Neutral Citation Number: [2025] UKUT 159 (AAC)

IN THE UPPER TRIBUNAL **Appeal No**. **UA-2022-001740-GIA**
ADMINISTRATIVE APPEALS CHAMBER

Between:

Mr K Gordon

Appellant

-v-

Information Commissioner

1st Respondent

&

His Majesty's Revenue & Customs

2nd Respondent

Before: Upper Tribunal Judge Mitchell
Hearing: Field House, Breams Buildings, central London on 7 June 2024

Representation:
Appellant: in person.
1st *Respondent*: Leo Davidson, of counsel, instructed by Solicitor to the Information Commissioner.
2nd *Respondent*: Richard Hanstock, of counsel, by General Counsel and Solicitor to HMRC.

On appeal from:
Tribunal: First-tier Tribunal (General Regulatory Chamber)
Tribunal Case No: EA/2022/0039
Decision date: 2 December 2022

SUMMARY OF DECISION

93 Information Rights
93.4 Freedom of Information – Absolute Exemptions

Judicial summary

The general prohibition on disclosure of HMRC information, in section 18(1) of the Commissioners for Revenue & Customs Act 2005, is not confined to taxpayer information subject to a duty of confidence under what is known as the *Marcel* principle. In turn, the set of HMRC information that is absolutely exempt from disclosure by virtue of section 44(1) of the Freedom of Information Act 2000, is also not so confined. Insofar as the Supreme Court in *R (Ingenious Media Holdings plc and another) v HMRC* [2016] UKSC 54 expressed the view that section 18(1) was confined to information falling within the *Marcel* principle, its remarks were *obiter* and the Upper Tribunal declines to follow them.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to DISMISS the appeal.

The decision of the First-tier Tribunal, taken on 2 December 2022 under case reference EA 2022/0039, did not involve an error on a point of law. Under section 11 of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal dismisses this appeal.

REASONS FOR DECISION

Introduction

1. In these reasons, unless otherwise indicated:

- "Commissioner" means the Information Commissioner;
- "CRCA 2005" means the Commissioners for Revenue and Customs Act 2005;
- "FOIA 2000" means the Freedom of Information Act 2000;
- "HMRC" means His Majesty's Revenue & Customs;
- *"Ingenious"* means the decision of the Supreme Court in *R (Ingenious Media Holdings plc and another) v HMRC* [2016] UKSC 54;
- "the Tribunal" means the First-tier Tribunal.

Factual background

The Appellant's request for information

2. On 21 July 2021, the Appellant made the following request for information to HMRC:

> "[A HMRC official] sent an e-mail dated 15 January 2019, timed at 09.05. Its subject was "TSC Questions." A screen shot of that e-mail is shown below.
>
> [*The screen shot was of an email sent by one HMRC official to another, whose email address was redacted, and copied to two further HMRC officials, whose email addresses were not redacted*.]
>
> > […] Thanks for yesterday's meeting. I'd be grateful for your help with the following questions:

> Someone said to me that the loan charge doesn't apply to loans taken out from 6/4/19. Is that right? If so, what is our plan for those and why won't there be an explosion of new DR schemes? Are we just hoping [*redaction*] will put people off?
>
> Do you know how many FTE we currently have working on DR settlements and how many of those we have moved over to it in recent months from other work?"

The second substantive paragraph contains the question "If so, what is our plan for those and why won't there be an explosion of new DR schemes?" Immediately after that question, there is a sentence with word(s) and/or number(s) between "hoping" and "will" redacted.

1. Please confirm that this redaction is still appropriate.

2. If so, please identify the statutory basis for such redaction.

3. If the redaction is no longer considered appropriate, please supply the word(s) and/or number(s) previously redacted.

Please note that I have previously raised this informally with the Press Office but they have not responded to this request. Hence my formal request."

3. HMRC refused the Appellant's request on 22 July 2021 on the ground that the information sought was absolutely exempt from disclosure under section 44(1)(a) FOIA 2000, as applied by section 23 CRCA 2005, because, if disclosed, the information would identify a person contrary to section 18(1) CRCA 2005. On the same day, the Appellant made the following supplemental request:

"Are you able please to confirm:

1. That the omitted person is the name of a taxpayer.

2. If so, that that taxpayer was or had been in the course of litigation with HMRC in relation to related matters.

3. If the answer to 2 is yes, whether there had been any published decisions in the course of that litigation by 15 January 2019.

4. If the answer to 2 is yes but the answer to 3 is no, whether there have been any published decisions in the course of that litigation since 15 January 2019?

Any other information you are able to provide that clarifies that the nature of the redacted information (for example a description of any words other than the taxpayer's name) would be most appreciated."

4. On 23 July 2021, HMRC refused to comply with the Appellant's supplemental request, again relying on section 44(1)(a) FOIA 2000. HMRC's stance remained unchanged on an internal review and the Appellant made a complaint to the Information Commissioner.

Information Commissioner's decision

5. The Commissioner decided that the information sought was held by HMRC in connection with its function of assessing and collecting tax, fell within section 18(1) CRCA 2005 and was therefore absolutely exempt from disclosure under section 44(1)(a) FOIA 2005. The Commissioner rejected the Appellant's argument that section 44(1)(a) did not apply, that argument being that it could reasonably be inferred that the redacted information was the name of a case decided by the Supreme Court so that no duty of confidentiality attached to the information. The Appellant appealed to the Tribunal against the Commissioner's decision notice.

First-tier Tribunal's decision

6. The Appellant attended the hearing before the Tribunal as did counsel for HMRC. The Commissioner was not represented but had previously supplied written submissions.

7. The Tribunal decided the appeal on the agreed assumption that the redacted information was "the name of a legal case, in which both HMRC and the taxpayer were parties, that had been heard in the Supreme Court and reported" ([46]).

8. The Tribunal directed itself to interpret CRCA 2005, in the context of section 44 FOIA 2000, in accordance with certain “broad points”:

(a) the fact that HMRC are prevented from disclosing certain information under FOIA 2000 does not affect any other powers HMRC may have to disclose information, and “this means that it is not logical to take account of the potential consequences of our decision on what HMRC would or would not lawfully be able to disclose in the future” ([48]);

(b) the fact that section 19 CRCA 2005 provides that certain contraventions of section 18(1) are a criminal offence did not require the Tribunal, in construing FOIA 2000 and connected provisions of CRCA 2005, to apply an interpretative presumption against doubtful penalisation or any rule of statutory interpretation that penal provisions are to be construed narrowly or strictly ([49]). FOIA 2000 contains no relevant penal provisions, and it uses part of a “criminal definition” in CRCA 2005 purely for convenience ([50]);

(c) the Supreme Court in *Ingenious* decided that section 18(1) CRCA 2005 was intended to reflect the ordinary principle of taxpayer confidentiality and, while not ruling on the point, approached with some scepticism the argument that section 18 “was not intended to be confined to information which was in any real sense confidential” ([52], [53]).

9. The Tribunal considered whether the information requested was “revenue and customs information relating to a person”, as defined by section 19(2) CRCA 2005. The information was not about internal administrative arrangements so that the issue was whether it was acquired as a result of, or held in connection with, the exercise of a function of HMRC in respect of a person. HMRC would have acquired the name of a case, whose litigation history began with a decision of HMRC, by the exercise of its litigation functions, those functions being authorised by HMRC’s ancillary powers under section 9 CRCA 2005 ([63]). Therefore, the requested information was ‘revenue and customs information relating to a person’ within the meaning of section 19(2) CRCA 2005 ([64]).

10. The Tribunal rejected the Appellant’s arguments as to the scope of section 18(1) CRCA 2005, for reasons which included:

(a) section 18 contains no reference to "confidential information", and section 18(1) imposes no express limitation on the type/s of information within its scope ([67]);

(b) the submission that disclosing the name of a reported case would not breach 'the principle of taxpayer confidentiality', so that section 18(1) was inapplicable, found some support in the views expressed by Lord Toulson in *Ingenious* ([68]). However, the statutory test in section 18(1) is not whether information "would be covered by the ordinary principle of taxpayer confidentiality". It is whether information is held in connection with a function of HMRC ([69]);

(c) acceding to the Appellant's argument would entail impermissible re-writing of section 18(1) ([70]), "however unlikely it seems that Parliament intended the names of reported tax cases to be exempt from FOIA under s44" ([73]).

11. The Tribunal determined that the requested information was held by HMRC in connection with its functions, and so the next question was whether disclosure of the information would specify the identity of the person to whom it related or enable their identity to be deduced ([71]). The Tribunal accepted the Appellant's argument that this must be the same person as that in relation to whom HMRC's function was exercised and which, on the parties agreed assumption (see paragraph 7 above), would be the taxpayer party in the case before the Supreme Court ([72]).

12. The Tribunal concluded that section 44 FOIA 2000 applied, the information sought was absolutely exempt from disclosure under FOIA, and so the Commissioner had correctly upheld HMRC's refusal to disclose the information ([74]).

Legal framework

Freedom of Information Act 2000

13. Section 2(2)(a) FOIA 2000 disapplies the entitlement conferred by section 1(1)(b) of that Act on a person who requests information from a public authority to have the information communicated to the person, where "the information is exempt information by virtue of a provision conferring absolute exemption".

14. The provisions conferring absolute exemption, listed in section 2(3) FOIA 2000, include section 44 (headed "Prohibitions on disclosure"). Insofar as relevant, section 44(1) provides as follows:

> "(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it--
>
> (a) is prohibited by or under any enactment…".

Commissioners for Revenue and Customs Act 2005

15. Section 3(1) CRCA 2005 provides that each person appointed as a Commissioner or officer of HMRC "shall make a declaration acknowledging his obligation of confidentiality under section 18".

16. Section 9 CRCA 2005, headed "Ancillary powers", provides as follows:

> "(1) The Commissioners may do anything which they think—
>
> (a) necessary or expedient in connection with the exercise of their functions, or
>
> (b) incidental or conducive to the exercise of their functions.
>
> …".

17. Section 13(1) CRCA 2005 provides that, subject to certain exceptions, "an officer of [HMRC] may exercise any function of the Commissioners".

18. Sections 17 to 23 CRCA 2005 appear under the cross-heading "Information".

19. Section 17(1) CRCA 2005 enacts the general rule that HMRC may use information acquired in connection with one of their functions in connection with any other of their functions.

20. Section 18 CRCA 2005 is headed "Confidentiality" and begins with the following general prohibition:

> "(1) Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs."

> (In CRCA 2005, "function" means "any power or duty (including a power or duty that is ancillary to another power or duty)": see section 51(2)(a).)

21. The general prohibition on disclosure of information does not apply to the disclosures specified in section 18(2) CRCA 2005. The general prohibition is also "subject to any other enactment permitting disclosure" (section 18(3)).

22. The disclosures of information specified in section 18(2) CRCA 2005 include:

(a) a disclosure "which is made in accordance with section 20…" (section 18(2)(b)). Section 20 specifies a range of disclosures, but all include the requirement that "the Commissioners are satisfied that [disclosure] is in the public interest";

(b) a disclosure "which is made with the consent of each person to whom the information relates" (section 18(2)(h).

23. Some, but not all, contraventions of the general prohibition in section 18(1) CRCA 2005 are an offence, framed by section 19(1) as follows:

> "(1) A person commits an offence if he contravenes section 18(1)…by disclosing revenue and customs information relating to a person whose identity –
>
> (a) specified in the disclosure, or
>
> (b) can be deduced from it."

24. The term "revenue and customs information relating to a person", is defined by section 19(2) CRCA 2005 as follows:

> "information about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs […] in respect of the person; but it does not include information about internal administrative arrangements of [HMRC]".

25. Section 19(3) CRCA 2005 provides a defence for a person charged with an offence under section 19(1), namely that the person proves "that he reasonably

believed (a) that the disclosure was lawful, or (b) that the information had already and lawfully been made available to the public."

26. Section 19(8) CRCA 2005 preserves other remedies for, or action in response to, a contravention of the general prohibition in section 18(1):

> "(8) This section is without prejudice to the pursuit of any remedy or the taking of any action in relation to a contravention of section 18(1)…(whether or not this section applies to the contravention)."

27. Section 23 CRCA 2005 is headed "Freedom of information", and subsection (1) provides as follows:

> "(1) Revenue and customs information relating to a person, the disclosure of which is prohibited by section 18(1), is exempt information by virtue of section 44(1)(a) of the Freedom of Information Act 2000 (c 36) (prohibitions on disclosure) if its disclosure—
>
> (a) would specify the identity of the person to whom the information relates, or
>
> (b) would enable the identity of such a person to be deduced."
>
> ("Revenue and customs information relating to a person" has the same meaning as in section 19(2) CRCA 2005: section 23(3).)

28. For this purpose, in determining whether disclosure of revenue and customs information relating to a person is prohibited by section 18(1) CRCA 2005, section 23(1A) requires section 18(2) and (3) (exceptions to the general prohibition) to be disregarded.

29. Section 23(2) CRCA 2025 provides that information, other than that specified in section 23(1), whose disclosure is prohibited under section 18(1) CRCA is not exempt information under FOIA 2000.

R (Ingenious Media Holdings plc & another) v HMRC [2016] UKSC 54

30. Lord Toulson gave the only judgment in *Ingenious*, which began with the following words:

> "1. This appeal concerns the scope of the duty of confidentiality owed by [HMRC] in respect of the affairs of taxpayers. The duty is now in statutory form."

31. Ingenious Media Holdings plc were an investment and advisory group specialising in the media and entertainment industries. They devised and promoted film investment schemes which "utilised certain tax relief" ([8]). In June 2012, HMRC's Permanent Secretary for Tax, David Hartnett, gave an 'off the record' interview about tax avoidance to two journalists from *The Times* newspaper.

32. On 21 June 2012, *The Times* published articles about film schemes and tax avoidance, which said certain things about Patrick McKenna, chief executive officer of Ingenious Media Holdings plc, including:

- "Patrick McKenna [is one of] two main providers of film investment schemes in the UK";

- HMRC believed "film schemes have enabled investors to avoid at least £5 billion in tax. Much of that sum, the Revenue says, is attached to schemes created by…Mr McKenna";

- "'He's never left my radar,' a senior Revenue official said of Mr McKenna…he's made a fortune, he's a banker, but actually he's a big risk for us so we would like to recover lots of the tax relief he's generated for himself and other people".

33. The "senior Revenue official" was David Hartnett ([11]) and there was "no dispute that [he] imparted information to *The Times* regarding the tax activities of Mr Mckenna and Ingenious Media…derived from information held by HMRC about them" ([12]).

34. Ingenious brought a claim for judicial review "although in substance it was a straightforward claim for breach of a duty of confidentiality" ([14]). The High Court dismissed the claim, and the Court of Appeal upheld the High Court's decision.

35. Before the Supreme Court, the initial issue was identified as the proper construction of section 18(2)(a)(i) CRCA 2005. Section 18(2) specifies certain disclosures to which the general prohibition in section 18(1) does not apply, and section 18(2)(a)(i) refers to a disclosure of information which "is made for the purposes of a function of [HMRC]". HMRC argued that the disclosure of information, during off the record discussions with *The Times'* journalists, was made for the purposes of a function of HMRC.

36. Lord Toulson, at [17], observed that "unfortunately, the courts below were not referred…to the common law duty of confidentiality". His Lordship said "the duty of confidentiality owed by HMRC to individual taxpayers is not something which sprang fresh from the mind of the legislative drafter" and went on to describe a principle of the law of confidentiality that the recipient of information of a confidential nature obtained or received in furtherance of a public duty "will in general owe a duty to the person from whom it was received or obtained or to whom it relates not to use it for other purposes". Lord Toulson said the principle was sometimes referred to as the *Marcel* principle (*Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225), and "in relation to taxpayers, HMRC's entitlement to hold and receive confidential information about a person or company's financial affairs is for the purpose of enabling it to assess and collect (or pay) what is properly due from (or to) the taxpayer".

37. Lord Toulson observed, at [18], that "the *Marcel* principle may be overridden by explicit statutory provisions". His Lordship noted that the construction of section 18(2)(a)(i) CRCA 2005 advanced by HMRC "means that the protection which would otherwise have been provided to the taxpayer by HMRC's duty of confidentiality will have been very significantly eroded by words of the utmost vagueness" and referred to the principle of statutory interpretation that fundamental rights cannot be overridden by general or ambiguous words ([19]). At [22], Lord Toulson said the "general principle of HMRC's duty of confidentiality regarding individual tax payer's affairs" was "long established" and "in passing [CRCA 2005], Parliament cannot be supposed to have envisaged that by section 18(2)(a)(i) it was authorising HMRC officials to discuss its views of individual taxpayers in off the record discussions, whenever officials thought that this would be expedient for

some collateral purpose connected with its functions, such as developing HMRC's relations with the press". HMRC's construction "would have significantly emasculated the primary duty of confidentiality recognised in section 18(1)".

38. Lord Toulson went on to say, at [23], that "I take section 18(1) to be intended to reflect the ordinary principle of taxpayer confidentiality referred to in para 17". His Lordship next referred, at [24], to HMRC's argument that, despite section 18 CRCA 2005's heading of "Confidentiality", it "is not confined to information which is in any real sense confidential" so that, to avoid absurdity, section 18(2)(i) should be "given a similarly expansive interpretation". This, argued HMRC, was supported by the wording of the criminal offence in section 19(1) and its statutory defence, drafted on the assumption that section 18(1) extends to information already in the public domain. Lord Toulson described the argument as "too subtle" and open to the objection that information may be available to the public yet not sufficiently widely known for all confidentiality in it to be destroyed (*McKennitt v Ash* [2006] EMLR 10). His Lordship added, at [25], that "it is a fallacy to suppose that [in the light of the section 19 defence] Parliament intended section 18 to prohibit the disclosure of information of the most ordinary kind about which there could be no possible confidentiality" and "moreover, even if section 18(1) has the wide scope suggested by HMRC (which it is not necessary to decide in this case), it does not follow that Parliament must be taken to have intended by subsection (2)(a)(i) to confer on officials a wide ranging discretion to disclose confidential information about the affairs of individual taxpayers".

39. The Supreme Court held that the information disclosed by HMRC to *The Times'* journalists was "information of a confidential nature, in respect of which HMRC owed a duty of confidentiality to them under section 18(1)" [32]. It was not suggested that the disclosures were reasonably necessary for the purposes of HMRC's investigations into film schemes [33]. Section 18(2)(a) CRCA did not justify the disclosures [35], and the appeal against the Court of Appeal's decision was allowed.

Ground of appeal

40. The Upper Tribunal initially granted permission to appeal against the Tribunal's decision on a single ground, described as follows:

> "While the Appellant concedes that the remarks of the Supreme Court in *R (Ingenious Media Holdings plc and another) v HMRC* [2016] UKSC 54

> concerning the general principle of taxpayer confidentiality and the scope of section 18 were *obiter*, the respect due to that Court's *obiter* opinions, as well as the potential for this issue to be of significance beyond the present parties, persuades me that I should grant permission to appeal on ground 1. Permission is granted on the ground that the First-tier Tribunal arguably misdirected itself in law by construing section 18 of the 2005 Act on the basis that Parliament's intention was not to align its scope with information falling within the 'general principle of taxpayer confidentiality', and, in consequence, arguably made an erroneous finding that the absolute exemption under section 44 of FOIA applied."

41. That ground was subsequently amended by the addition of the following:

> "This ground includes the question whether the Upper Tribunal's decision in *Gordon v Information Commissioner and HMRC* [2020] UKUT 92 (AAC) was wrongly decided because it did not construe section 18 of the 2005 Act so as to align its scope with 'the general principle of taxpayer confidentiality'."

Arguments

Appellant

42. The Appellant submits that the legal issue on this appeal is whether the name of a case decided by the Supreme Court is information which falls outside the absolute exemption from disclosure under section 44(1)(a) FOIA 2000. Resolution of the issue turns ultimately on the legal meaning of section 18(1) CRCA 2005, and that depends on whether it is given a literal or purposive construction. A purposive construction, which confines section 18(1) to matters that are protected by the law of confidence, is necessary in order to give effect to Parliament's intention.

43 The Appellant submits that the section 44 FOIA 2000 / section 23 CRCA 2005 absolute exemption relates to a sub-set of information falling within section 18(1) CRCA 2005. The exemption applies to section 18(1) information that is (a) 'revenue and customs information relating to a person' and (b) which either specifies the person's identity or enables the person's identity to be deduced. The definition of 'revenue and customs information relating to a person', in section 19(2), identifies a broad category of information namely "information about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs" but not including information about "internal administrative arrangements". It should be noted that the relaxation of section 18(1), in section 18(2), is concerned

with specified ‘situations’ rather than categories. This means that section 23(1A) CRCA 2005 does not really assist in identifying the scope of section 18.

44. Section 23(2) CRCA 2005 incorporates section 19(2)’s definition of “revenue and customs information relating to a person”. That definition clarifies the scope of the criminal offence under section 19(1) which is itself based on section 18. As a penal provision, section 19 should be construed narrowly. If section 18(1) were interpreted broadly, the scope of the penal provision would also widen. This would have ‘widespread practical consequences’. If HMRC are correct, discussions between HMRC and professional bodies would be inhibited because HMRC would be unable to refer to a decided case whose name is in the public domain. It might be reasonable to assess disclosure of the name of a Supreme Court case as falling within the section 19 statutory defence (public domain) but that defence is on much ‘shakier ground’ if it is held that such information is fully within the scope of section 18(1).

45. The Upper Tribunal has already decided, in *Gordon v Information Commissioner & HMRC* [2020] UKUT 92 (AAC) that, in section 19(2) CRCA 2005, the words “in respect of the person” attach to “the exercise of a function of Revenue and Customs” rather than “information”. The Appellant invites the Upper Tribunal to depart from Judge Jacobs’ ruling. The judge overlooked that the section 18(2) ‘relaxations’ concern ‘situations’, not types or categories of information.

46. It is significant that, in *Ingenious*, the Supreme Court suggested that section 18(1) CRCA 2005 should be “taken to reflect the ordinary principle of taxpayer confidentiality”, which would mean that a reference to a published tax case (which necessarily includes the name of a taxpayer) ought not to fall within section 18(1). If the literal meaning of section 18(1) would catch such information, then, consistent with Parliament’s intention for the ordinary principle of taxpayer confidentiality to be put on a statutory footing, a purposive construction should be adopted which excludes such information. Section 18(1) should not cover material that cannot reasonably be considered confidential. The heading to section 18 (‘Confidentiality’), while not determinative, provides a clue as to its intended meaning.

47. Parliamentary debates on the Bill that became CRCA 2005 show that the primary aim of the clause that became section 18 was to fulfil the aim of protecting taxpayer confidentiality. The Appellant’s skeleton argument sets out a number of Ministerial and other statements, recorded in Hansard, made during Second

Reading of the Bill in the House of Commons, and subsequently at Committee stage, by the Paymaster General, as well as statements made by the government minister in charge of the Bill in the House of Lords. More extensive extracts from Hansard were provided the day before the hearing. I have read the Hansard extracts but need not set them out here. At the hearing, the Appellant took me through the Hansard extracts at some length and submitted that his survey showed a pattern namely a persistent Ministerial suggestion or intention that section 18(1) CRCA was confined to matters that are confidential.

48. The Appellant submits that section 18(1) CRCA 2005's precise scope is ambiguous so that it is appropriate to refer to the Hansard material under the rule in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593. If regard is had to Hansard, it is quite clear that "the intended scope of the legislation is unquestionably limited to taxpayer confidentiality". Moreover, section 3, inserted in the Bill in response to concerns expressed in Parliamentary debate on the Bill, "dovetails section 18" and "would be wholly inoperable if it covered every piece of information that an officer will learn in the course of his or her duties". Section 18(1) has to relate to genuinely confidential material. Otherwise, for instance, a HMRC official would not even be able to tell a family member at a social function what is the basic rate of income tax without contravening section 18(1).

49. The Appellant disputes that his case really amounts to a complaint about the express words of section 23 CRCA 2005, and the nature of the absolute exemption under section 44 FOIA. His challenge turns on the meaning of "information" in section 18(1).

50. The argument that a literal construction should prevail if the statutory wording is clear reveals a fundamental misunderstanding of the court's role in statutory interpretation. A purpose construction is not the option of last resort. At the heart of the modern approach to statutory interpretation is purposiveness (see Lord Nicholls in *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2005] 1 AC 684 at [36], and the commentary in 12.2 of Bennion on Statutory Interpretation (8th edition)). At the hearing, the Appellant outlined developments in the interpretation of tax statutes over the last 50 or so years which he argued demonstrated that they are no longer a special interpretative category in which greater weight is placed on an enactment's literal meaning.

51. HMRC's stance in these proceedings departs from their position before the Tribunal where they argued that CRCA 2005 put on a statutory footing the

longstanding principle of taxpayer confidentiality. The reasons now relied on by HMRC for their changed position are flawed:

(1) the literal/purposive arguments are dealt with above;

(2) the Appellant's interpretation does not render section 23 CRCA 2005 redundant. HMRC's case misstates the relationship between various CRCA 2005 provisions, and the Appellant's skeleton arguments provides the example of information about a new legislative provision to support his case that his interpretation does not render section 23 redundant. The Appellant argues that "section 23 is necessary specifically to ensure that taxpayer-sensitive information is protected from disclosure – were that not the case then disclosure would fall within one of the exceptions provided for by section 18(3)";

(3) HMRC's burden arguments are misplaced. Information in the public domain is already exempt information under FOIA 2000. In fact, the Appellant's interpretation would reduce the burden on HMRC, by avoiding the need to redact names of published cases when HMRC disclose information;

(4) a suggestion that the Appellant's interpretation would encourage 'fishing' requests for information about celebrities is misplaced, and concerns a very different factual context.

52. HMRC's argument by reference to the statutory defence to the section 19(1) CRCA 2005 offence overlooks that it applies where information is disclosed contrary to section 18(1), but it is believed (albeit wrongly) that the information is already in the public domain.

53. The Upper Tribunal should hold that section 18(1) CRCA 2005 only protects information that falls within the principle of taxpayer confidentiality and that, accordingly, the First-tier Tribunal made a mistake of law.

Information Commissioner

54. The wording of section 18(1) CRCA 2005 is clear and unambiguous. Had Parliament intended to define the scope of section 18(1) by reference to some existing legal principle of confidentiality (taxpayer or otherwise), it could have done so. But it did not. Instead, Parliament framed section 18(1)'s prohibition by reference to all information held by HMRC in connection with any of its functions,

including ancillary functions. And it did so without making reference to the content of information or its relation to any taxpayer.

55. The value of an Act's section headings, as an aid to statutory interpretation, should not be overstated. While it is permissible to have regard to headings, they serve the purposes of convenience and ease of reference, and do not have the force of a legal proposition (*R v Harbax Singh* [1979] QB 319). The heading of section 18 CRCA 2005 – "Confidentiality" – does not show that Parliament thereby intended to import an entire legal framework (the highly developed legal concept of confidentiality) whose principles are simply not reflected in the wording of section 18 itself.

56. The Supreme Court's decision in *Ingenious* is not determinative of the present appeal because:

(a) as the Court itself acknowledged, and the Appellant accepts, its remarks about the scope of section 18(1) CRCA 2005 were *obiter*;

(b) *Ingenious* concerned one statutory exception to the general prohibition, in section 18(2)(a)(i) CRCA 2005, which the Court held had a narrower meaning than that contended for by HMRC. The Court affirmed the robustness of the prohibition, and therefore of the protections intended by Parliament;

(c) the Court held that HMRC's common law duty of confidentiality existed alongside section 18, and section 18 was merely "intended to reflect" that duty;

(d) section 18(1) is manifestly broader than the concept of taxpayer confidentiality / the *Marcel* principle since it applies in connection with any HMRC function (not only those exercised in relation to taxpayers), and it applies even where the information neither permits any person to be identified nor reveals anything about a taxpayer's affairs. And there is no statement in *Ingenious* to the effect that section 18 only replicates existing protections or is in some way circumscribed by reference to the law as it existed before CRCA 2025 was passed.

57. Evidently, the inter-relationship between sections 18, 19 and 23 CRCA 2005 was carefully considered by Parliament. The provisions begin with section 18(1)'s very broad prohibition, which is cut down by the exemptions in section 18(2) and (3). The criminal offence in section 19, which bolsters protections against wrongful disclosure, does so by reference to identifiability but it also removes from the ambit of the offence information about internal arrangements, which would be redundant

unless such information fell within section 18(1) in the first place. Section 19 also provides a statutory defence for disclosures that may have breached section 18(1) so that, if the defence is established, these are not criminal contraventions of section 18(1).

58. Section 23 CRCA 2005 has a different purpose than sections 18 and 19. Its purpose is to define the interface between CRCA 2005 and FOIA 2000. It is not correct that the Upper Tribunal's decision might affect the scope of the statutory defence in section 19. The decision on this appeal could not determine the scope of statutory defences available to a person charged with an offence under section 19(1). The answer to the Appellant's basic rate of income tax example (query made of a HMRC official at a social function) is that the statutory defence would be available.

59. Section 19 CRCA 2005's purpose is clear. It bolsters the section 18(1) general prohibition in a particular case namely where a person would be identifiable if the information were disclosed.

60. At the hearing, in relation to the literal/purposive construction issue, Mr Davidson did not dispute the Appellant's description of the guiding legal principles. He differed in how they should be applied in this case, in particular regarding how Parliament's intention is identified. The will of Parliament is to be identified from the statutory wording used, and that remains the cornerstone of statutory interpretation. If the wording used leads to absurdity or otherwise does not give effect to the identified will of Parliament, a purposive construction may be necessary. In this case, however, the literal wording of section 18 CRCA 2005 is not at odds with what Parliament sought to achieve. The Appellant's emphasis on the use of 'confidentiality' in various CRCA 2005 section headings is a red herring. CRCA 2005 uses 'confidentiality' to convey its everyday meaning of 'something which must not be talked about' rather than its common law, equitable or *Marcel*-type meaning. Where a statutory term is defined, which is what section 18 effectively does in relation to 'confidentiality' as used in CRCA 2005, that definition should be the focus rather than the label attached to it.

61. Recourse to Hansard Parliamentary debate material is not permissible under the rule in *Pepper v Hart*, which requires the enactment in question to be ambiguous or obscure, or for its literal meaning to lead to absurdity. None of those defects apply in this case but, even if they did, there was no clear Parliamentary

statement as to the intended meaning of section 18(1) CRCA 2005 made by a Minister / promoter of the Bill that became CRCA 2005.

62. It is instructive to consider how Parliament might have drafted CRCA 2005 if its intention was as the Appellant contends. Parliament could have used a similar drafting device to that in section 41 FOIA 2000 which expressly refers to information which, if disclosed to the public, would constitute an actionable breach of confidence. The fact that Parliament declined to take a similar approach in CRCA 2005 shows that it did not intend to confine section 18 to information that the law considers confidential.

63. The First-tier Tribunal correctly construed section 18(1) CRCA 2005 and, hence, correctly applied section 44 FOIA 2000. This appeal should be dismissed.

HMRC

64. HMRC submit that section 18(1) CRCA 2005 does what the ordinary meaning of its word say, and there is a strong public policy rationale in favour of construing it in accordance with its plain meaning. The plain meaning puts safeguarding taxpayer confidentiality at the forefront and the public interest is served by clarity regarding the safeguarding of taxpayer information.

65. HMRC submit that the so-called “modern approach” to statutory interpretation, relied on by the Appellant, does not extend to inferring a purpose which conflicts “with that served by clear statutory language”. As the Supreme Court said in *Uber BV v Aslam* [2021] UKSC 5 at [70]:

> “The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose.”

66. In the absence of a clear tension between the words used and Parliament’s presumed purpose, HMRC submit that the clear wording of the statute will always be the starting and ending point of any exercise in statutory interpretation. A clear purpose of section 18 CRCA 2005 is to reassure the public that information obtain by HMRC will not be disclosed other than in ‘tightly defined’ circumstances. The Tribunal’s literal interpretation of section 18 is consistent with that clear purpose and should be upheld. The Appellant’s narrower interpretation, which aligns section 18 with the legal concept of confidentiality, would significantly dilute the protections afforded to the subjects of information held by HMRC, and frustrate the ‘clear and

apparent will' of Parliament. Section 18 does not dilute existing legal protections, rather it adds to them. The Appellant's case is that section 18 effectively codifies existing legal and equitable protections enjoyed by taxpayers but, if that was all Parliament intended, it would have expressed itself differently in section 18.

67. The Appellant's construction of section 18(1) CRCA 2005 would defeat the purpose of section 44(1)(a) FOIA 2000, which is intended to "subordinate FOIA…to existing statutory restraints on disclosure". In the present context, that intention is further underscored by section 23(1A) CRCA 2005's disapplication, for the purposes of section 44(1)(a) FOIA 2000, of the statutory exceptions to the general prohibition in section 18(1) CRCA 2005. The statutory context reflects "a clear Parliamentary intention to ensure that all information held by [HMRC] in connection with its functions (or as a result of exercising its functions) that relates to taxpayers, or from which the identity of a taxpayer could be deduced, should benefit from the absolute exemption under FOIA". Limiting section 18(1) CRCA 2005 (and, in turn, section 44(1)(a) FOIA 2000) to information in respect of which HMRC were under a common law or equitable duty of confidence to a taxpayer would frustrate that intention.

68. The Appellant's arguments, made by reference to extensive citation from debates on the Bill that became CRCA 2005, repeat those dismissed by the Upper Tribunal in *Gordon v Information Commissioner & HMRC* [2020] UKUT 92 (AAC) at [20] and [27]. As the Upper Tribunal correctly held in that case, recourse to Hansard material was not permissible under *Pepper v Hart* because the provision under analysis is not bedevilled by any ambiguity, obscurity or absurdity. Furthermore, the Ministerial statements relied on by the Appellant do not satisfy the *Pepper v Hart* requirement to be clear and unequivocal. The statements neither seek to define 'taxpayer confidentiality' nor posit that such confidentiality delimits any provision of the Bill that became CRCA 2005. Moreover, the Ministerial statements in fact support a literal construction of section 18 in that they refer to a new "binding statutory duty of confidentiality" without making any express reference to existing duties of confidentiality at common law.

69. The argument that the Tribunal's interpretation would, in the light of section 19(1) CRCA 2005, prevent HMRC from referring to decided cases relating to taxpayers in any circumstances is misconceived, for the following reasons:

(a) section 19(2) is of narrower scope than section 18(1). The latter applies to information "held…in connection with a function" whereas the former applies to

information "about, acquired as a result of, or held in connection with the exercise of a function" in relation to a person (see *Gordon* at [17]);

(b) the *actus reus* of the offence of wrongful disclosure under section 19(1) requires a disclosure that contravenes section 18(1). A disclosure made for the purposes of a function of HMRC (within section 18(2)(a)(i)) leaves section 18(1) free of contravention so that there can be no offence under section 19(1);

(c) 'as a backstop and subject to context', a reasonable belief that the information had already and lawfully been made available to the public would be likely to exist, giving rise to section 19(3)'s defence to the offence of wrongful disclosure.

70. It is of note that section 18(2) CRCA 2005 is expressly disapplied when it comes to determining the scope of the FOIA 2000 absolute exemption created (section 23(1A) CRCA 2005). However, the availability of this exemption does not restrain HMRC from making a disclosure for its own purposes to the extent permitted by section 18(1) and in the light of section 18(2) and (3). The Court of Appeal in *Mitchell v HMRC* [2023] EWCA Civ 261 rejected the argument that the provision should be read down 'as a matter of common law'. Likewise, the Upper Tribunal should apply the clear words of section 18(1), which reflect the balance of public interests drawn by section 18 (and CRCA 2005 as a whole). To read down the scope of "information" within section 18(1), so as to confine it to information subject to a common law / *Marcel*-type duty of confidence, would 'seriously undermine' section 18(2)'s influence on that balance of interests by limiting the scope of information to which section 18(1) applies.

71. The Appellant's construction of section 18 CRCA 2005 would largely nullify section 23. The Appellant argues that section 18(1) applies only to information to which a common law duty of confidence attaches, but information of that type *already* enjoys an absolute exemption from disclosure by virtue of section 41 FOIA 2000. If section 23 CRCA 2005 is to have any practical effect, it must have been intended to apply to, or at least include, information to which no freestanding duty of confidence attaches. The fact that Parliament saw fit to enact section 23 CRCA 2005 further indicates that section 18(1) was intentionally framed to go beyond existing protections.

72. The Appellant's construction would give rise to a significant administrative burden for HMRC. On each request for information under FOIA 2000, HMRC would

have to assess whether a common law / *Marcel*-type duty of confidence had arisen. This could also lead to "a flood of FOIA requests for information relating to prominent individuals or businesses whose tax affairs attract public comment". HMRC's concerns about the potential administrative burden are not misplaced by virtue of the information sought already being in the public domain. This argument overlooks that HMRC would have to ascertain whether information has been placed in the public domain and, if so, to what extent and whether it was with the taxpayer's informed consent. Such steps would be necessary for HMRC "to understand whether by that separate disclosure it has been released from the obligation of confidentiality that it owed at common law to the taxpayer in relation to that material". For HMRC to conduct this analysis in every case would be unworkable and the imposition of such a burden in the absence of express legislative wording should not lightly be assumed.

73. The Appellant's 'burden' argument also overlooks the implications of section 21 FOIA 2000 (exemption for information accessible to applicant by other means). Were HMRC to invoke section 21, that would constitute official confirmation that the information already available in the public domain is identical to that held by HMRC. And the opposite conclusion could be drawn where section 21 is not invoked. The ensuing 'revelatory risk' would provide a route for achieving official confirmation or denial of the provenance or accuracy of information. As well as being unworkable in practice, this would be wholly incompatible with the strong protection for taxpayer information afforded by the plain wording of CRCA 2005.

74. The statutory defence to the offence under section 19(1) CRCA 2005 anticipates that the general prohibition in section 18(1) may extend to information that is already in the public domain. Otherwise, some elements of the defence would be redundant.

75. The Supreme Court's remarks in Ingenious about the scope of section 18(1) CRCA 2005 were obiter and arose from a very different set of factual circumstances (see Lieven J in *Good Law Project v Uber London* [2019] EWHC 3125 (Admin) at [17]). It should also be borne in mind that the Supreme Court did not have the benefit of reasoned arguments in the courts below about the common law duty of confidentiality.

Analysis

76. Section 44(1)(a) FOIA 2000 provides that information is exempt information under that Act if its disclosure is prohibited by any enactment. Without section 23 CRCA 2005, all HMRC information whose disclosure is prohibited by section 18 CRCA 2005 would be exempt information for the purposes of FOIA 2000. Therefore, the purpose of section 23 is to delimit the application of section 44(1) FOIA 2000 in relation to information whose disclosure is prohibited under section 18 CRCA 2005.

77. Section 23 CRCA 2005 identifies a category of the information whose disclosure is prohibited under section 18 and provides that it is exempt information for the purposes of section 44(1)(a) FOIA (by implication, section 18(1) information falling outside that category is not exempt information). In order for information to form part of the category of section 18(1) CRCA 2005 information that is exempt information, the following conditions must be satisfied:

(a) the information's disclosure must be prohibited by section 18(1) CRCA 2005 (section 23(1), introductory words). This means prohibited by reference to section 18(1) alone, regardless of whether an exception from section 18(1)'s general prohibition applies under section 18(2) or (3) (section 23(1A)); and

(b) the information must be "revenue and customs information relating to a person" (section 23(1) CRCA 2005, introductory words). That term means the same thing as in section 19(2) CRCA 2005 (section 23(3)). In other words, information about, acquired as a result of, or held in connection with the exercise of a function of HMRC in respect of a person unless it is information about internal administrative arrangements of HMRC; and

(c) disclosure of the information would identify the person to whom it relates or enable the person's identity to be deduced (section 23(1)(a), (b) CRCA 2005).

78. If disclosure of information is not prohibited by section 18(1) CRCA 2005, condition (a) above is not satisfied, and the information is not exempt information under section 44(1)(a) FOIA 2000. The Appellant argues that disclosure of information in the form of the name of a case decided by the Supreme Court cannot be prohibited by section 18(1) because that provision is confined to information to which the *Marcel* principle applies. It is not disputed that information in the form of

the name of a case decided by the Supreme Court would not be protected under the *Marcel* principle as described by Lord Toulson in *Ingenious*.

79. I shall first consider the purpose and scope of section 18 CRCA without reference to Lord Toulson's views in *Ingenious*. If purpose and literal wording align, there is no scope to do anything other than apply the literal wording. I agree with the Respondents that any analysis of an enactment's purpose must begin with its wording and statutory context. And the question whether a provision is ambiguous, or obscure, cannot be answered without considering the entirety of the Act in which the provision appears (*A-G v Prince Ernest Augustus of Hanover* [1957] AC 436 at 463).

80. HMRC submit that the Appellant's case is that section 18(1) CRCA 2005 effectively codifies the pre-existing common law principle of taxpayer confidentiality as expounded in case law. I am not sure that characterisation is accurate because true codification involves restatement of the law, whether common law or statute (and is conventionally signalled by mention of 'codify' in an Act's long title). Even if the Appellant is correct that section 18(1) is confined to information protected by the *Marcel* principle, I do not think this would amount to codification of the law because CRCA does not replicate existing legal remedies for a breach of confidence.

81. An enactment may, without codifying the law, nevertheless operate by reference to some existing principle of law. My understanding of the Appellant's case is that this is what section 18(1) CRCA 2005 does, and the existing principle is that of taxpayer confidentiality / the *Marcel* principle. However, if that was Parliament's intention, one would have expected it to be clearly expressed. As the Commissioner argues, Parliament could have deployed a similar drafting device to that used in section 41 FOIA 2000 and formulated the prohibition on disclosure by reference to information whose disclosure "would constitute a breach of confidence actionable by [a specified person]". However, there are cases where an enactment imports common law rules by implication (for example, section 15 of the Commons Registration Act 1965 as construed in *Bettison v Langton* [2001] UKHL 24, [2001] 3 All ER 417) and so the absence of anything close to an express reference to an existing common law principle in section 18(1) is not necessarily determinative.

82. Turning now to the wider statutory context, CRCA 2005 is certainly much concerned with 'confidentiality'. That word is found in the headings of four of its 57

sections (sections 3, 18, 29 and 40). None of those sections provide any obvious indication that they are concerned with confidentiality as that term is understood under the common law / *Marcel* principle. For an Act so concerned with regulating the use of HMRC information, that would be a surprising omission had Parliament intended to control HMRC's use of information by reference to an existing principle of law.

83. Section 18 is one of several sections of CRCA 2005 grouped under the cross heading "Information" (sections 17 to 23). The group begins by enacting a general rule, in section 17(1), that HMRC may use information acquired in connection with one of its functions for the purposes of any of its other functions. So that is concerned with internal use (or re-use) of information by HMRC.

84. The next section within this group, section 18 CRCA 2005, controls the transfer of information outside HMRC. It begins with what is, on the face of it, a very broadly expressed prohibition. Section 18(1) provides that HMRC "may not disclose information which is held" by HMRC in connection with a function of HMRC. The prohibition in section 18(1) is expressed in absolute terms without qualification by reference to disclosure that would constitute an actionable breach of confidence or, for that matter, contravene any other existing legal rule.

85. The extent of section 18(1) CRCA 2005's general prohibition is diminished by section 18(2) and (3). Section 18(2) disapplies the general prohibition in relation to a range of specified disclosures described across eleven separate paragraphs. The fact that Parliament saw the need to make so many exceptions to the general prohibition is itself an indication that the general prohibition was intended to cast its net as wide as the literal wording would suggest.

86. One of the excepted disclosures, in section 18(2)(h) CRCA 2005, is where the disclosure is made with the "consent of each person to whom the information relates". It is difficult to see why that would have been considered necessary had the intention been to confine section 18(1) to taxpayer information falling within the *Marcel* principle.

87. The next section in the information group, section 19 CRCA 2005, confers enhanced protection on a subset of section 18 information, by criminalising certain disclosures of information in contravention of section 18(1). The elements of the offence, in section 19(1), include the phrase "revenue and customs information

relating to a person". That phrase is defined by section 19(2) to expressly exclude "information about internal administrative arrangements of" HMRC. This is a further sign that section 18(1)'s ambit is as wide as a literal reading would suggest and not confined to *Marcel*-type information. If such information were not within section 18(1) to begin with, there would be no need to exclude it for the purposes of section 19.

88. Section 22(1)(a) CRCA 2005 provides that nothing in sections 17 to 21 authorises the making of a disclosure which contravenes the data protection legislation. This further indicates that, in the information group of sections, Parliament sought to create a comprehensive (or reasonably comprehensive) statutory code regulating the use of information by HMRC and, where that served Parliament's purpose, to do so by reference to external legal rules (in section 22's case, statutory rules).

89. The information group of sections ends with section 23 CRCA 2005 (headed "Freedom of information") which, like section 22, operates by reference to external legal requirements. Section 23 identifies a category of section 18(1) information that is exempt information by virtue of section 44(1)(a) FOIA 2000. This category of section 18(1) information is not coterminous with the category of information given enhanced protection against disclosure by section 19 CRCA 2005. This is a further indication that, in this group of sections, Parliament gave careful and conscious consideration to how HMRC's use of information was to be controlled.

90. I agree with HMRC that, if section 18(1) CRCA 2005 is confined to *Marcel*-type information (being information protected by the law of confidentiality), the reason for section 23 CRCA 2005 is not obvious. Section 41 FOIA 2000 provides that information is exempt information if its disclosure would constitute an actionable breach of confidence (like section 44 exempt information, section 41 exempt information is absolutely exempt from disclosure under FOIA 2000: see section 2(3)(h) FOIA 2000).

91. To summarise this part of the analysis, if *Ingenious* is left out of account, there are a number of indications that Parliament's intention was not to confine section 18(1) CRCA 2005 to information within the existing law of confidentiality / *Marcel* principle of taxpayer confidentiality, and that Parliament's intention in fact aligns with the literal meaning of section 18(1):

(a) neither section 18(1) nor any other section of CRCA 2005 headed 'confidentiality' is framed by reference to the law of confidentiality / the *Marcel* principle. CRCA 2005 effectively modified section 44 FOIA 2000 yet Parliament decided not to use in CRCA 2005 a similar drafting device to that used in section 41 FOIA 2000 to enact a provision that operates by reference to the law of confidentiality;

(b) certain of the disclosures of information to which section 18(1) does not apply (in section 18(2)) are of doubtful utility if section 18(1) was intended to be confined to information falling within the *Marcel* principle. And the extent of those exceptions further suggests that section 18(1)'s literal meaning aligns with its legal meaning;

(c) the statutory defence to the offence under section 19(1) appears drafted on the assumption that section 18(1) applies to information falling outside that to which the *Marcel* principle applies;

(d) sections 17 to 23 CRCA 2005 may properly be described as a carefully constructed code regulating HMRC's use of information. The lynchpin of much of this code is section 18(1). It would be surprising if Parliament, in framing that code, failed clearly to express its intention in enacting section 18(1). The likelihood that Parliament did so fail is reduced further by the existence of section 3(1), which requires each HMRC official and Commissioner to "make a declaration acknowledging his obligation of confidentiality under section 18". Parliament is unlikely to have required such declarations to be made by reference to an obligation of confidentiality whose literal meaning is at variance with its legal meaning.

92. I can now address, the implications, if any, of *Ingenious*. It is common ground that, insofar as Lord Toulson expressed a view in *Ingenious* about the totality of information falling within section 18(1) CRCA 2005, his remarks were *obiter*. For my part, I am not convinced that Lord Toulson's *obiter* view was that section 18(1) was confined to information falling within the *Marcel* principle. His Lordship did indeed say, at [1] of *Ingenious*, that HMRC's duty of confidentiality "is now in statutory form" but those were clearly introductory or scene-setting remarks that cannot reasonably be considered to encapsulate the entirety of his findings and *obiter* views. Lord Toulson also said, at [23], that section 18(1) was intended to "reflect the ordinary principle of taxpayer confidentiality" referred to at [17], but that remark in is capable of being read in two ways: either section 18(1) was confined

to information within the *Marcel* principle or that, whatever its precise scope, section 18(1) included such information. There is a good argument that His Lordship intended the latter because, if the former were intended, his Lordship might have been expected to say 'replace' instead of 'reflect'. It is true that Lord Toulson's remarks in [25] are capable of being read as expressing the view that section 18 does not protect "information of the more ordinary kind about which there could be no possible confidentiality', but they are also capable of being read more narrowly, that is as a reason for rejecting HMRC's argument that the nature of the section 19 statutory defence demonstrated that section 18's scope was wider than the *Marcel* principle.

93. In my judgment, Lord Toulson's obiter remarks are capable of being read consistently with what I consider to be the ratio of *Ingenious*, namely (a) whatever the ambit of section 18(1) CRCA 2005, it includes information falling within the *Marcel* principle, and (b) the excepted disclosure in section 18(2)(a)(i) should be construed so as to preserve section 18(1) protection for such information since the clear statutory wording necessary to signal Parliament's intention to weaken existing legal protections was absent.

94. In any event, if my understanding of Lord Toulson's *obiter* remarks is incorrect, and he did express the view that section 18(1) CRCA 2005 is confined to information falling within the *Marcel* principle, I do not follow them. I am not required to do so, since they are *obiter*, and that view cannot be reconciled with the purpose of section 18, and related provisions of CRCA 2005, construed as set out above.

95. In my judgment, *Pepper v Hart* does not permit me to have recourse to Ministerial statements recorded in Hansard. I do not consider section 18(1) CRCA's meaning to be either ambiguous or obscure. On the contrary, it is a clearly expressed provision. And its literal meaning does not lead to absurdity. It cannot be considered absurd to enact a legislative scheme that significantly inhibits the disclosure of taxpayer information, even if disclosure of that information was not previously constrained by the common law / *Marcel* principle. Moreover, and as argued by the Respondents, I do not consider that the Ministerial statements relied on by the Appellant include any clear statement that the clause of the Bill that became section 18(1) was intended to be confined to information falling within the *Marcel* principle.

96. The Appellant argues that the construction of section 18(1) CRCA 2005 should be informed by the interpretative principle against doubtful penalisation. However, this case is not about the construction of a penal provision, it is about the construction of provisions that identify which information held by HMRC is exempt information by virtue of section 44(1) FOIA 2000. It is true that a component of the offence under section 19(1) CRCA 2005 is the general prohibition against disclosure in section 18(1). However, Parliament has crafted a comprehensive code about use of HMRC information, in sections 17 to 23 CRCA 2005, and it would in my view frustrate Parliament's intention if I were to disturb, or unbalance that code, by adopting a constrained construction of section 18(1) with a view to limiting the scope of section 19(1) (a criminal court would not be bound by my decision in any event).

97. Finally, the practical consequences argument. In *Shannon Realties v Ville de St Michael* [1924] AC 185, at 192 Lord Shaw said:

> "Where the words of a statute are clear, they must, of course, be followed, but…where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating and that alternative to be rejected which will introduce uncertainty, friction or confusion into the working of the system."

98. I have decided that the relevant statutory wording in this case is clear and serves Parliament's intended purpose. As a result, the Appellant's supposed practical consequences cannot play a part in the construction of section 18(1) CRCA 2005. In any event, HMRC's argument that the Appellant's preferred construction carries its own administrative burdens is at least as persuasive as the Appellant's argument that a literal construction of section 18(1) imposes administrative burdens on HMRC.

Conclusion

99. The First-tier Tribunal correctly construed section 18(1) CRCA 2005 in accordance with its literal meaning and, in turn, correctly applied section 44(1) FOIA 2000. The Tribunal's decision involved no error on a point of law as described in this case's ground of appeal. This appeal is dismissed. It follows that I also reject

the argument that Upper Tribunal Judge Jacob's analysis in *Gordon v Information Commissioner & HMRC* [2020] UKUT 92 (AAC) was legally flawed.

100. I apologise for the delay in giving this decision. As I understand the parties were informed, a backlog of work consequent on my absence from duties while recovering from serious injuries sustained in an accident has led to this delay. I thank the parties for their patience.

101. Finally, I wish to express my gratitude to the Appellant and counsel for the Respondents for their skilful advocacy, both orally at the hearing and in prior written submissions.

Authorised for issue on 6 May 2025,

Upper Tribunal Judge Mitchell