeable gains arising by virtue of that schedule.

149. Section 90 of TCGA is designed to carry over the realised gains of the transferor settlement to the transferee settlement. However, s 90 did not apply to gains realised by the

non-resident trustees *after* the advancement, and this gave rise to arrangements known as the 'flip flop' schemes. Mark I Flip Flop, being the predecessor of MIIFF, operated in the manner as illustrated by the following example at [10] in *Herman*:

> 'The trustees of a non-resident settlement hold assets worth £1 million. The assets have a capital gains tax base cost of £0.5 million. The trustees borrow £1 million and advance it by way of resettlement on the trust of a resident settlement for the benefit of beneficiaries of the non-resident settlement. The non-resident trustees sell the assets and discharge the borrowings. Because section 90 did not apply to the post-advancement gains, they were left in the (now redundant) non-resident settlement.'

150. To counter Mark I schemes, the Finance Act 2000 ('FA 2000') enacted anti-avoidance legislation to the TCGA (as Schedules 4B and 4C), which applied to transfers between settlements 'linked to trustee borrowings'. At the same time, a new subsection 90(5) was inserted to s 90 TCGA to bring in the operation of schedule 4B (as above) within section 90. The new subsection 90(5), while effective in countering Mark I schemes, inadvertently paved the way for Mark II schemes, which were designed to effect the disapplication of s 90 through trustee borrowings by triggering the new subsection 90(5) through settling the borrowed funds into a new trust.

151. Mark II Flip-Flop schemes worked essentially by triggering the disapplication mechanism introduced by FA 2000 as a targeted anti-avoidance rule against Mark I Flip Flop schemes, by exploiting the flaw in the new subsection 90(5).

152. The Treasury Notes to the Finance Act 2003 ('FA 2003') which amended the flaw in the anti-avoidance legislation introduced by FA 2000, described the Mark II scheme as follows:

> 'The scheme is used where the settlement carrying out the transfer of value has already disposed of all or most of its assets, but the gains have not yet been attributed to beneficiaries. The transfer of value to another settlement triggers a deemed disposal of the settlement's assets, but the settlement has few if any unrealized assets so there are few if any gains to go in the Schedule 4C gains pool. Because the Finance Act 2000 legislation only requires gains created by the deemed disposal to go into the pool, any existing unattributed gains remain in the transferor settlement and it is claimed that the capital from the transfer of value can then be paid out to beneficiaries by the trustees of the transferee settlement without triggering a capital charge.'

153. Whereas Mark I schemes eluded the application of s 90 in relation to post-advancement gains to be realised by the non-resident transferor trust, Mark II schemes eluded the application of s 90 in relation to gains *already* realised in the transferor trust *before* the settlement of borrowed funds into a transferee trust. By triggering the new subsection 90(5) through linking the two settlements with trustee borrowings, the application of s 90 was switched off. Mark II schemes worked by locking in the trust gains of the transferor trust, so that the stockpiled gains remained stranded in the transferor trust. As observed in *Bowring FTT* at [9]:

> 'The new trick required that the trust be non-resident and that there were actual gains which had not been distributed but no latent gains. For the scheme to work, the funds would also be transferred to a new trust from which they would be distributed, but before the transfer took place s 90(1) would be switched off by entering into the exact steps which would trigger the anti-avoidance legislation that is Sch 4B, linking the transfer to the new trust with trustee borrowings. The intention was that the realised gains would

> be left behind in the original trust and the new trust could make distributions to the beneficiaries free of liability to CGT. Although Sch 4B applied in theory, it bit on nothing as there were no chargeable assets in the old trust. …'

154. To counter MIIFF, amendments to TCGA (such as to subsection 90(5)) were made by FA 2003 and had retrospective effect as regards transfers between settlements made after 21 March 2000, but only in so far as the transferred property remained within the transferee's settlement as at 9 April 2003. If the funds in the transferee settlement had already been distributed to beneficiaries before the date of 9 April 2003, then the retrospective effect of the FA 2003 amendments did not apply.

**Herman:** ***the charging provision was under s 97(5) TCGA***

155. It is common ground, as stated in *Herman* at [12] that MIIFF 'was effective in preventing the realised stockpiled gains of the non-resident [transferor] settlement being carried into the [transferee] settlement'. If assets in a transferee settlement following implementing MIIFF had already been distributed to beneficiaries by 9 April 2003, then the only way to attribute trust gains to a beneficiary in receipt of a capital payment under a MIIFF scheme is to establish that subsection 97(5) TCGA applies. Section 97 relevantly provides as follows:

> **97 (Supplementary provisions)**
>
> (1) In sections 86A to 96 and Schedule 4C and this section "capital payment"–
>
> (a) means any payment which is not chargeable to income tax on the recipient …;
>
> (2) In subsection (1) above references to a payment include references to the transfer of an asset and the conferring of any other benefit, and to any occasion on which settled property becomes property to which s 60 applies.
>
> (3) […]
>
> (4) For the purposes of sections 86A to 96 and Schedule 4C the amount of a capital payment made by way of a loan, and of any other capital payment which is not an outright payment of money, shall be taken to be equal to the value of the benefit conferred by it.
>
> (5) For the purposes of sections 86A to 96 and Schedule 4C a capital payment shall be regarded as received by a beneficiary form the trustees of a settlement if –
>
> (a) **<u>he receives it form them directly or indirectly</u>**; [Emphasis added] or
>
> (b) it is directly or indirectly applied by them in payment of any debt of his or is otherwise paid or applied for his benefit, or
>
> (c) it is received by a third person at the beneficiary's direction..

156. In *Herman*, Sir Stephen concluded that s 97(5) TCGA applied to the capital payments received by Mr and Mrs Herman, and gave the relevant 'signposts' for s 97(5) at [21]:

> '… An obvious signpost will be the existence of a plan, if there is one. … The second signpost is to analyse the trust law and determine whether the [transferee] settlement "served as a vehicle to receive and continue the act of bounty effected by" the trustees of the [transferor] settlement. … The precise means by which the scheme was implemented will, in addition, be relevant to the question whether there is sufficient linkage to make the payments "indirectly" receipts from the trustees of the [transferor] settlement.'

157. In *Bowring FTT*, the tribunal followed the signposts in *Herman* and likewise concluded that s 97(5) applied to the capital payments in issue. The first-instance decision was overturned on appeal to the Upper Tribunal. Barling J observed in *Bowring UT*:

> '[89] I do not believe that assessment of the facts in order to determine whether a capital distribution was received from/made by a particular settlement, is susceptible to the application of some more or less formulaic "test", whether by reference to the existence of a plan or otherwise. In my view the issue raised here requires **all relevant facts to be considered, and each case will depend on its own facts**. Relevant facts will no doubt include whether what is done is pursuant to a plan or understanding or agreement.' (Emphasis added.)

**Bowring UT:** ***MIIFF effective in switching off s 90 TCGA***

158. The Mark II Flip Flop scheme was designed to take advantage of a flaw in the anti-avoidance legislation introduced to tackle Mark I Flip Flop ('MIFF'). Beneficiaries resident in the UK receiving capital distributions from a trust are normally chargeable to the extent of gains accumulated in the trust. The Scheme sought to separate the trust gain from the capital payments by establishing additional trusts with funds secured on the trust assets as explained at [13] by Barling J in *Bowring*:

> 'The proposed scheme and its intended effect would be as follows: the trustees of the 1969 trust would borrow money on the security of the trust fund, and then transfer the borrowed money to a second settlement with the same beneficiaries. In those circumstances the transfer to the second settlement would be treated by schedule 4B TCGA as a "transfer of value … linked with trustee borrowing", so that ss 90(5)(a) would prevent section 90 from applying to the transfer. Accordingly the second settlement would not "inherit" any of the trust gains on the 1969 trust pursuant to ss 90(1), with the result that the £3m trust gains would remain in the 1969 trust, allowing distributions to be made by the trustees of the second settlement to the beneficiaries of that settlement free of CGT.'

159. In terms of the statutory construction of s 90 TCGA, Barling J expressed his agreement with the submissions of Mr Prosser, counsel for the taxpayers, which he credited at [91] as being 'very strongly supported by the legislation in the respects identified above, and in particular by the purpose and *modus operandi* of s 90'. Mr Prosser's submissions are set out at [75]-[77] of *Bowring UT*:

> '[75] … [Mr Prosser] submits that the essential purpose of s 90 is to transfer trust gains of the transferor settlement for the relevant year to the transferee settlement *because* the capital distribution will be treated as "received from" the trustees of the latter settlement, and *not* from the trustees of the transferor. The thinking behind this transfer of gains is, he says, obvious. If the trustees of the transferee settlement make a distribution to a beneficiary in a later year, that will be a capital payment "received from" ("made by") those trustees, and it will *not* be payment "received from" ("made by") the trustees of the transferor settlement, who made the trust gains. Therefore, absent s.90, the payment made by the transferee settlement would not be matched with the trust gains of the transferor settlement, and tax would be avoided. To prevent this loss, s.90 transfers the gains to the settlement from which capital payments will be received in the future.
>
> [76] Mr Prosser emphasises that s.90 therefore recognises the separate existence of each of the two settlements, and that if the trust gains remain in the first settlement then tax will be avoided. … If s.90 had had its intended effect of transferring the relevant gains to the 2002 [transferee] trust, then

> HMRC's current assertion of an indirect payment by the transferor would mean that the trust gains were in the wrong settlement, unable to be matched by the capital payments made to beneficiaries by the transferee settlement. …
>
> [77] … [Mr Prosser] submitted that in a case where s.90 was *not* "switched off" by the unintended effect of ss.90(5)(a) and schedule 4B, for example where there was a transfer of trust assets between settlements without linked borrowing, it is inconceivable that HMRC would make the present argument, regardless of whether the transfer of trust assets was part of a plan. In those circumstances HMRC would say, with justification, that any such plan was irrelevant and that the payments were clearly received from/made by the transferee settlement. …' (Emphasis original).

160. It was the flaw in the drafting of (the then new) subsection 90(5)(a) that gave rise to the 'unintended effect' of allowing the trust gains to be stranded in the transferor settlement by switching off the operation of section 90, avoiding the capital distributions from being brought to charge under section 87 TCGA. Barling J remarked that HMRC sought to 'sidestep' this limb of Mr Prosser's arguments by submitting that 'on the fact of the present case, s.90 would not have applied to transfer the gains to the transferee settlement, *even in the absence of the flawed drafting of ss.90(5)(a)*' (italics original, at [78]). The argument run for HMRC by Mr Vallat is after *WT Ramsay Ltd v IRC* [1982] AC 300 and related authorities is set out at [78]-[81] of *Bowring UT*, and summarised as follows:

(1) The realistic view of the facts is that there were two steps in the scheme;

(2) These two steps are (i) a transfer of trust assets from the 1969 trust to the 2002 trust; and (ii) capital payments form the 2002 trust to the beneficiaries;

(3) The two steps should be viewed as 'a composite whole for tax purposes', and the individual steps would not be taxed.

(4) Taking a realistic view of the facts, the capital payments in the present case were made by the 1969 trust *via* an intermediary settlement, namely the 2002 trust.

(5) 'Consequently, "transfer … of … settled property" to the 2002 trust did not occur within the meaning of ss.90(1)', and 'there would have been no transfer of trust gains between the two settlements, even if s.90 had not been "switched off" by ss.90(5)(a)'.

**Bowring: *the factual matrix that escaped the s 97(5) charge***

161. The FTT in *Bowring* held that the capital payments, although made directly by the trust, could also be interpreted as being made indirectly by the other, thereby the trust gains in the original trust could be linked to the payments and chargeable to CGT by virtue of the different charging provision under subsection 97(5) TCGA. Barling J at the Upper Tribunal of *Bowring* held that the FTT had erred in law in respect of the 'made indirectly' criterion under subsection 97(5) TCGA. In holding that s 97(5) TCGA did not apply, Barling J had special regard to the following facts from the FTT's findings, which are summarised at [90] of *Bowring UT*:

(1) That 'the trustee of the 1969 [transferor/old] trust made an outright, unconditional transfer of its settled property to the 2002 [transferee/new] trust'.

(2) That there was no agreement between the trustee of the old trust and those of the new trust.

(3) That the trustee of the old trust 'had no say whatsoever' in what the trustees of the new trust did with the transferred property, whether by way of distributions to the beneficiaries or otherwise.

(4) That (a) 'there was a plan to enable capital payments to be made free of CGT', (b) that 'the plan envisaged virtually all the transferred property being paid to the beneficiaries of the 2002 trust (who were also beneficiaries of the 1969 trust)', and (c) both sets of trustees knowingly played a part in the realisation of the plan.

(5) But the existence of the plan did not affect the fact that (a) the 1969 trust's settled property was transferred to the 2002 trust and was held on the terms of the latter settlement, and (b) that the 2002 trustees did make the capital payments 'entirely in the exercise of their own discretion', (c) the 2002 trustees 'alone decided on the amounts and dates of the payments', (d) the 2002 trustees made those decisions after the trust assets had been transferred to them, and (e) the 'independence' of the 2002 trustees' decision-making is 'underscored' by their decision 'to leave a substantial part of the trust assets undistributed, notwithstanding that the plan had envisaged otherwise'.

***Summary of the substantive issues determined in MIIFF judgments***

162. The joined Appellants were among the followers who are awaiting decisions in test cases on MIIFF. Following initial decisions in HMRC's favour, notably *Herman* (2007) and *Bowring FTT* (2013) negotiations were re-opened with Baker Tilly as the agents taking over the matter from Tenon LLP, the original proposers of the Scheme.

163. In 2014, Mazars took over the representation for the group of joined Appellants in the present appeals. At that time, the decision of *Bowring FTT* had been appealed to the Upper Tribunal and became the lead case. In 2015, the Upper Tribunal in *Bowring* reversed *Bowring FTT* and allowed the taxpayers' appeal.

164. In the judicial decisions connected with MIIFF, the issues having been determined are:

(1) The scheme MIIFF as designed is effective in triggering subsection 90(5), thereby disapplying the legal effect of section 90 TCGA altogether.

(2) The effectiveness of MIIFF in disapplying s 90 TCGA was confirmed in *Herman* as well as in *Bowring*.

(3) Any contentions against the effectiveness of MIIFF on the *Ramsay* principle were rejected by the UT in *Bowring*, making it conclusive that as a matter of law, MIIFF is effectively in switching off section 90 TCGA.

(4) However, it remains possibly for a capital payment made by a transferee trust to a participant in MIIFF to be brought within charge of CGT under the supplementary provisions of section 97, and in particular, whether the participant ***'receives [the capital payment] form [the transferee trust] directly or indirectly***': subsection 97(5).

(5) Whether a capital payment is caught under subsection 97(5) for a charge to capital gains tax to arise is dependent on the peculiar set of factual circumstances pertaining to the capital payment so made to a participant; the determination '***requires all relevant facts to be considered, and each case will depend on its own facts***': *Bowring UT* at [89].

165. The only judicial determination from *Bowring UT* that is of relevance to the Appellants is that the MIIFF scheme has been held to be effective in switching off section 90 TCGA, but *Bowring UT* leaves it entirely open as to whether a capital payment made to a participant of MIIFF remains chargeable under section 97(5) TCGA.

166. It is therefore not a foregone conclusion that the capital payments made to the Appellants are not subject to a charge under section 97(5) TCGA, even if section 90 TCGA was switched off. The factual matrix at *Bowring* [90] as summarised above point to the multi-factorial considerations that a tribunal is required to undertake in determining whether a

capital payment made by a transferee trust of MIIFF remains chargeable to CGT under section 97(5) TCGA.

***Whether HMRC have met the burden***

167. Having considered the implications of the judicial decision in *Bowring UT*, I now turn to consider whether HMRC have met the burden in relation to the disputed information requests as being reasonably required for checking the Appellants' tax position as concerns the capital payments received from the transferee trusts on implementing MIIFF. I have in mind the guidance from *Kotton* that the question in front of me is 'an expressly limited one'; that it is not for me to investigate 'the merits of the underlying tax investigation', or indeed whether the investigation is justified or reasonably required.

168. My consideration should be focussed on whether 'there is a *rational connection* between the information and documents sought and the underlying investigation', while also having regard to the pronouncement in *Derrin CoA* that 'at the investigatory stage it will be *difficult to be definitive as to the precise way* in which particular documents will establish tax liability', and bearing in mind that the statutory scheme of Schedule 36 in conjunction with the issuance of a Closure Notice is that HMRC are entitled to full disclosure of relevant facts relating to the tax position in issue before making a determination under s 28A TMA to close the enquiry.

169. I have regard to Officer Bentley's evidence and its related submissions as follows:

(1) That in order to understand fully the Appellants' tax position as regards CGT on the capital payments, it is necessary for him to check the documentation produced to implement the MIIFF arrangements to ascertain whether or not the transferee trust in making the capital payment to each of the Appellants was acting as 'an intermediary' of the transferor trust.

(2) As I understand, the guiding questions set out in Officer Bentley's witness statement in making the information requests are derived from the guidance in *Bowring* at [90] where the UT set out the factual matrix in *Bowring* for the conclusion that the capital payments were not caught by section 97(5) TCGA.

(3) Officer Bentley's evidence is that he considered the documents created in planning and implementing the scheme would help to show to what extent a plan was in place, and in his words the extent of 'influence' and 'collusion' between different actors in the chain, including to what extent the transferor and the transferee trustees were involved in the setting up of the scheme, and to what extent their actions were 'premeditated'. Officer Bentley is open that the documents requested may provide him with evidence to that effect, but equally accepts that he does not know, as he has not seen all of the requested documents to form a view.

(4) The submission on Officer Bentley's evidence as regards the insurance documentation is that to take out insurance before entering the scheme shows 'a plan or arrangement' and the content of the insurance documents would show to what extent there was a plan in place and potentially to what extent parts of the plan were preordained, and the extent in which the transferor and the transferee trustees were involved as may indicate any influence on the transferee trustees by the transferor trustees to distribute the gains. (It is submitted that Barling J did not mention insurance once in *Bowring UT* and it is evident that Barling J did not consider the impact of parties taking out insurance to protect future liability for tax arising from the planning in reaching his decision.)

(5) It is observed that in Bowring (at [90]) 'the independence of [**the transferee trustees**'] decision-making is underscored by the fact that they decided to leave a substantial part of the trust assets undistributed, notwithstanding that the plan had envisaged otherwise' is an important factor for the conclusion reached that the capital payments were not subject to s 97(5) charge. However, HMRC have noted that in the Appellants' cases 'the whole of the transfers' from the transferor trusts were transferred by the transferee trusts (four of)[14] to the relevant Appellants as beneficiaries in the year 5 April 2003. It is submitted that this fact alone differentiates the cases from Bowring, and it is not clear whether Barling J would have reached the same decision on the independence of the transferee trustees if those trustees had followed the 'plan or understanding' to the letter.

(6) HMRC highlight that there appears to be evidence that the original trustees needed to consent to actions taken by the new trustees, and while the Appellants stated (at paragraph 16 of ASA2)[15] that the statement is 'incorrect' – no evidence has been produced in support that the statement is 'incorrect'. The statement (alleged to be incorrect) in ASA2 is from a Note of Meeting between Turcan Connell and Tenon and dated 29 October 2002, and in relation to Dr Draffan, the Note states as follows:

> '**Draffan –** present trustees are being difficult they will not resign unless a deed of indemnity is signed by the new trustees. This is not unusual with Scottish trusts but this deed contains *a clause which states at every stage of the planning the old trustees would have to be consulted*. The new trustees fear that if the old trustees are being difficult now they could be difficult when they put the planning into place.' (Italics added for the statement in question.)

(7) The purpose of these proceedings is not for the Tribunal to decide whether, and to what extent, the trustees were under a plan or arrangement, or whether they had complete discretion. Rather the purpose of the hearing is to decide whether HMRC are entitled to documents which they say may help them to determine those facts. The purpose of the Information Notices, in part, is to see whether and to what extent the transferee trustees had discretion over the funds transferred to them, and information requests towards such purpose is reasonably required to check the Appellants' tax position.

170. I accept the evidence from Mr Bentley, oral and written, as to the reasoning that has gone into considering each of the disputed Items and why they remain reasonably required for the identified tax issue in these enquiries, namely checking the Appellants' capital gains tax position as recipients of capital payments from the 2002 transferee trusts pursuant to the MIIFF arrangements. I find the 'rational connection' between the Items of requests being reasonably required and the identified tax issue to be cogent, consistent, and considered in each instance.

171. I am satisfied that the Respondents have met the burden of proof in relation to Notices under appeal. I have regard to the fact that the nutshell conclusion relevant to my

[14] The transferee trusts of which HMRC have the deed advances to evidence the whole of the transfers were transferred to the beneficiaries are: Turcan 2002 (No. 1) Trust; Turcan 2002 (No. 2) Trust; Thomson 2002 Trust; Wiseman 2002 Trust. HMRC do not have the trust deed advances for Dr Draffan.

[15] Paragraph 16 of ASA2 reads: '[in relation to Items 6, 8 and 9] HMRC are asked to explain why they contend that there remain documents that are within [Dr Draffan's] possession and power which have not been provided. For completeness, to the extent that HMRC rely on a statement in the Note of Meeting dated 29 October 2002 (C004 *Note of Meeting HT Julie Hutchison John Joyce and Emma Brittain of 29 October 2002,..*) which seems to suggest that the original trustees needed to consent to actions taken by other trustees, that statement is incorrect.'

consideration is at [89] of *Bowring*, that the determination of the substantive issue concerning the Appellants' tax position is not susceptible to '*some more or less formulaic "test*"'. There is no check-box approach that can be followed by HMRC to reach a conclusion to close the enquiry, and that the information requests are necessarily multi-factorial to address the relevant questions highlighted in Officer Bentley's evidence.

172. The Appellants in the present appeals have all received capital payments from trustees of a 2002 trust under the MIIFF arrangements but with the additional feature of insurance cover that was part and parcel of the overall arrangements. The documentation surrounding the insurance indemnity (i.e. Items 11, 14, 15 and 20) is an indispensable part of the arrangements as implemented for the Appellants, and is therefore reasonably required for checking the Appellants' tax position in relation to any potential exposure under section 97(5) TCGA.

173. As to Item 10 as respects the Engagement Letter for tax planning advice from Tenon, it is the documentation that evidences the inception of the MIIFF arrangements, and forms part of the continuum of documentation that constitutes '*all relevant facts to be considered*', and is reasonably required for the purpose of checking the Appellants' tax position.

174. For the avoidance of doubt, I have addressed specifically only those Items being contended by the Appellants as 'not reasonably required' under this heading on the basis that the Appellants have accepted that the remaining Items are 'reasonably required', even if contended on grounds of paragraph 18 or 23 restrictions from production.

175. For the reasons stated, and on being satisfied that the Respondents have met the burden that the disputed Items on the Information Notice are reasonably required, the Appellants' ground of appeal that the Information Notices and any Items therein are not reasonably required is hereby dismissed in full, having considered the Appellants' contentions very carefully and in detail, and I set out the reasons why the contentions are to be dismissed in their final analysis.

***Appellants' contentions dismissed***

*The aim is to see if facts fall 'on all fours' with Bowring*

176. As highlighted above, Ms Nathan's rebuttal (at ACS §16) of HMRC's closing submission (at §25) contains the chief tenor of the contention against the information sought in the Notices:

> (a) that 'the aim [of the Notice] is to see if the facts of the instant appeals fall "on all fours" with the facts considered to be material in Bowring UT';
>
> (b) it follows that asking for different information to that considered to be relevant in *Bowring UT* is clearly asking for immaterial facts/documents and cannot be reasonably required (underlining original).

177. The Appellants' submission in this respect has the appearance of a syllogism, and I consider the premise at (a) and the conclusion at (b) in turn.

178. The premise as formulated at (a) is advanced as the 'aim' or the purpose of the Notices, and reading the specially formulated premise in conjunction with other submissions, namely:

> (i) the context in which the information has been sought is to 'determine whether the facts of the Appellants fall squarely on all fours with the facts of *Bowring*' (ASA1 §45);
>
> (ii) reviewing the documents provided 'shows clearly that the facts of this case fall squarely within the boundaries of *Bowring*' (ASA1§46);

(iii) HMRC ignore 'the true position evidenced by the correspondence which is to identify whether the arrangements entered into by the Appellants falls "on all fours" with the position in *Bowring*' (at ASA2 §5).

179. The statutory purpose of the Information Notices by reference to the 'tax position' being checked is clearly set out in the Respondents' Skeleton Argument at §46. I accept HMRC's plain statement to be the correct identification of the tax position being checked for the issuance of the Notices in November 2019 that is in line with the statutory provisions under Sch 36.

180. The alternative formulation by counsel for the Appellants would appear to seek to delineate the permissible scope of the Notice by reference to what counsel consider to be 'relevant' in *Bowring UT*. I reject the proposition that the 'aim' of an information notice is to be reformulated in terms as set out at ACS§16, and for the 'reasonably required' test to be applied against this specific formulation according to Ms Nathan's submissions. The primacy of the statutory wording weighs against any liberty to be taken in permitting such an individualised formulation of the statutory test.

181. The statutory test for 'reasonably required' is set out in terms as provided under para 1(1) of Schedule 36, and that is the correct test to be applied in determining the reasonably required criterion. HMRC's submission at RSA §46 has correctly set out the tax position to which the statutory test is to be applied. There is no justification to depart from the statutory formulation of the applicable test, and the principal danger in any attempt to re-cast the statutory test in wording supposedly tailored to each and disparate case is the deviation from the correct test, not to mention that it will be setting an undesirable and impermissible precedent.

182. I accept that the context of the information requests has *Bowring UT* firmly in the background, and I have applied the statutory test of 'reasonably required' against the tax position to be checked in the context of the *Bowring* judgement by Barling J. I reject the submission that the 'reasonably required' criterion is to be determined by reference to 'whether the facts of the Appellants fall squarely on all fours with the facts of *Bowring*' – to do so will require an evaluation of the substance of the contents in the documents provided, which is plainly not within the remit of the tribunal hearing an appeal against an information notice.

183. In determining on whether the reasonably required criterion is met, my focus is on 'whether there is a rational connection between the information and documents sought and the underlying investigation' (*Kotton* at [62]) to check the Appellants' CGT position in relation to the capital payments received in participating in MIIFF arrangements. To that end, HMRC have met the burden, and it is not for me to determine 'whether the facts of the Appellants fall squarely on all fours with the facts of *Bowring*' – that is for HMRC to determine in due course before the issuance of closure notices for the Appellants.

184. I dismiss the premise as formulated for the Appellants to be 'the true position' for the reasonably required test. The references to the correspondence between Mazars and HMRC prior to the issue of the information notices do not detract from the premise as formulated by counsel for the Appellants being out of line with the statutory test under para 1(1) Sch 36 which is incumbent upon me to apply.

185. Given the submission for the Appellants in this regard is cast as a syllogism, by dismissing the premise, it follows that the conclusion does not stand either. Indeed, the Appellants' conclusion that HMRC have ignored 'the true position evidenced by the correspondence which is to identify whether the arrangements entered into by the Appellants

falls "on all fours" with the position in *Bowring*' is not a finding of fact that I am supposed to, or required to, make to determine the 'reasonably required' criterion as having been met.

186. Even if there were a 'true position' to be evidenced by the correspondence, that is in the background before the issue of the Notices, and does not affect the correct formulation of the statutory test for the information requests as set out at RSA§46. In any event, from the submissions for the Respondents, it would appear that the documents provided to HMRC so far have suggested to HMRC that there are material differences between the Appellants' capital payments position to that in *Bowring*, having regard to the following facts as highlighted above.

(1) The insurance cover to provide tax indemnity common to all Appellants was absent in *Bowring*;

(2) The capital advances to the Appellants are the whole transfers received from the transferee trusts, which differ from *Bowring* where the transferee trust retained significant capital undistributed; (Dr Draffan's deed of capital advances not provided);

(3) The Note of Meeting of 29 October 2002 (Turcan Connell and Tenon) which stated that Dr Draffan's 2002 trust 'deed contains a clause which states at every stage of the planning the old trustees would have to be consulted' would suggest that the new trustees in Dr Draffan's case did not have the discretion as the trustees of the transferee trust in *Bowring*, (noting the Appellants' submission that the statement is 'incorrect' but with no supporting evidence why that that statement is 'incorrect').

*Fishing Expedition*

187. The Appellants rely on *Derrin HC* where Simler J remarked at [20]:

> 'Finally, HMRC may not use their Sch 36 powers for a fishing expedition – whether for their own or the purposes of another revenue authority. A broadly-drafted request will not be valid if in reality HMRC are saying "can we have all available documents that we are bound to find something useful". What is required is that the request is genuinely directed to the purpose for which eh notice may be given, namely to secure the production of documents reasonably required for carrying out an investigation or enquiry of any kind into another taxpayer's tax position.'

188. Simler J's remark in *Kotton* at [60] should be juxtaposed against, and read in conjunction with her remark in *Derrin HC* at [20]:

> '… given that the scheme is directed at an early investigatory stage and in any investigation some lines of enquiry may prove more fruitful than others but nevertheless may need to be pursued.'

189. I agree with the Respondents' submission in this respect, that 'what constitutes "fishing" must be considered in the light of the reasonably required test'. I have special regard that what the Court of Appeal said in *Derrin CoA* at [68] in relation to complex arrangements (as in the MIIFF) that it is 'inevitable in many cases, particularly where there are complex arrangements designed to evade tax, that at the investigatory stage *it will be difficult to be definitive as to the precise way in which particular documents will establish tax liability*.'

190. I accept the Respondents' submission that the instances of 'fishing' pertain to information requests which 'do not relate to an identified tax issue and seek documents of so wide a class that they are merely hoping to find a tax issue'. This position is supported by *Onecall* at [64]: that 'HMRC can only reasonably require information which relates to identified tax issues'.

191. In relation to the criticism that the requests are widely drawn, the Respondents submit that Officer Bentley's requests relate specifically to a tax issue (namely the CGT position of the capital payments from the trust, and more specifically whether the relevant factor set out by Barling J in *Bowring* have been met. Where possible, Officer Bentley has confined the requests to those relating to specific documents or meetings evidenced to exist. For example:

(1) Item 1 is based on the letter of 16 January 2002 from Turcan Connell to Tenon, wherein it is stated that there is to be a meeting between Turcan Connell and Tenon to discuss the tax planning services; and

(2) Items 2, 3 , 4 and 5 are based on the documents and presentation referred to in the internal email from Heather Thompson (at HB2568) to colleagues at Turcan Connell, sent on 29 May 2002 (see below).

192. Further, the Respondents submit that there are instances where the requests have to be more widely drawn, such as Item 19, but they remain 'in keeping with the statutory provisions of Schedule 36'. Item 19 asks for meeting notes but within a defined period when the planning took place – it is submitted that this 'is not fishing but tailoring information requests as far as possible to address the tax issue'. The tailoring of the information notice is further evidenced by the withdrawal of the initial information notices issued on 7 July 2017, and the reduction in the number of requests between the informal and formal schedules.

193. Overall, the Respondents submit that they cannot specify the requests in further detail than what has been done since HMRC do not know which documents exist to be able to specify or itemise the requests further. HMRC also refer to Mr Mackenzie's oral evidence wherein he stated that Mazars hold documents they believe are not reasonably required. While HMRC have asked Mazars for further specification of these documents, they have not been provided with further details regarding these documents which are in Mazars' possession but withheld as being not reasonably required.

194. Ms Nathan referred in her closing submissions to *Cliftonville*, where the appellant had used a tax avoidance scheme and appealed against certain information requests on ground of being 'nothing more than a fishing expedition for a tax avoidance motive' (at [84]). Judge Nicholl rejects the ground that there was a fishing expedition because 'the requests are limited to correspondence that relates to the implementation of [the tax avoidance scheme]'.

195. Similarly, I consider that the Respondents are looking at the specific issue as concerns whether the capital payments made by the transferee trusts acting as an 'intermediary' for the transferor trusts. The issue is well identified, and there is 'a rational connection between the information and documents sought' and the identified issue. The rational connection is not severed when a request is widely drawn out of necessity. Having heard the parties' evidence, I accept that it is difficult at the early investigatory stage for HMRC to be more definite and precise, and when HMRC do not have the full knowledge of what documents exist when Mazars have not provided details as requested. I reject the Appellants' contention that the disputed Items are fishing expedition.

*Illegitimate purpose*

196. Ms Nathan's cross-examination of Officer Bentley centred on the internal memorandum for Old Documents Authorisation prepared by Officer Whitehead as evidence that the information requests were motivated by an illegitimate purpose, that of bringing the Appellants' case for litigation to overturn *Bowring*.

197. Mr Dixon submits that the starting point is not to look at the purpose of the underlying enquiry (*Kotton* at [62]) but to consider the individual requests and whether they are

reasonably required: 'the legislation does not make the approval of a notice conditional on the tax investigation itself being reasonably required'.

198. To the extent that the Appellants submit that HMRC are trying to 'overturn' the decision in *Bowring*, the Respondents say that 'it fails to hold water' because:

(1) Officer Bentley 'categorically' stated that is not the intention and should the documents evidence that the case falls with the same fact pattern of *Bowring* the enquiries will be closed.

(2) Procedurally, it is only good governance that before issuing an appealable decision, the officer considers whether the closure notice decision would 'stand up to the strains of litigation', and that is 'the likely context of Mr Whitehead's comments on litigation'.

(3) Even if the Appellants' line of questioning on Mr Whitehead's statement on litigation were to be correct, and the purpose of requesting the information and documents is to take a case to litigation, this logically necessitates that the purpose is to check the tax position, as the only way for a case to get to litigation is for the Respondents to decide there is an underassessment of tax and issue a Closure Notice accordingly.

(4) As to the purpose being to 'overturn' *Bowring*, this cannot be the case given that the Respondents are out of time to appeal *Bowring*. Moreover, it is clear from the decision from Barling J that there is no 'formulaic test' and each appeal 'requires all relevant factors to be considered, and each case will depend on its own facts', so any likely decision would also be confined to its own facts.

199. Officer Bentley was cross-examined extensively on what was authored by Officer Whitehead. I consider the relevance of the Old Documents Authorisation for present purposes is to allow the requests to cover documents beyond the usual time limit of 6 years from the date of issue of the notice. The procedure within HMRC for such an authorisation to be granted is an area of governance of executive powers which the Tribunal has no jurisdiction to consider.

200. To the extent that there is a reference to litigation in the Old Documents authorisation, I accept the Respondents' submissions in this respect. I have special regard to the dictum in *Kotton* that the reasonably required criterion does not bring in the 'merits of the underlying tax investigation' (at [60]); and the tribunal is not required to establish the merits of the underlying tax investigation as a pre-condition for determining if the information requests are reasonably required for the purpose of checking the taxpayer's tax position.

201. Finally, insofar as the illegitimate purpose is to bring a case to overturn *Bowring*, it is worth noting that any reliance on *Bowring* by any participant of MIIFF arrangements is strictly limited to the conclusive determination that the scheme was effective in switching off the application of s 90 TCGA. In that respect, *Bowring* is no different from *Herman* and the decision in *Bowring* does not mean that *Herman* has been wrongly determined.

202. The *Bowring* case does not confer a blanket dispensation on all participants of MIIFF arrangements because it has made it clear that notwithstanding s 90 TCGA being switched off, the capital payments pursuant to MIIFF arrangements may still be subject to a charge of capital gains under s 97(5) TCGA as being made 'directly or indirectly' by the transferor trusts to the beneficiaries, and each case has to be determined with regard to its own factual matrix. To that end, the determinative factors that decided *Bowring* were fact-specific, and the submission that the illegitimate purpose is to 'overturn' *Bowring* does not hold water, as submitted by HMRC.

## WHETHER IN THE PERSON'S POWER OR POSSESSION

### Burden of proof

203. Ms Nathan submits that on an appeal against a Schedule 36 notice the burden lies on HMRC to show that all conditions for its imposition are satisfied, including that an item of request is within the person's possession and power (ASA1§37, ASA2§2), citing *Cliftonville* at [39]; *Jenner* at [14] – [16]; and *OneCall* at [6]. (*Jenner* simply refers back to *Mathew* and *Cliftonville* at [39]; *OneCall* at [6] concerns the burden on the reasonably required criterion.)

204. In *Cliftonville*, which was concerned with an appeal against an information notice such as the present cases, the burden of proof in relation to the grounds of appeal being advanced was settled by reference to the general rule in civil litigation that the burden rests with the party who makes a substantive assertion, whether in the affirmative or in the negative, and this general tenet in litigation should apply equally as respects the substantive assertion in an appeal against an information notice. The conclusion reached in *Cliftonville* is at [39], which states:

> 'In this case, HMRC must establish its assertion that the items requested are reasonably required by the officer for the purpose of checking the appellant's tax position, and then the onus is on the appellant on the grounds of its appeal, including grounds that an item is not a statutory record or that a restriction in Part 4 of Schedule 36 applies.'

205. Paragraph 18 of Schedule 36 comes under Part 4, and the statutory wording is in the affirmative: '*An information notice only requires a person to produce a document if it is in the person's possession or power*'. The conclusion reached in *Cliftonville* is in line with the general rule that if the Appellants rely on para 18 Sch 36 restriction, then the onus is on the Appellants to establish any particular documents under a certain request are not in the Appellants' possession or power. The conclusion in *Cliftonville* at [39] is expressly cited in Ms Nathan's submission, but it is not immediately clear how the conclusion at *Cliftonville* [39] lends support to the submission that HMRC bear the burden in establishing the para 18 condition.

206. The Appellants also refer me extensively to *Mattu*[16] for case law principles applicable in determining whether a document is in the possession or power of a recipient of an information notice. In *Mattu* the matter in front of the Upper Tribunal was HMRC's application for imposing a tax-related penalty under para 50 Sch 36 FA 2008 for an alleged failure to comply with an information notice. In relation to burden, the Upper Tribunal in *Mattu* held at [100]:

> 'HMRC accepted that, whilst they strictly have the burden of proof, in an issue of this type it is sufficient for HMRC to raise a prima facie case that the documents and information are in the Respondent's possession or knowledge and then it is for the Respondent to show that they are not. As the FTT said in *HMRC v Parissis* [2011] SFTD 757 ("*Parissis*") at [19] in relation to the predecessor legislation to Sch 36, which is in identical terms on this point:
>
> > "It seems to us that it is HMRC's application for a penalty and it is for them to satisfy us that the documents are in the respondents' possession or power. We bear in mind it is hard to prove a negative. But, we think, although HMRC must raise a prima facie case that the

[16] *HMRC v Mattu* [2021] UKUT 0245 (TCC).

> documents are in the respondents' possession or power then it is for the respondents to show that they are not."'

207. The Appellants' Closing Submissions in Reply (ACS §18) say that 'it is absurd to suggest that the burden is not on the Respondents to show a *prima facie* case that a document is in the power and possession of the Appellants', and at ACS§19, Ms Nathan submits:

> 'It cannot be seriously suggested that the Respondents bear no obligation to indicate how either: (i) a document is in the taxpayer's possession, or (ii) how it is reasonably believed to be in the taxpayer's possession so that it can be produced. Without the Respondents properly identifying whether and why they say a document is in the power and possession of the Appellants, the FTT should not order its production.'

208. Ms Nathan's submission on burden is that *Mattu* is the authority to follow in deciding on burden. I have regard to the fact that *Mattu* is an authority on application by HMRC to impose a tax-related penalty under para 50 Sch 36 for alleged failure to comply with the information notice, and that the onus in a penalty case always rests with the party seeking to impose it, while the issue here, being an appeal against an information notice is substantively different from the matter in front of the UT in *Mattu*. However, I accept the validity of Ms Nathan's submission in that the Respondents bear the burden to show a *prima facie* case that 'the documents exist, or could reasonably be said to exist, before directing compliance' (ACS§20).

209. I accept Ms Nathan's submission as respect the *prima facie* case that HMRC have to establish in accordance with *Mattu*, but the Upper Tribunal in *Mattu* also clearly stated that the burden then reverses onto the taxpayer, on approval of the approach adopted in *Parissis*: '*although HMRC must raise a prima facie case that the documents are in the respondents' possession or power then it is for the [taxpayers] respondents to show that they are not*'.

210. The approach in *Parissis* is in line with *Cliftonville* at [39], which Ms Nathan has cited in support of her submissions on burden. In relation to para 18 Sch 36, I determine the Items in dispute with HMRC bearing the *prima facie* burden, then 'the onus is on the appellant on the grounds of its appeal, including grounds that a restriction in Part 4 of Schedule 36 applies'.

**Case law on para 18 Sch 36 'possession or power'**

211. The relevant case law principles are summarised from the key authorities as follows.

(1) The requirement in para 18 of Sch 36 that items must be in the possession or power of the recipient of the notice strictly applies to documents and not to information': (at [99] *Mattu*).

(2) 'The term "power" means both legal power and de facto power to obtain documents (or information)': ([101] *Mattu*). The UT adopted what the FTT said at [78] to [82]in *Parissis* in relation to the taxpayers who were served an information notice, were the settlors and beneficiaries of the trust, and the trustee was a professional trustee, and there had been cooperation and direct transactions between the trustee and the taxpayers.

(3) The FTT (Judge Mosedale) in *Parissis* held that HMRC had raised a prima facie case that the documents were in the 'power' of the taxpayers/respondents as follows:

> "[79] Could documents be within the [taxpayers'] power if they have to get the consent of another person (in this case the trustee) in order to obtain them? It costs very little to ask. We consider, in the context of information notices where the emphasis is on the present and future, …' that documents

> are within a person's power if they can obtain them, by influence or otherwise, and without great expense, from another person even where that person has the legal right to refuse to produce them.
>
> [81] HMRC have raised a prima facie case that the [taxpayers] respondents would be given the documents by the trustees: they are both settlors and beneficiaries. The respondents, we find, transferred some of their wealth to the trustee on trust for themselves. We find they were unlikely to do this if they did not believe that the trustee would act on their instructions. The trustee is a professional trust company and will have a reputation to maintain. … we find it is likely a trustee would choose, in the spirit of trusteeship, to provide copies of them to the settlors and beneficiaries.
>
> [82] HMRC have raised a prima facie case that the documents are within the power of the [taxpayers] respondents and we therefore think it is for the respondents to show that they have asked the trustee for the documents and been refused. They have not done this. They are therefore liable to a penalty.'

(4) In *Patel*[17] where the taxpayers claimed that the documents requested in an information notice were not in their possession or power, but were within the possession of the professional offshore trustee, the FTT (Judge Sinfield) held at [14]-[16]:

> (a) That the taxpayers 'must have power to influence the behaviour of the Trustee in relation to such things as the provision of documents or information';
>
> (b) That the appellant taxpayers 'can influence and, in practice, require the Trustees to comply with their lawful and reasonable requests';
>
> (c) 'From the language of the letter [to the Trustee] and the fact that no attempt was made to follow it up for more than a year … and the passive acceptance of the Trustee's refusal to provide the documents and information, I conclude that the Appellants have not made any serious attempt to obtain the relevant information and documents from the Trustee.'

**Evidence on 'possession or power'**

***Appellants' evidence***

212. To establish para 18 restriction applies to those requests as contended, each of the Appellants provides a witness statement that the documents are not in their possession or power to provide. Dr Draffan, Mr Wiseman, and Mr Clark as executor of Mrs Thomson, together with 8 beneficiaries of the Turcan Family trusts were cross-examined.

213. Dr Draffan's witness statement is representative of others, and in relation to his position as a settlor and beneficiary of the relevant trusts. The relevant parts of Draffan's statement are:

> '8. In respect of Items 1, 4 and 10, I can confirm that to my knowledge no marketing material exists or has ever existed. This was confirmed to HMRC… and that I am no longer in possession of Item 16.
>
> 9. Turcan Connell's letter of 16 January 2002 is referred to at Item 1. On the advice of Mazars, legal advice privilege is claimed on all other solicitor client correspondence until this heading.
>
> 10. I understand from advice given to me by Mazars/Turcan Connell that, as a beneficiary of the above mentioned trusts I am entitled to certain

[17] *H A Patel & K Patel (a partnership) v HMRC* [2014] UKFTT 167 (TC).

> information as of right – as a liferenter about the trust income I am entitled to and about the value of the trustee stat that may fall into my estate for IHT purposes. From that advice, I understand however that I do not have a general entitlement to information in the possession of the trustees. Attempts by Mazars to seek information relating to items 2, 7, 18 on behalf of myself (and other beneficiaries) were not successful. I am therefore unable to obtain documents held by the trustees outlined above and certainly [not] items 2, 7, and 18.'

214. In cross-examination, Dr Draffan confirmed that: (a) he had no 'first-hand knowledge' of documents being provided by Mazars; (b) was unable to say whether Mazars had these documents or whether Turcan Connell would provide the requested documents to them. The other Appellants who gave oral evidence were asked a similar set of standard questions, and their replies did not differ from the two material aspects highlighted here of Draffan's replies.

215. As to Mr Mackenzie's evidence, I accept Mr Dixon's submission that the witness statement does not set out his view of what documents are supplied, whether these are the totality in relation to each request and whether the Appellants have power to obtain more. In cross-examination, Mr Mackenzie stated that:

(1) Mazars held certain documents that had not been provided to HMRC as those documents are considered to be 'not reasonably required' under Sch 36.

(2) When asked to state whether Mazars had provided with the list of documents (as requested by HMRC) that are in Mazars' possession but are withheld from disclosure on grounds of 'not being reasonably required', Mr Mackenzie stated that Mazars had refrained from providing HMRC with such a list so far.

(3) When asked whether the Respondents could be sure what documents Mazars have in their possession, he accepted that HMRC could not be sure as Mazars had not given a list of those documents which Mazars categorise as not reasonably required.

216. Mr Mackenzie was asked about why there was no communication for Robert Turcan's children from Turncan Connell, and his reply was that Robert Turcan was acting as the family adviser to the whole family, and the communications were between Robert Turcan and his siblings and their children; that there would be no written records of communications for Robert Turcan's children as they would have been verbal.

***HMRC's submissions on Appellants' evidence***

217. In relation to 'possession', HMRC submit that:

(1) The Appellants have failed to evidence satisfactorily that on the balance of probabilities, that each of them has provided all the documents in their possession relevant to the remaining requests. Each Appellant admitted to having no first-hand knowledge of any of the matters in their witness statements, which were made in complete reliance on Mazars. It became evident that when being questioned on the existence of documents, they were unable to say whether Mazars had these documents or whether Turcan Connell would provided the requested documents to them.

(2) Mr Mackenzie confirmed more documents would be provided if the Notices were found to be reasonably required.

218. In relation to 'power', HMRC submit that:

(1) Both Mr Wiseman and Dr Draffan were settlors and beneficiaries of the trusts and they would expect to be provided with documents from those advising them; this is

supported by the evidence, including the response from Turcan Connell to Mazars' requests for information (AHB 20 and 47).

(2) Likewise, whilst the Turcan family and Mr Clark (the executor of Ms Thomson's estate) were not sure whether they would have a right to the documents as beneficiaries only, the evidence at AHB 47 illustrates it is likely Turcan Connell would provide them with documents relevant to their planning and implementation of the MIIFF arrangements, if requested.

(3) Further, Turcan Connell offered to provide the Appellants with documents they considered would meet the information requests, and that more may be available but they would not look for these if Mazars considered them not to be reasonably required.

(4) Mr Mackenzie stated on several occasions that he was not aware whether Turcan Connell had provided the documents referred to in the email, nor could he confirm that the Appellants had even asked for them to be provided. It is submitted that this does not amount to a 'serious attempt to obtain the relevant information'.

**Whether *prima facie* case for disputed Items**

219. For each Item disputed on the ground that it is not in the Appellants' possession or power in reliance on para 18 Sch 36, HMRC have to meet the *prima facie* burden that 'the documents exist, or could reasonably be said to exist, before directing compliance' (per Ms Nathan's submission). The *prima facie* evidence is set out in Officer Bentley's witness statement, and I deal with each disputed Items in turn as follows.

***Item 1– Correspondence/ documentation re: offer of tax planning services by Tenon as referred to in Turcan Connell's letter dated 16 January 2002***

220. HMRC's case is that the substance of the request is derived from the meeting referred to in Turcan Connell's letter of 16 January 2002 on the offer of tax planning services by Tenon, and to include all documentation prepared in connection with the planning and the minutes of the meeting which took place immediately following that letter. Excerpts of the letter of 16 January 2002 from Turcan Connell to John Joyce, Regional Chairman of Tenon are as follows:

> 'In advance of our meeting it would be helpful if you could confirm in writing the overall costs of the exercise in terms of both tax generated and professional costs. … Taking account of the complexity of the planning and the high value, …We would like to be quite sure that the insurance cover is not affected in any way by the fact any trust is subject to Scots law and that Scottish legal advice is being provided externally from Tenon …'

221. The Appellants' evidence is to confirm that 'to [their] knowledge no marketing material exists or has ever existed'. Further, many of the documents that fall within Item 1 are also subject to a claim of legal professional privilege under para 23 Sch 36.

222. I accept that there is a prima facie case that Item 1 requests are valid as correspondence and documentation emanating from the planning discussion between Tennon and Turcan Connell. I also accept that the Appellants do not have in their possession the marketing material, and to their knowledge, that no such material has ever existed, and therefore para 18 restriction applies to the marketing material.

223. In any event, I do not consider the marketing material to be essential to the identified tax issue in question, since the effectiveness of the MIIFF in switching off s 90 TCGA (which would be what the marketing material of the scheme sought to promote) is not the relevant issue. In my judgment, even if the marketing material did exist, it would not have assisted in

addressing the question whether s 97(5) TCGA charge is in point in relation to the capital payments made to the Appellants.

224. To the extent that most of the correspondence and documentation has been granted privilege as claimed, the Appellants can rely on para 23 restriction, save for the specified documents relating to the 31 July 2002 meeting which I have considered not to be privileged and shall be disclosed (see below).

*Privilege waived by 4 of the Appellants as beneficiaries of the Turcan Trusts*

225. Further, the parties are aware that the 4 Appellants who are beneficiaries of the Turcan trusts (being children of Robert Cheyne Turcan) have waived their right to privilege. The relevant documents which would otherwise have fallen under Item 1 for these 4 Appellants who have waived their privilege could have been directed for disclosure, even if the equivalent documents are otherwise protected by privilege as granted to the other 10 Appellants.

226. However, I accept that documentary evidence from the exchanges between Mazars and Tom Duguid that the communications between Robert Turcan and his own children are not on Turcan Connell's file, and of Mr Mackenzie's evidence that Mazars do not hold the equivalent set of communications for Robert Turcan's children as for other beneficiaries for production.

***Items 2 and 3 – 'timetable' and 'step by step plan'***

227. The basis for Items 2 and 3 is an internal email of 29 May 2002 from Heather Thompson of Turcan Connell. The internal email exchange within Turcan Connell was between Heather Thompson (of Turcan Connell) to Alasdair McLaren (Guernsey office of Turcan Connell), Robert Turcan (being the family adviser of the Turcan Trusts as well as a partner of the firm), Douglas Connell, and Graham Scott, the subject heading is absent in Thompson's email but Robert Turcan's reply gave the subject heading as 'Tenon'.

> Email Sent: 29 May 2002 (on behalf of Heather Thompson by a clerk of TC)
>
> 'I attach a note of my meeting on Monday with Tenon and a representative of Willis, the brokers. Also attached is a provisional timetable. The next stage is to prepare a detailed step by step plan for each trust and Lee Blackshaw of Tenon is coming here in [sic] 11th June to do this. This will be followed by a presentation to the trustees with the intention of being in a position to enter into formal engagement letters by the end of June. I am advised that the process takes about three months and we would be aiming to complete by the end of September.
>
> Finally, I attach the most up-to-date note of the stockpiled gains showing figures as at 5th March 2002. In relation to the Wiseman/[redacted]/Draffan trusts there may be up to £100,000 of capital payments to be deducted from the stockpiled gains, so the actual figure will be between £600,000 and £700,000.'

228. The Appellants' stated ground against Items 2 and 3 is to state that 'there is no evidence that the Appellants were aware of the existence of such documents nor that they had possession of such documents', and that applies to Items 2 and 3, being information referred to in Heather Thompson's (of Turcan Connell) email dated 29 May 2002, such as the 'timetable'.

229. The submissions for the Respondents are:

> (1) In relation to Item 2, the 'timetable' is likely to exist, as evidenced by the email of 29 May 2002. The Appellants were unable to confirm whether Mazars

have this document or whether they could obtain it from Turcan Connell. The Appellants have further stated that an engagement letter signed by the trustees on 26 September 2002 is in the Appellants' possession.

(2) In relation to Item 3, the Appellants were unable to confirm whether the step by step plan exists or is in their power and possession. There is also likely to have been correspondence distributing the plan and discussing its content. The email was sent by an employee of Turcan Connell to the family advisers, so it is likely that the Appellants would be able to obtain copies from Turcan Connell.

230. In relation to Items 2 and 3, I find that HMRC have met the *prima facie* burden that the information and documents requested exist. In the light of the evidence as respects information gathering so far, I also find that it is within the Appellants' power to request for the production of such information and documents from Turcan Connell, either in their capacity as settlor *cum* beneficiary as in the case of Mr Wiseman and Dr Draffan, or as beneficiaries of the 2002 trusts.

231. However, while the step-by-step plan and timetable evidently existed at one point and would appear to be some kind of working documents for Turcan Connell to liaise and co-ordinate their actions with Tenon, that does not mean that those documents to keep the lawyer and Tenon on track would have been passed on to the Appellants for them to be in possession.

232. As to whether the Appellants have the power to request Turcan Connell to locate Items 2 and 3, I consider that even if the Appellants were to have the power to make such a request, it would have been privileged documents and be protected from disclosure.

233. For these reasons, I conclude that even though HMRC have met the prima facie burden that Items 2 and 3 exist (or existed), the Appellants are not in power or possession of the Items and in any event the documents would be privileged. Items 2 and 3 are to be removed.

***Item 4 – documentation re: trustees' presentation of 31 July 2002***

234. It is not in dispute that there was a presentation by Tenon on 31 July 2002, and the *prima facie* case is made out that there exists documentation relating to that presentation, as well as before and after the presentation in preparation of and in following up from the event.

235. The Appellants' ground of appeal is in substance the same as Items 2 and 3, which is to say that that there is no evidence that the Appellants were aware of the existence of such documents, nor that they had possession of such documents.

236. HMRC's position is that the Appellants had referred to there not being any 'marketing material' but the presentation was likely to have taken place as it was referred to in the email of 29 May 2002, and that it is likely that further documents were prepared in connection with the presentation.

237. My conclusion on Item 4 the same as Items 2 and 3, and the Appellants, and in any event could have relied on para 23 restriction in relation to Item 4.

***Items 6, 7, and 8 – clauses on trustees' involvement***

238. The Appellants' position is that these items relate to copies of clauses contained in any of the trust deeds relating to the involvement of the trustees, and Mazars have 'consistently said that there are no other clauses other than the ones in the trust deed itself'.

239. The Respondents in closing submissions have accepted that Items 6, 7 and 8 have been compiled with. The appeal against Items 6, 7 and 8 therefore falls away.

***Item 12 – documentation referred to in the indication letters***

240. HMRC do not accept that Item 12 has been fully complied with as contended for the Appellants. Item 12 is referenced to the documentation mentioned in the 'indication letters' dated 22 November 2002 for each of the five transferor trusts. The indication letters are from Ambridge Partners addressed to Mr Astley-Rushton, Executive Director of Global Financial & Executive Risks Practice based in London.

241. The subject title of the Indication letter is '*Proposed Tax Opinion Insurance Policy*' followed by the name of each of the transferor trusts. The first page reads as follows:

> 'Outlined below are the terms of our preliminary non-binding indication (the "Indication") for the Tax Opinion Insurance Policy ("Policy") requested by your and your client on behalf of Dr G H Draffan (the "Proposed Insured"), related to the UK Capital Gains Tax planning ("Planning") as more fully described in the Specimen Policy from set forth below. …
>
> Based upon *our review of the information* that you and the Proposed Insured have furnished to us thus far, we are pleased to provide an Indication of our interest in providing tax insurance for the relevant issues. The Indication is subject to our receipt, review, and acceptance of *the following underwriting documents and/or additional information*: [Italics added.]
>
> 1. Warranty Letter by each beneficiary in the letter from attached hereto as Exhibit A;
>
> 2. Confirmation by solicitors representing each beneficiary in the letter form attached hereto as Exhibit B;
>
> 3. Items set forth in items 1 and 2 must be received by December 6, 2002.
>
> Policy Type & Form: Manuscript form of Ambridge Partners' Tax Insurance Policy, …
>
> Limit of Liability: £463,318 (or less if desired)
>
> Proposed Insured: Dr G H Draffan
>
> Deduction & Retention: None.'

242. Ambridge Partners' Indication Letters are 3 pages long each, and are identical in substance for all the other 4 transferor trusts as the letter to Dr Draffan 1988 Trust, save for the particulars as concerns the names of the 'Proposed Insured', and the quantum as respects the limit of liability, which are as follows:

(a) The Turcan 1968 trust for £732,229

(b) The Turcan 1972 trust for £308,672

(c) The Len Thomson 1988 trust for £448,307

(d) The Colin Wiseman1988 trust for £463,254

243. Item 12 is drawn in terms to refer to the substance of the Indication Letters that would have enabled Ambridge to make the Policy offer to each of the transferor trusts. Item 12 also particularises the requirement to provide information or documents in relation to 'the timing of the payments and the amounts paid' as respects the 'capital payments for each beneficiary' as referred to in the Indication letters. HMRC are of the view that not all relevant documents under Item 12 have been provided.

244. It is clear from the Indication letters that Ambridge Partners had been provided with a body of relevant information to enable Ambridge to assess the risks and to set the terms and conditions for the Policy on offer, and also the quantum for the 'Limit of Liability', and HMRC's assessment is reached in the context of insurers having to base the premium and their exposure to liability on sufficient information to enable the Policy offer to be made.

The timing and the amounts paid as respects the capital payments for each beneficiary are items of information readily ascertainable as having been received or not.

245. Based on what have been provided to date as in compliance of Item 12, HMRC are of a view that not all documentation referred to in the Indication Letters has been provided. I accept that Item 12 has not been fully complied with, and any outstanding documentation is to be provided pursuant to the Directions that accompany this Decision.

***Item 13 – documentation of engagement of law firm by trustees relating to insurance policy***

246. The Appellants have stated that all documents under Item 13 have been provided and any documents not provided under this request are covered by LPP.

247. HMRC accept that the engagement letters have been provided, but submit that it is difficult to determine whether all the documents requested (and not covered by LPP) have been provided; and that the evidence from the Appellants (as covered below) failed to determine that there were no further documents.

248. I note the specific response by Mr Duguid to Mazars on 19 January 2022 (*supra* [86](3)) that he had spent hours looking for these documents and have identified some of them. These may be some of the documents that have been provided by Mazars to HMRC, and to the extent that any further documents may have existed but not provided, I accept that they would be protected by privilege, and the Appellants shall not be required to produce further documents.

***Item 16 – Confirmation letter of 27 November 2002***

249. HMRC hold a copy of a letter dated 27 November 2002 from Turcan Connell to Justin Astley Rushton of Willis Ltd (the insurance broker) enclosing copies of solicitor's confirmation letters for "the Scottish Trusts". HMRC submit that copies of the letters themselves issued to the insurance company on behalf of each beneficiary have not been provided.

250. HMRC have treated this Item as being appealed under para 18 restriction. However, the Appellants' 'Schedule of Categories' to sum up the ground of appeal against Item 16 as 'Mr Bentley's evidence shone a spotlight on the vagueness and speculative nature of such a claim'.

251. I take it therefore that the Appellants are contending that Item 16 is 'purely speculative' and 'constitute fishing expedition' as the general heading. I do not consider that Item 16 request to be 'vague' or 'speculative'. There is clear indication from the letter dated 27 November 2002 held by HMRC that the copies of the letters have been enclosed to the broker.

252. Insofar as the ground of appeal is in reliance on para 18 restriction, I find that the Appellants have the power to request the production of the confirmation letters issued to the insurance company on their behalf from Turcan Connell, notwithstanding the Appellants' (such as stated in their witness statements) that the letters are no longer in their possession.

***Item 17 – documentation relating to instruction and tax planning advice***

253. The Appellants assert that Item 17 requests are covered by legal privilege. Officer Bentley's evidence is that the claim to LPP indicates that the documents exist, and HMRC would suggest that the documents are 'directly relevant' to the test set out in *Bowring*.

254. I conclude that Item 17 requests are subject to para 23 restriction. Even if in the view of HMRC the existing documents falling under Item 17 are instructive in assisting them to

complete the enquiry and form a view, such documents are privileged for the reasons as set out below and I vary the Information Notices by removing Item 17.

***Item 18 – documentation of advice given by Tenon to trustees: minute of 7 October 2002***

255. HMRC rely on the Minute of Trustees Meeting on 7 October 2002 in relation to Turcan 1972 No. 1 Trust of the Directors of Saltire Trustees (Overseas) Limited to pass a resolution to instruct investment advisers to liquidate portfolio to meet Tenon's fees, and to progress with the restricting. It is noted in the Minute that 'The Trustees had previously appointed Tenon Tax to advise on the restructuring of the trust.

256. The Appellants' contention is that 'there is no evidence that any such advice was given, or that any of the beneficiaries were privy to any such advice'.

257. Contrary to the Appellants' contention, the fact that the overseas trustee company resolved to liquidate the portfolio in part to meet Tenon's fees, it is evidence that advice was received from Tenon Tax. HMRC have met the prima facie case that such documentation exists to evidence the tax advice given by Tenon.

258. HMRC's position is that while the Appellants suggest that Mazars have been unsuccessful in their attempt to obtain, it is unclear what those attempts have been and whether the beneficiary has made the request, especially where in the case of Dr Draffan and Mr Wiseman who were settlors and beneficiaries of their respective trusts.

259. To the extent that the Appellants are not in possession of such advice documentation, request can be made for Turcan Connell to assist in its production. Advice from Tenon is not covered by privilege; nor is it being contended that Item 18 is subject to para 23 restriction.

***Item 19 – Meeting minutes of trustees for each of the trusts in the year 2002***

260. The *prima facie* case for HMRC is made on the basis that the minutes in HMRC's possession are formal minutes of trustee meetings for each of the participating trusts covering the mechanics of the tax avoidance scheme; that the minutes provided to date cover the mechanics and little else.

261. HMRC also have the document on their list (H18) which refers to an engagement letter from Sedgwick Detert Moran & Arnold concerning advice and assistance in relation to the insurance policy to be arranged as part of the tax avoidance scheme. Officer Bentley's evidence is that having taken from Moran & Arnold, there are no minutes of meeting to discuss this further; that it is not unreasonable to expect trustees to discuss the merits of such advice and to minute any decisions taken, and in particular the *reasons* for those decisions. These are absent in the documents provided so far.

262. The Appellants contend that 3 trustee minutes in the supplementary bundle, as well as the minutes for 9 and 30 October 2002 meetings have been provided, but HMRC have assumed that there were further documents but unable to cite any support that such documents exist.

263. HMRC submit that while some formal meeting notes have been provided, there is evidence that further meeting notes are stated to exist [AHB 20], which have not been provided by Wiseman, and where a request by Turcan Connell to find meeting notes for Dr Draffan was said to be outstanding. HMRC accept that that they have received meeting notes for Mr Wiseman of 9/10/02 and 30/10/02. The Tribunal has not heard from any Appellant with first-hand knowledge that all meeting notes have been provided, and the request should not be considered as having been complied with.

264. I conclude that HMRC have met the prima facie burden that further documents exist beyond those that have been specified by the Appellants in contention as meeting the

requirement. I accept Officer Bentley's evidence that the named minutes as produced 'cover the mechanics and little else'. The trustees involved were all professional trustees and would have discharged their fiduciary duties to a professional standard.

265. In the background was the formal engagement of a firm to advise the trustees of the insurance policy to be arranged in implementing MIIFF scheme. It is reasonable to infer that the trustees' deliberations and final decisions would have been well documented as an indispensable part of their record keeping in accordance with their statutory obligations as trustees in making those decisions on behalf of the beneficiaries. It was not a casual decision being considered that can be left unrecorded. In particular, as Officer Bentley's evidence highlights, the reasons for the trustees' decisions would also be recorded in minutes.

266. On the balance of probabilities, while the Appellants have provided some of the minutes, it is likely that there are more minutes to evidence the substantive decisions having been taken by the trustees. I accept that the Appellants do not have in their possession these minutes, but it is in their power to request for these minutes to be produced by applying to the professional trustees who would have regard to their duty in obliging with such request.

***Item 20 – engagement letter for advice on the insurance signed by trustees of each trust***

267. Item 20 is specific, and by reference to the engagement letter of Sedgwick Detert Moran & Arnold (mentioned in H18) to provide insurance advice on the policy to be taken out, and as signed by the trustees of each trust.

268. The Appellants' contention is that 'the existence of such documents has not been proven', and that 'it is unclear what light they can shed on the factors found to be relevant' in *Bowring*.

269. Item 20 has been addressed above under the 'reasonably required' criterion. I am satisfied that HMRC have met the prima facie burden that the engagement letters existed, and the trustees would have signed the engagement letters to contract with Sedgwick Detert Moran & Arnold to provide them with insurance policy advice, and would have retained a copy of the engagement letter signed as part of their record keeping. It is also within the power of the Appellants as beneficiaries to request the trustees to provide a copy of the signed engagement letter with the insurance adviser, and I direct Item 20 for production.

***Item 22 – deed of indemnity for each trust***

270. The Appellants' position is that copies of all Deeds of Indemnity for each of the trusts have been provided, and in the light of the evidence this request must be regarded as satisfied given that there is no evidence of any other deeds of indemnity or in power and possession of the Appellants. The Respondents in closing submissions have accepted that Item 22 has been complied with. The appeal against Item 22 falls away.

***Item 23 – trust minutes re: appointment of funds to beneficiaries***

271. Officer Bentley's evidence is that it is not unreasonable to expect trustees to take advice in advance of making appointments and to discuss the merits of such advice. Consequently, HMRC would expect any decisions, and in particular the reasons for those decisions, be recorded in the form of minutes.

272. In submission, Mr Dixon states that HMRC consider that further meeting notes are likely to exist to evidence the trustees' decisions to distribute large sums to the beneficiaries, and that it is reasonable to consider that there was some discussion between the transferee trustees or notes recording the reasons why they considered distributing the full funds was appropriate.

273. For the Appellants, it is submitted that these documents have been provided, but that HMRC appear to consider that the trustees must have taken advice in advance of making appointments to the beneficiaries. HMRC's evidence disclosed 'the purely speculative nature of this view'; this request is 'unfounded and no more than fishing expedition'.

274. From what is obtainable, HMRC are aware that the transferee 2002 trusts appointed all the funds to the beneficiaries. Insofar that the 2002 trustees were professional trustees, it is reasonable to expect that there would be minutes recording the decisions to appoint all the funds to the beneficiaries.

275. The Appellants have submitted that the expectation that the trustees would have taken advice before making the capital appointments is purely speculative and unfounded. I consider that this information request is to offer an opportunity for the Appellants to evidence the independence of the transferee trustees in making those decisions to appoint all the funds to the beneficiaries, so soon after the inception of the 2002 trusts. If there is evidence that such advice was taken before the appointment, it may go towards establishing the transferee trustees' independence, and that the transferee trusts were not mere 'intermediaries' acting as a conduit. I accept that there might not have been any advice taken by the transferee trustees for any documents under Item 23 to be produced, as suggested by what HMRC have highlighted in a meeting note which remarked on '*a clause which states at every stage of the planning the old trustees would have to be consulted'* (*supra* [169](6)). If no such documents are available for production, it is then for HMRC to draw their own inference, adverse or otherwise, from the absence of such documents to evidence any advice having been taken prior to the appointment of all of the trust funds by the transferee trustees.

276. I conclude therefore that for Item 23, the Appellants are at liberty to produce any further documents as they wish, but shall not be directed to produce any further documents as required.

## WHETHER PRIVILEGED INFORMATION OR DOCUMENTS

### Application of 13 January 2023 to adduce further documents for LPP claim

277. Pursuant to direction 24 of Judge Redston's Directions, the Appellants lodged a folder on 23 December 2022 of twelve lists of documents (the Original Bundle of 138 pages), in respect of which LPP was said to have been 'originally asserted on 25 April 2022', which I infer the April 2022 date as by reference to the date of the 'LPP List' served on the Tribunal and the Respondents pursuant to direction 10, (in lieu of 28 March 2022 per direction 10).

278. The application is made pursuant to rule 5(2), 5(3)(d) and 6 of the Tribunal Procedure (First-tier Tribunal) Rules 2009 for the Tribunal to exercise its case management powers to admit the Additional Bundle of 195 pages; that Appellants apologise for the 'late identification' of the documents during the preparations for the hearing, and that number of additional documents 'is relatively modest', totally sixty (60) documents, many of which are materially similar to each other; that the Appellants have 'promptly sought to bring them to the attention of the tribunal'. It is submitted that any prejudice to the Respondents is 'limited' since HMRC 'are not privy to the documents in respect of which legal advice privilege is being claimed'.

279. The Additional Bundle of 60 documents is tabulated in an Annex attached to the Application, and the further documents relate only to the following trusts and the beneficiaries of those trusts, namely: (i) Mrs L Turcan 1968 Trust; (ii) The Turcan 2002 (No.

1) Family Trust; (iii) Mrs L Turcan 1972 (No. 1) Trust; and (iv) The Turcan 2002 (No. 2) Family Trust.

**Application of 19 January 2023**

280. The application has the dual purposes of amending the preceding application of 13 January 2023 by removing several documents from the Annex attached thereto, and to adduce two further documents for which privilege is asserted.

*Mr Mackenzie's additional witness statement*

281. Mr Ross Mackenzie of Mazars filed an additional witness statement dated 19 January 2023 in respect of this application, wherein he referred to Item 1 of the Information Notices issued on 21 November 2019 with the request as follows:

> 'Copies of all correspondence and other documentation of any form including faxes, emails, notes, of telephone call and meeting notes etc relating to the offer of tax planning services by Tenon to the clients of Turcan Connell as referred to in Turcan Connell's letter of 16/01/02. This should include all documentation prepare in connection with the planning and in particular the minutes of the meeting which took place immediately following that letter.'

282. Mr Mackenzie's second statement refers to his earlier statement dated 5 December 2022, in which he stated that:

> '… on 1 September 2015, HMRC responded to a request from Mazars to provide [Mazars] with details and copies of documents lodged with HMRC by Tenon in 2005 and 2006 by providing a List of the Documents with a short description of each document. No copies were provided. Document B1 [on HMRC's List] was listed as "16/01/2002 Letter Regarding the Proposed Way of Dealing with the Stockpiled Gains".'

283. Mr Mackenzie's statement continues at paragraphs 10 and 11 by stating how he had mistaken Document B1 to be the same documents for which LPP is now asserted:

> 'The correspondence commenced with a letter from Turcan Connell to the client of 16 January 2002.
>
> As this letter referred to dealing with stockpiled gains and HMRC held B1 being a letter dated 16 January 2022 from Turcan Connell dealing with stockpiled gains, I concluded that it was the same letter as document B1 included in the List of Documents provided by HMRC. I concluded therefore that there was no need to include this letter in the list of documents to be included in our letter to HMRC of 29 January 2020 [to claim LPP for documents in Mazars' possession which could be covered by Item 1 of the Information Request] ….'

284. According to Mr Mackenzie, 'this error became apparent' when compiling the hearing bundle, and that document B1 in HMRC's List refers to '*a letter from Douglas Connell of Turcan Connell to John Joyce of Tenon*' and is 'a different document to the one we thought was in HMRC's possession'. The same error has also led to the letter of 16 January 2002 being omitted from Mr Wiseman's List of Documents for the LPP application (before Judge Bailey).

285. For the purposes of the LPP claim, the application seeks to correct the error by inclusion of the 16 January 2022 letters sent to Dr Draffan and Mr Wiseman which are in Mazars' possession (and not in HMRC's possession).

*Removing documents in the Additional Bundle*

286. Mr Mackenzie's statement continues by referring to several documents that have been included in the application of 13 January 2023 to be adduced as part of the Additional Bundle of which he became aware that they are already in HMRC's possession. The application seeks to amend the earlier application of 13 January 2023 by removing those documents, the Appellants no longer seek to assert LAP in relation to those documents.

**Disposal of the applications**

287. The application of 13 January 2023 to adduce the Additional Bundle is granted, for reasons not only as given by the Appellants, but also in view of the substantive matter being concerned with a fundamental part of the rule of law as respects the Appellants' right to assert privilege, it is right and proper, and in the accordance with the overriding objecting of dealing with cases fairly and justly, to admit the Additional Bundle for consideration.

288. The application of 19 January 2023 is also granted. I understand only too well the file management challenges in these proceedings. HMRC were provided with a list of documents by Tenon, prior to the engagement of Mazars by the Appellants in dealing with the Information Notices. HMRC furnished Mazars with the listing of the documents provided by Tenon, but without providing the actual copies of the documents now in HMRC's possession. Although Mazars had been working with the Information Notices for a period of time, the sheer volume of documents involved for multiple Appellants had given rise to some confusion as regards the status of the said documents. It is in the interest of justice to allow these errors to be rectified.

**Case Law on Privilege**

***The rationale for LPP***

289. In *R v Derby Magistrates'*[18], the dicta from the House of Lords on the protection of privileged documents and communications are: (a) the need for complete and unfettered confidence in seeking legal advice; (b) privilege is 'a fundamental condition' for the administration of justice, and (c) privilege as reflecting 'the paramountcy' of public interest.

290. In *Addlesee*[19], it is observed that legal professional privilege is an encompassing term for both (a) legal advice privilege and (b) litigation privilege. With reference to Lord Hoffmann's speech in *Morgan Grenfell*, Lewison LJ remarked that *Morgan Grenfell* has established LAP as a fundamental human right, while *Addlesee* observed that LAP is 'not merely a private right', and is 'not like a private right to confidentiality' (at [32]).

291. To preserve the integrity of the principle for LPP, there is no scope for judicial discretion in weighing one interest against another in a balancing exercise, and this is the clear conclusion reached by Lord Nicholls in *Derby Magistrates'*.

> 'In the absence of principled answers to these and similar questions, and I can see none, there is no escaping the conclusion that the prospect of a judicial balancing exercise in this field is illusory, a veritable will-o'-the-wisp. That in itself is sufficient reason for not departing from the established law. … Confidence in non-disclosure is essential if the privilege is to achieve its raison d'étre. If the boundary of the new incursion into the hitherto privileged area is not principled and clear, that confidence cannot exist.' (p512D-E)

292. The proper extent of legal advice privilege has been subjected to some recent and extensive judicial considerations. The areas of debate as arising from two sources are

[18] *R v Derby Magistrates' Court, ex parte B* [1995] 3 WLR 681; [1996] 1 AC487.
[19] *Lee Victor Addlesee and Ors v Denton Europe LLP* [2019] EWCA Civ 1600.

succinctly set out at [20] in *Property Alliance v RBS*[20]. First, the fact that over solicitors have, in addition to offering legal advice, tended to offer their clients a range of what might loosely be described as "business services". Secondly, that not all communications between a solicitor and his client will necessarily be for the purpose of giving or obtaining legal advice. It is helpful to set out the criteria for determining when a document or communication is privileged.

*(1) The criterion of confidentiality*

293. It is perhaps axiomatic that privilege cannot be claimed unless the evidence in question is confidential: see *Wheeler v Le Marchant* (1881)[21]. In *Balabel*[22], Taylor LJ said at p330-D:

> '… the purpose and scope of the privilege is still to enable legal advice to be sought and given in confidence. In my judgment, therefore, the test is whether the communication or other document was made confidentiality for the purposes of legal advice. Those purposes have to be construed broadly.'

*(2) Whose privilege?*

294. In *Addlesee* the issue was whether LAP ceased to exist if there was no legal person capable of asserting it, the Court of Appeal's conclusion at [29] is instructive.

> 'The rationale for the privilege means that privilege comes into existence at the time when the person in question consults his lawyer. The client must be sure *at the time when he consults his lawyer*, that, without his consent, there are *no circumstances* under which the privilege communications will be disclosed without his consent. …the lawyer's mouth "is shut forever". It is not the immunity which must be asserted. On the contrary, it is the consent to disclosure which must be established.' (Italics original.)

*(3) A 'relevant legal context'*

295. In *Three Rivers (No. 6)* the Supreme Court stated in relation to a 'relevant legal context':

(1) At [38]: 'there must be a "relevant legal context" in order for the advice to attract legal professional privilege', citing *Balabel* at p330-G, wherein Taylor LJ stated:

> 'legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context'.

(2) To distinguish privileged material from communications when a solicitor is acting as the client's 'man of business' when advising the client on all matters of business, (eg. investment policy, finance policy); per *Balabel* where Taylor LJ stated at p331-H:

> '… to extend privilege without limit to all solicitor and client communication upon matters within the ordinary business of a solicitor and referable to that relationship [would be] too wide.'

(3) In marginal cases where the seeking or the giving of advice by lawyers does or does not take place in a relevant legal context, the guidance to judges is as follows:

> '[38] … In cases of doubt the judge called upon to make the decision should ask whether the advice relates to *the rights, liabilities, obligations or remedies* of the client either under private law or under public law. If it does not, … legal advice privilege would not apply. If it does so relate then, in my opinion, the judge should ask himself whether the communication falls

[20] *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2015] EWHC 3187 (Ch); [2016] 1 WLR 992.
[21] *Wheeler v Le Marchant* (1881) 17 Ch D, 675 at 677.
[22] *Balabel v Air India* [1988] Ch 317, at p330 and p331.

within the policy underlying the justification for legal advice privilege in our law.

*Is the occasion on which the communication takes place* and is *the purpose for which it takes place* such as to make it reasonable to expect the privilege to apply? The criterion must … be an objective one.' (Per Lord Scott; italics and sub-paragraph insertion added.)

*(4) Lawyer-client communications and evidence thereof*

296. In *Prudential* Lord Neuberger at [29]: 'it is universally believed that LAP only applies to communications in connection with advice given by members of the legal profession'. A more nuanced definition as to the remit of lawyer-client communications is given in *Three Rivers (No. 5)*[23] wherein the Court of Appeal concluded, after extensive review of the 19th century authorities, that: (a) LAP attaches only to documents '*passing between the client and his legal advisers and evidence of the contents of such communications*' (at [21]); (b) unlike litigation privilege[24] which can be extended to lawyers' communications with third parties if requirements for litigation privilege is made out[25], LAP will not attach to communications between the lawyers and third parties; (c) LAP is extended to a lawyer's own drafts of documents and memoranda, even if not transmitted to the client.

297. In *USP Strategies*[26], where the issue was whether privilege extends to the documents that *'evidence'* the privilege communications, Mr Justice Mann referred to Longmore LJ in *Three Rivers (No. 5)* and observed:

'[19] That extended formulation would be capable of catching a number of things beyond the actual communication (oral or written) between solicitor and client, when applied to advice rather than instructions, all of which would be consistent with the policy underlying privilege and with a common sense application of that policy to the practicalities of everyday commercial life.

a) First, it obviously applies to a letter of legal advice, or a letter containing legal advice.

b) Second, it would cover the client's own written record of what his solicitor had told him orally. There is every reason why it should.

c) Third, it would cover the situation where a client representative who obtains the advice passes that advice internally in the organisation in question. This would apply whether the advice is passed on verbatim or whether it is summarised or extracted. …'

*(5) Documents betraying the trend of the advice*

298. Mann J concluded at [21] of *USP Strategies* that the proper analysis, consistent with *Three Rivers (no. 6)* 'is to continue to afford privilege to material which evidences or reveals the substance of legal advice (subject, of course, to wavier)'. The rationale for this approach by Mann J is set out at [19]:

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[23] *Three Rivers DC and Ors v Governor and Company of the Bank of England (No. 5)* [2003] EWCA Civ 474; [2003] 3 WLR 667.

[24] See for example, Lord Scott in *Three Rivers (No. 6)* where he distinguished LAP from litigation privilege and stated at [10]: 'Litigation privilege covers all documents brought into being for the purposes of litigation. Legal advice privilege covers communications between lawyers and their clients whereby legal advice is sought or given.' See also Lord Carswell's discussion on 'the bounds' of litigation privilege at [85] et al, in particular at [96]-[97] when referring to and 'the extent of the rule' as defined by Sir George Jessel MR in *Ventouris v Mountain* [1991] 1 WLR 607, pp649-650.

[25] Lord Carswell's speech at [102] in *Three Rivers (No. 6)* stating the three conditions to be satisfied for litigation privilege to cover communications with third parties.

[26] *USP Strategies plc and Ors v London General Holdings Ltd and Ors* [2004] EWHC 373 (Ch).

> 'A client may well wish to discuss advice received with a partner, or with another adviser, … with a contractual counterparty who might be affected. The effect of privilege would be seriously dented if those communications were held to be not privileged so that, if evidence of them could be obtained., an insight as to the advice would become available. That is not a sensible result.'

299. *Lyell v Kennedy*[27], a nineteenth-century authority concerning professional privilege in a dispute over an intestate estate. The Chancery court declined to order the production of certain documents by the defendant, and Cotton LJ reasoned that:

> '… to order the defendants to produce them would be … giving them a clue to the advice which had been given by the solicitor, and giving them the benefit of the professional opinion which had been formed by the solicitor and those who had acted in a professional capacity for the defendant.' (At page 26.)

300. Bowen LJ in *Lyell v Kennedy* referred to the application for production of documents as asking for 'the key to the labour which the solicitor had bestowed in obtaining them' (p31). In *Ventouris v Mountain*[28] Bingham LJ stated the ratio of *Lyell v Kennedy* as follows:

> 'The ratio of the decision is, I think, that where the selection of documents which a solicitor has copied or assembled betrays the trend of the advice which he is giving the client the documents are privileged….'

301. In *Edwardian Group*[29] Morgan J confirmed that the professional privilege in question in *Lyell* was legal advice privilege (i.e. not litigation privilege), and as I understand, that is because the documents applied for production were preliminary to litigation and had been collected for the purpose of preparing a defence in litigation and for the purpose of instructing counsel in that litigation. The approach in *Lyell* to a claim to legal advice privilege is summed up by Morgan J after a review of authorities (including Australian cases) at [37]:

> 'I would adopt the distinction … between a case where there is a definite and reasonable foundation in the contents of the document for the suggested inference as to the substance of the legal advice given and merely something which would allow one to wonder or speculate whether legal advice had been obtained and as to the substance of that advice.'

*(6) Continuum of communication*

302. The key authorities as regards this criterion are the following.

(1) The scope of privileged material in a relevant legal context is delineated by the 'continuum of communication', per Taylor LJ in *Balabel* at p330-F:

> 'Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. … Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.'

[27] *Lyell v Kennedy (No. 3)* [1884] 27 CH D 1.
[28] *Ventouris v Mountain* [1991] 1 WLR 607.
[29] *In the Matter of Edwardian Group Limited and another v Jasminder Singh and others* [2017] EWHC 2805 (Ch).

(2) Lord Carswell in *Three Rivers (No. 6)* expressed the principle variously as follows:

> '[111] … all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client.'

> '[114] The work of advising a client on the most suitable approach to adopt, assembling material for presentation of his case and taking statements which set out the relevant material in an orderly fashion and omit the irrelevant is to my mind the classic exercise of one of the lawyer's skills.

(3) In *Property Alliance v RBS* the court had to decide the extent to which legal advice privilege could be claimed over certain documents produced by the Executive Steering Group (ESG) of RBS in litigation relating to allegations of *LIBOR* misconduct. RBS engaged the city law firm Clifford Chance to provide advice and assistance in co-ordinating the communication and responses to regulators in a number of jurisdictions. The court rejected counsel's submissions for Property Alliance that in respect of the said documents, any direct references to legal advice received from Clifford Chance or the other lawyers could be redacted, and the remainder of the documents should be disclosed because:

> '… in *Balabel's* case, Taylor LJ held that all documents forming part of the continuum of communications between lawyer and client for the purposes of obtaining legal advice would be privileged, even if they did not expressly refer to legal advice, provided that they were party of the "necessary exchange of information of which the object is the giving of legal advice as and when appropriate". It is therefore quite clear that the communication of information between a lawyer and client *can* be privileged, provided that it is information that is communicated in confidence for the purposes of the client seeking, and the lawyer giving, legal advice. The test is one of relevance and purpose: the source of the information makes no difference.' (At [32], italics original.)

*(7) Dominant purpose of giving/receiving advice*

303. Before the decision of the House of Lords in *Waugh v British Railways*[30], there was uncertainty as to the test to be applied in considering whether a document is privileged if the evidence shows that the purpose of using it is to obtain legal advice or assisting in the conduct of litigation was only one of the purposes for its production. The *Waugh* decision has established the 'dominant purpose' test by endorsing the test propounded by Barwick C.J. in *Grants v Downs* (at p677):

> 'Having considered the decisions, the writings and the various aspects of the public interest which claim attention, I have come to the conclusion that the court should state the relevant principle as follows: a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.'

[30] *Waugh v British Railways* [1980] A.C. 521.

304. The issue arose in *Guinness Peat Properties v Fitzroy Robinson*[31] as concerns 'whose purpose' is relevant to the 'dominant purpose' test, in a situation where the purpose of the author of a letter with attachments differed from the purpose of the procurer of the same. Fitzroy Robinson was a firm of architects, and Mr McLeish (for the firm) wrote to their professional indemnity brokers to give insurers notice of a claim against them. The letter attached documents which made admissions, and stated that the letter was for the purpose of complying with the policy, (which was not a privileged purpose). The partnership now claimed privilege. The Court of Appeal reversed the judgment from below, and Slade LJ in giving the lead judgment, reasoned as follows:

> 'On my analysis of the facts, it was the insurers who caused the McLeish letter to be brought into existence for the purpose of using it or its contents in order to obtain legal advice or to assist in the conduct of litigation. … The relevant proposition of law, in my judgment, is that stated by Brightman LJ in *Buttes Oil Co. v Hammer (No. 3)* [1981] 1 QB 223 at p. 267 as follows:
>
> > "… if two parties with a common interest and a common solicitor exchange information for the dominant purpose of informing each other of the facts, or the issues, or advice received, or of obtaining legal advice in respect of contemplated or pending litigation, the documents or copies containing that information are privileged from production in the hands of each."'

305. In *Jet2*[32] Hickinbottom LJ at the Court of Appeal discussed the 'dominant purpose' test as respects the two limbs of privilege at [95]:

> '(i) Although they do have some different characteristics, litigation privilege and LAP are limbs of the same privilege, legal professional privilege. It is uncontroversial that the dominant purpose test, grown out of *Grant v Downs*, applies to litigation privilege. … I am unpersuaded that … the limbs are fundamentally different with regard to purpose. In my view, there is no compelling rationale for differentiating between limbs of the privilege in this context. The "dominant purpose" test in litigation privilege fixed by *Waugh* derives from Australian jurisprudence, which has since *Grant v Downs* treated the purpose test (whatever it might be) as applying to both limbs of the privilege.
>
> (ii) Whilst I accept that the position is not uniform, generally the common law in other jurisdictions has incorporated a dominant purpose test in both limbs of legal professional privilege, …This not only suggests that such a test is able to work in practice; but this is a legal area in which there is advantage in the common law adopting the same principles.'

306. Hickinbottom LJ continued by concluding how the dominant purpose test is to apply to LAP at [96]:

> '… whilst I readily accept that the jurisprudence is far from straightforward and the authorities do not speak with a single, clear voice, I consider Morris J [at the High Court] was correct to proceed on the basis that, for *LAP to apply to a particular communication or document, the proponent of the privilege must show that the dominant purpose of that communication or document was to obtain or give 'legal advice*….' (Italics added.)

307. In relation to multi-addressee communications, the court's guidance in *Jet2* is at [98] for establishing the 'dominant purpose' is to apply a two-stage test to 'internal exchanges':

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[31] *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* (1987)1 WLR 1027, (1987)2 All ER 716.

[32] *R(oao Jet 2.com Limited) v Civil Aviation Authority (Law Society of England and Wales intervening)* [2020] EWCA Civ 35; [2020] 4 All ER 374

> ‘(i) The dominant purpose criterion applied; so that, if the dominant purpose of the email was to obtain legal advice from an in-house lawyer, then it would be privileged, even if it also at the same time sought the commercial views of others. However, if its dominant purpose was to seek commercial views, then the email would not be privileged even if it was contemporaneously sent to a lawyer for the purpose of giving legal advice ….
>
> (ii) However, even if the dominant purpose is not in respect of obtaining legal advice, it may still be privileged if it “discloses or is likely to disclose the nature and content of the legal advice sought and obtained’ …, or if it “might disclose” such advice….’

308. Further guidance from Hickinbottom LJ in *Jet2* on the dominant purpose test applicable to multi-addressee communications is at [100], of which the following are pertinent to the present determination.

> ‘(iv) … My preferred view is that they should be considered as separate communications between the sender and each recipient. LAP essentially attaches to communications. Where the purpose of the sender is simultaneously to obtain from various individuals both legal advice and non-legal advice/input, it is difficult to see why the form of the request (in a single, multi-addressee email on the one hand, or in separate emails on the other) in itself should be relevant as to whether the communications to the non-lawyers should be privileged. …
>
> (v) In my view, there is some benefit in taking the approach … to consider whether, if the email were sent to the lawyer alone, it would have been privileged. If no, then the question of whether any of the other emails are privileged hardly arises. If yes, then the question arises as to whether any of the emails to the non-lawyers are privileged, because (eg) its dominant purpose is to obtain instructions or disseminate legal advice.
>
> (viii) … in terms of meetings (including records of meetings), attended by non-lawyers and lawyers, at which commercial matters were discussed with the lawyer adding legal advice and input if and when required. … the same principles set out above as applying to documents and other communications are applicable. Legal advice requested and given at such a meeting would, of course, be privileged; but the mere presence of a lawyer, perhaps only on the off-chance that his or her legal input might be required, is insufficient to render the whole meeting the subject of LAP so that none of its contents (including any notes, minutes or record of the meeting) are disclosable. If the dominant purpose of the meeting is to obtain legal advice … unless anything is said outside the legal context, the contents of the meeting will be privileged. If the dominant purpose of the discussions is commercial or otherwise non-legal, then the meeting and its contents will not generally be privileged; although any legal advice sought or given within the meeting may be. It is likely that, where not inextricably intermingled, the non-privileged part will be severable (and, on disclosure, redactable) …’

***Summary of relevant principles***

309. Hickinbottom LJ summarised the position as indicated by the authorities in *Jet2* at [69], noting that he had left aside for the time being the issue of whether the relevant purpose has to be ‘dominant purpose’, which was addressed in detail in the affirmative at [70] *et al*.

> ‘(i) Consideration of LAP has to be undertaken on the basis of particular documents, and not simply the brief or role of the relevant lawyer.

(ii) However, where the brief or role is *qua* lawyer, because "legal advice" includes advice on the application of the law and the consideration of particular circumstances from a legal point of view, and a broad approach is also taken to "continuum of communications", most communications to and from the client are likely to be set in a legal context and are likely to be privileged. Nevertheless, a particular communication may not be so – it may step outside the usual brief or role.

(iii) Similarly, where the usual brief or role is not *qua* lawyer by (eg) as a commercial person, a particular document may still fall within the scope of LAP if it is specifically in a legal context and therefore, again, falls outside the usual brief or role.

(iv) In considering whether a document is covered by LAP, the breadth of the concepts of legal advice and continuum of communications must be taken into account.

(v) Although of course the context will be important, the court is unlikely to be persuaded by fine arguments as to whether a particular document or communication does fall outside legal advice, particularly as the legal and non-legal might be so intermingled that distinguishing the two and severance are for practical purposes impossible and it can be properly said that the dominant purpose of the document as a whole is giving or seeking legal advice.

(vi) Where there is no such intermingling, and the legal and non-legal can be identified, then the document or communication can be severed: the parts covered by LAP will be non-disclosable (and redacted), and the rest will be disclosable. …

(vii) A communication to a lawyer may be covered by the privilege even if express legal advice is not sought: it is open to a client to keep his lawyer acquainted with the circumstances of a matter on the basis that that lawyer will produce legal advice as and when he considers it appropriate.'

**Appellants' Submissions for the appellants**

310. The submissions for the Appellants' LPP are summarised as follows.

(1) In respect of a communication (whether oral or written):

(a) between a client and his lawyer, where the lawyer is acting in the course of their professional relationship and within the scope of the lawyer's professional duties;

(b) under conditions of confidentiality; and

(c) for the purpose of enabling the client to seek, or the lawyer to give, legal advice or assistance in relevant legal context.

(2) It also applies where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required.

(3) LAP is also available in respect of communications which record or evidence legal advice, or which reproduce or otherwise reveal the advice or give a clue to the advice given or betray the trend of the advice.

311. The First-tier Tribunal (Judge Bailey) had formerly considered the availability of LAP in respect of documents relating to Mr Wiseman, whose application to have joined to these proceedings was granted on 5 December 2022. The Appellants contend that the First-tier

Tribunal considered materially similar documents to those before this Tribunal and that Tribunal's decision, dated 24 Augst 2020 is of material assistance to this Tribunal in determining the availability of LAP in respect of the documents before it.

312. The documents before the Tribunal relate to different Appellants who participated in the same tax arrangement. Accordingly, the communications between Turcan Connell and each of the Appellants are materially similar. In accordance with the Directions of 28 February 2022, the approach taken in the submissions is to address Dr Draffan's set of arrangements in some detail, on the basis that such submissions are equally applicable to materially similar communications between Turcan Connell and the other Appellants. Where a particular document is not materially similar to those between Turcan Connell and Dr Draffan, that document is separately addressed.

**HMRC's submissions**

313. Where documents are the same as those in *Wiseman v HMRC* [2022] UKFTT 0075 (TC), and to which it was decided privilege applies, the information notice does not require the Appellants to provide the information or document. However, for the most part, the documents for which privilege is asserted are not the same as in *Wiseman*. HMRC are unable to determine whether the information or documents are protected by privilege, as the descriptions of those documents for which privilege is asserted are 'too vague to allow the Respondents to effectively decide whether privilege applies'. HMRC submit:

(1) Merely because communications are between legal advisers and clients does not necessitate that the communications are covered by legal privilege: 'for LAP to apply to a particular communication or document, the proponent of the privilege must show that the dominant purpose of that communication or document was to obtain or give legal advice' (*Jet2* at [96]).

(2) It is unclear from the descriptions what the nature of the communications were, and to whom they were addressed and sent to. As established in *Jet2* at [98], a two-stage test should be followed when determining whether multi-addressee communications meet the dominant test criterion.

(3) To the extent that only part of the document is privileged, the document can be disclosed with the privileged part redacted, which would not be considered as a waiving of privilege on the whole document: *GE Capital Group*[33]at [176].

**Discussion**

314. The onus is on the Appellants to establish that privilege attaches to each communication for which privilege is asserted. Apart from establishing the communication is in confidence between a client and a lawyer acting in a professional capacity, it is necessary that there is a relevant context for the provision of legal advice relating to 'the rights, liabilities, obligations or remedies of the client either under private or under public law' for LAP to be attached. The dictum in *Balabel* that 'legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context' is apt for present purposes.

315. For privilege to be attached, each document or communication is to be considered on its own terms, but viewed in the wider context of the continuum of communications which precede and follow it, and whether the communication evidences or betrays the trend of advice being given. Where a communication has more than one purpose, it is then necessary to consider whether the dominant purpose is the seeking and giving of legal advice, or whether the document contains evidence of the legal advice being given. The dominant

[33] *GE Capital Group Ltd v Bankers Trust Co* [1995] 1 WLR 172.

purpose is to be ascertained from the perspective of the author of the document or the person under whose direction the document was created.

316. If the dominant purpose of the communication is non-legal, then the document will not be privileged and is disclosable with redaction.

**Dr Draffan's LPP documents**

317. There are 10 documents for which privilege is asserted for Dr Draffan, and a further document that is admitted by the application dated 19 January 2023. In total, there are the 11 documents specifically identified for Dr Draffan and serve as the representative of the equivalent documents for the other 16 Appellants.

318. I have adopted the description of each document as provided in the submissions to preserve the integrity of the claim, since the descriptions have been provided for the Appellants in compliance with direction 10 of Judge Redston's Directions, as well as the designations of 'TC' for Turcan Connell, who were engaged to act as solicitor to the taxpayer, and 'Participator' in Dr Draffan's capacity as a participator in the Mark II Flip Flop scheme.

| | **Date** | **Description** | **LPP/ Not** |
|---|---|---|---|
| 1 | 17/01/02 | TC letter to participator: *Advising that the scheme is beneficial and what the savings to the participator would be.* | LPP |
| 2 | 11/03/02 | TC letter to participator: *Counsel's view is suitable for the trust, but wishes Scottish law to be vetted by Scottish Counsel.* | LPP |
| 3 | 26/04/02 | TC letter to participator: *Scottish counsel to delay advice until immediately after the budge in case the Chancellor's provisions would affect the proposed scheme. No negative announcements. Scot counsel can now review papers asap.* | LPP |
| 4 | 13/05/02 | TC letter to participator: *Scottish Counsel has confirmed view that trustees have necessary power to carry out scheme for eliminating gains in the trust.* | LPP |
| 5 | 12/07/02 | TC letter to participator: *Long letter with legal advice – explaining details of scheme and that Tenon confirmed it will be possible for elimination of stockpiled gains to be carried out in respect of the trust.* | LPP |
| 6 | 31/07/02 | TC note of meeting: *Advice on the risk management process and sharing scheme benefits.* | **Not LPP** |
| 7 | 31/07/02 | TC briefing for participator at meeting: *Additional notes for the meeting detailing figures for the estimated gain.* | **Not LPP** |
| 8 | 07/08/02 | TC letter to participator: *Advice – enclosed notes of the meeting advising him re property and the position of winding up the trust, IHT advice, inter alia.* | LPP |
| 9 | 19/08/02 | TC letter to participator: *Advice on the Trust property in Scotland and the rights of the beneficiary in respect of capital payment.* | LPP |
| 10 | 29/08/02 | TC letter to participator: *Advice on Trusts, IHT and CGT.* | LPP |
| | *Additional* | | |
| 11 | 16/01/02 | Further document adduced by application of 19 January 2023 | LPP |

***Letters – Draffan/ 1-5***

319. I am satisfied that each of the five letters records communication to Dr Draffan from Turcan Connell giving advice as regards the rights, liabilities, obligations, and remedies in the context of the benefits and savings arising from the Scheme; of what would be prudently and sensibly be done in obtaining Scottish counsel's input; that the cohort of letters forms a continuum of communications to keep the Appellant informed so that advice may be sought and provided. I conclude that each letter is privileged from disclosure.

***Draffan/ 6-7 Meeting Notes 31 July 2002 –***

320. Document 6 records the meeting which took place 31 July 2002, with by 12 attendees: from Tenon (4 attending), clients of Turcan Connell's (3 in total), and advisers from Turcan Connell (5 in total). Mr Wiseman was one of the three clients who attended, and Dr Draffan was not one of the attendees.

321. The Appellant's description of Document 6 is ambiguous, and can be readily construed to be referring to a meeting that had taken place between Dr Draffan and Turcan Connell. For the avoidance of doubt, Document 6 is not a record of a meeting that had taken place between Dr Draffan and Turcan Connell. Further, Document 6 would appear to be a multi-addressee communication, since Dr Draffan, while not being present at the meeting, presumably had been circulated the Notes of the Meeting of 31 July 2002.

322. Document 7 is specific to Dr Draffan's 1988 Trust, and sets out the estimated stockpiled gain in the trust, and the costs and benefits in participating in the Scheme. Documents 6 and 7 have in common in their title headings the references to 'Tenon' and 'Meeting 31st July 2002'.

323. Turning to the question as to whether privilege is attached to Documents 6 and 7, I have regard to the guidance in *Jet2* at [98] and [100], and especially at [100](vii) where it is stated that 'the mere presence of a lawyer, perhaps only on the off-chance that his or her legal input might be required, is insufficient to render the whole meeting the subject of LAP so that none of its contents (including any notes, minutes or record of the meeting) are disclosable'.

324. The Appellants' submissions have expressly referred to *Colin Wiseman v HMRC* [2022] UKFTT 0075 (TC) as of assistance in the present determination. which would appear to be the equivalent documents being considered by Judge Bailey in *Wiseman*, under the heading:

> 'The 31 July 2002 meeting
>
> [40] Next I consider the documents relating to the meeting on 31 July 2002, and the dominant purpose of the discussion which took place at that meeting. While I accept that part of the communications at this meeting was the continuum of keeping client and solicitor informed, I have concluded – in light of the privileged communications before and after the meeting – that – from the perspective of Turcan Connell – the dominant purpose of the communications at the 31 July 2002 meeting was for Tenon to present information to the Applicant.
>
> [41] Having concluded that the dominant purpose of the communications at the meeting on 31 July was not the provision of legal advice, it follows that the two documents relating to the 31 July 2002 meeting are not privileged from disclosure.'

325. I agree with Judge Bailey that the dominant purpose of the communications at the Meeting of 31 July 2002 was for Tenon to present information to Turcan Connell and its clients, and not the provision of legal advice, and are not privileged from disclosure.

326. In respect of whether any direction should be made in terms of redaction, Judge Bailey's conclusion is at [42] and [43] of *Wiseman*.

> '[42] Insofar as either document would reveal what appears to be the giving or seeking of legal advice or the scope of that advice, and insofar as that material is not inextricably intermingled, then those parts should be redacted. However, where it is not possible to separate legal advice or the scope of the legal advice, then the privileged parts cannot be redacted.
>
> [43] I have [given] this aspect very careful consideration. I have eventually decided that it is not possible to extricate privileged communications from these two documents. Therefore, no part of the documents relating to the meeting of 31 July 2002 meeting should be withheld from disclosure.'

327. For the same reasons and analysis as given by Judge Bailey in *Wiseman*, I conclude that the two Documents 6 and 7 are not privileged and shall be directed for disclosure.

328. The same conclusion applies to the equivalent documents to Draffan 6 and 7 in the cases of the other 15 Appellants. I understand that Mr Wiseman had withdrawn his appeal to the Upper Tribunal of Judge Bailey's refusal decision and Wiseman Documents 6 and 7 would have become disclosable following the withdrawal of his appeal.

***Draffan/ 8 to 10***

329. I am satisfied that these are communications are in the continuum of communications of the privileged communications under Draffan/ 1 to 5, and are between Turcan Connell and Draffan as their client, in the context of Turcan Connell providing advice concerning rights and liabilities under private and public law, and on 'what should prudently and sensibly be done in the relevant legal context', and are therefore privileged from disclosure.

***Draffan/11 & Wiseman – letter of 16 January 2002***

330. The letter of 16 January 2002 was the inception of the relevant legal context and preceded the other communications in the listing of the Draffan's LPP documents that form the continuum of communications. The letter of 16 Janaury 2022 by application for Draffan is in substance identical to that addressed to Mr Wiseman, and both are privileged from disclosure.

***Other Appellants' documents in the LLP Bundle***

331. The conclusion on the representative list of LPP documents for Dr Draffan as listed above applies equally to the equivalent documents for the other Appellants which are not included in the LPP Bundle. Further documents included for the other Appellants and exhibited in the LPP Bundle have been examined and I am satisfied that they are all privileged from disclosure. HMRC have a list of these documents and in summary I note as follows:

(1) 4 letters for the Mrs Thomson;
(2) 7 letters for Chloë Turcan;
(3) 6 letters for Henry Turcan;
(4) 7 letters for David Charles Turcan;
(5) 7 letters for James Turcan;
(6) 7 letters for John William Turcan;
(7) 7 letters for Sarah Jane Turcan;
(8) 8 letters for Edward Inglefield;
(9) 10 letters for Frederick Inglefield;

(10) 8 letters for Katherine Crofton-Atkins;

(11) 8 letters for Olivia Campbell-Slight.

***The Additional LPP Bundle re: Turcan Family trusts***

332. The Additional LPP Bundle of 195 pages was lodged by application of 13 January 2023, with some documents later removed by application of 19 January 2023 on the fact that they are already in HMRC's possession. I am satisfied the remaining documents in the Bundle are all privileged material, some of which would appear to be internal working documents generated by Turcan Connell in relation to the Turcan family trusts, and include email communications with the Appellants as beneficiaries. I am satisfied that the documents all privileged.

**CONCLUSION**

333. The Items of information requests are confirmed or varied as set out below.

(1) Upon the consensus reached by the parties, Items 5, 6, 7, 8, 9, 21, 22, and 24 have been accepted as having been fully complied with.

(2) Items 10, 11, 14, 15 and 20 are reasonably required pursuant to para 1(1) of Sch 36, and are directed for production.

(3) Item 1 is subject to privilege under para 23 Sch 36, save for Documents 6 and 7 dated 31 July 2002 per Dr Draffan's list of LPP documents as representative, and the equivalent Documents 6 and 7 for the other Appellants are likewise directed for production along with Dr Draffan's.

(4) Items 2, 3 and 4 are removed for reasons that para 18 and/or para 23 restrictions apply.

(5) Item 12 is confirmed and is directed for production.

(6) Item 13 is removed as having been partially complied with, and the remainder being subject to para 23 restriction.

(7) Item 16 is upheld as within the Appellants' power to produce.

(8) Item 17 is removed as subject to para 23 restriction.

(9) Item 18 is upheld as within the Appellants' power to produce.

(10) Item 19 is accepted to have been partially complied with, but on the balance of probabilities, it is likely that there are more trustee minutes in the year, and the Appellants as beneficiaries have the power to request production from the trustees.

(11) Item 20 is chiefly considered under the heading of being 'reasonably required', and the documentation provided to the insurance providers can reasonably be expected to exist for the premium and terms to be set, and is directed for production within the 30-day time period (and longer than the Items contended to be not reasonably required).

(12) Item 23 is accepted to have been partially complied with, and the Appellants are at liberty to provide any further documents that fall within Item 23.

334. For the reasons stated, the appeals are allowed in part as summarised below:

(1) Items 5, 6, 7, 8, 9, 21, 22, and 24 are allowed on the ground of having been fully provided.

(2) Items 1, 2, 3, 4, 13 and 17 (save for 2 documents dated 31 July 2002) are allowed on grounds of para 18 and/or para 23 restrictions.

(3) Item 23 are allowed on ground of para 18 restriction, but with the Appellants having leave to produce as they wish.

(4) The appeals against Items 10, 11, 14, 15 and 20 on ground they are not reasonably required are dismissed.

(5) The appeals against Items 16, 18, 19 (and also Item 20) on ground of para 18 restriction are also dismissed.

335. In relation to the Additional LPP Bundle which contains the documents for which privilege is asserted for the Turcan Family trusts, I am satisfied that all of the documents contained in the Additional LPP Bundle are privileged. The fact that the documents in the Additional LPP Bundle concern the Turcan Family trusts and therefore also the 4 Appellants who have waived privilege does not alter the status of those documents which are found to be privileged. I have regard to the legal principle that privilege is 'absolute' and 'once privileged, always privileged'.

336. From Mr Mackenzie's evidence, I conclude that documents contended to be 'not reasonably required' are already in Mazars' possession and can be provided within a two-week period, while allowing a longer duration for Item 20 to be gathered for production.

## DIRECTIONS

337. The Tribunal hereby directs:

(1) Not later than 14 days after the date of release of this Decision, the Appellants shall serve on the Respondents information and documents under Items 10, 11, 14, and 15.

(2) Not later than 21 days after the date of release of this Decision, the Appellants shall serve on the Respondents the documents as represented by Draffan/ 6-7, which relate to the Tenon presentation meeting on 31 July 2002 as the only two documents for production under Item 1.

(3) Not later than 30 days after the date of release of this Decision, the Appellants shall serve on the Respondents information and documents under Items 16, 18, 19, and 20.

(4) The Appellants are at liberty to provide any documents under Item 23, and if any documents are to be produced, to do so within 30 days of the release of this Decision.

## NO APPEAL RIGHT TO THIS DECISION

338. This document contains full findings of fact and reasons for the decision. There is no right of appeal in respect of this decision pursuant to paragraph 32(5) of Schedule 36 to the Finance Act 2008.

**HEIDI POON**
**TRIBUNAL JUDGE**

**Release date: 20 September 2024**