Simon's Tax Cases/Simon's Tax Cases 2018/R (on the application of Rowe and others) v Revenue and Customs Commissioners; R (on the application of Vital Nut Co Ltd and others) v Revenue and Customs Commissioners - [2018] STC 462

[2018] STC 462

R (on the application of Rowe and others) v Revenue and Customs Commissioners; R (on the application of Vital Nut Co Ltd and others) v Revenue and Customs Commissioners

[2017] EWCA Civ 2105

COURT OF APPEAL, CIVIL DIVISION

ARDEN, McCOMBE AND THIRLWALL LJJ

18–20 JULY, 12 DECEMBER 2017

Tax avoidance – Accelerated payment notices – Partnership payment notices – HMRC issuing accelerated payment notice (APN) and partnership payment notice (PPN) in respect of notified schemes entered into before APN and PPN regime in force – Whether decision unreasonable and outside the statutory purpose – Whether retrospective effect beyond statutory powers – Whether breach of natural justice – Whether power to issue APN only arising if designated HMRC officer deciding that notified scheme ineffective – Whether no understated partner tax in respect of PPN – Whether breach of Convention rights – Finance Act 2014 – Human Rights Act 1998, Sch 1, Pt I, art 6, Sch 1, Pt II, First Protocol, art 1.

The two appeals concerned accelerated payment notices ('APNs') and partner payment notices ('PPNs') which were served by the Revenue and Customs Commissioners ('HMRC') under the Finance Act 2014. APNs and PPNs required the persons on whom they were served to pay disputed tax in advance of a final determination on the basis that the sums would be repayable with interest if the arrangements were held to be effective. The statutory framework for APNs/PPNs was linked to the provisions for the disclosure of tax avoidance arrangements, known as DOTAS. That disclosure gave HMRC information about tax avoidance schemes at an early stage, enabling it to issue APNs/PPNs in respect of DOTAS arrangements for which HMRC had issued a scheme number, or in respect of arrangements which were substantially the same as schemes already notified. HMRC could issue APNs/PPNs where it was enquiring into the taxpayer's return or claim, or the taxpayer had brought an appeal that had not been determined, and the taxpayer had made the return, claim or appeal on the basis that a particular tax advantage arose from the arrangements implemented. The amount required to be paid by the APN/PPN was determined by a 'designated officer', who was in practice a senior officer of HMRC. The amount represented the additional tax that the designated officer determined, to the best of his information and belief, to be due on the assumption that the relevant tax advantage was counteracted. In respect of partnerships, the accelerated payment on the PPN was called the 'understated

partner tax', which was defined by para 4[a] of Sch 32 to the 2014 Act as 'the additional amount that would

become due and payable by the relevant partner in respect of tax if … such adjustments were made as are required to counteract so much of what the designated HMRC officer so determines as the denied advantage as is reflected in a return or claim of the relevant partner'. The taxpayer could make written representations to HMRC objecting to the notice, on the basis that the conditions for issuing the notice were not met, and on the amount of the accelerated payment. There was no right of appeal, and if the taxpayer wished to challenge the validity of the APN/PPN, he had to proceed by way of judicial review. *Rowe* was a lead case for some 81 taxpayers who had participated in DOTAS schemes established by Ingenious Media plc which had involved partnerships. The taxpayer in *Rowe* was a member of a partnership which had suffered losses in the tax year 2004–2005, and some of the losses were allocated to the taxpayer, and that was reflected in the partnership return. The taxpayer's original individual return for the tax year 2004–2005 did not make reference to his share of partnership losses, but shortly afterwards the taxpayer submitted additional information that claimed to carry back his share of the partnership losses suffered in that year to the tax year 2001–2002, which he described as a standalone claim. HMRC made an initial partial repayment, but opened a tax enquiry into the tax return of the partnership for the tax year 2004–2005, which was a deemed enquiry into the individual tax returns of the partners. HMRC subsequently issued closure notices for those enquiries, amending the individual partners' returns. In the taxpayer's case, his entitlement to a share of any losses derived from the partnership was removed. He appealed, and so did the partnership. That appeal failed, and further appeal proceedings were pending. HMRC issued a PPN to the taxpayer, pursuant to a policy to issue APNs/PPNs in all cases whenever taxpayers had implemented a DOTAS scheme, unless it was accepted that the DOTAS scheme was obsolete, or accepted to be effective for tax purposes. The taxpayer brought judicial review proceedings against the issue of the PPN which were dismissed, and the taxpayer appealed. In *Vital Nut*, HMRC had not assessed the taxpayer to tax in respect of the disputed sums, but issued an APN while the enquiry was on-going, and had been on-going for a number of years, although it indicated that it was ready to issue a closure notice. The taxpayer brought judicial review proceedings which were dismissed, and it appealed. On the two appeals, the following issues fell to be decided: (i) whether service of the PPN on *Rowe* was beyond the statutory purpose of the APN/PPN regime, where the taxpayer had entered the scheme before the enactment of the relevant statutory provisions; (ii) (in the *Vital Nut* case) whether an APN/PPN should only be issued where the designated officer had come to a view that the tax scheme was ineffective; (iii) whether the issue of APNs/PPNs went beyond the statutory powers as HMRC had sought to apply the regime retrospectively to schemes entered into before the statutory regime had come into force; (iv) whether the decision to issue the APN/PPNs had been taken in breach of HMRC's general duty of fairness; (v) whether the decision was in breach of principles of natural justice; (vi) (in the *Rowe* case) whether there was any 'understated partner tax' for tax 'due and payable' where there was a standalone carry back claim that was not part of the tax return for which the HMRC enquiry had been opened; (vii) whether the

[a] Paragraph 4, so far as material, is set out at [17], below.

APN/PPN regime was in breach of art 1[b] of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) ('A1P1'); and (viii) whether the APN/PPN regime was in breach of art 6[c] of the Convention.

Held – The appeals would be dismissed for the following reasons—

(1) The service of the PPN on the taxpayer in *Rowe* was not beyond the purpose of the regime in the 2014 Act, even though the taxpayer had entered the scheme before the enactment of the relevant statutory provisions. The object of the powers was to enable HMRC by exercising them to disincentivise other taxpayers from entering into such schemes. On that basis, it had to be part of the statutory purpose that taxpayers should be deterred from stringing out appeals. Tax avoidance schemes were viewed as undesirable because they consumed an undue amount of HMRC's scarce resources. The rationale of the regime was to change the economics of marketed tax avoidance schemes, and change taxpayers' behaviour so as to deter or reduce the use of those schemes, the premise being that the use of such schemes was in effect anti-social behaviour (see [51]–[53], [154], [231], below).

(2) The new powers to exact accelerated payments should only be available if the designated officer had formed the view that the tax scheme did not work, having diligently weighed up to the appropriate extent all the information available and not before, and the designated officer had no reason to doubt that information. It was not enough for the designated officer to take the view that there was a dispute. She had to be positively satisfied on the information that she then had that the scheme was not effective. However, it was not wrong in law for HMRC to adopt a general policy, provided sufficient provision was made for cases which did not properly fall within it. The circumstances which were likely to be exceptional would be varied and case-specific. It was sufficient that the legislative scheme provided for disclosure to HMRC and an opportunity to make representations. It was sufficient that HMRC had formulated the policy. That policy could not affect the function of the designated officer, which had to be performed independently of the policy, and required her to form a view about the effectiveness of the scheme. However, in the *Vital Nut* case, it was highly likely that the same decision would have been reached by the designated officers, even if the correct test had been applied, and accordingly relief would be refused (see [62], [63], [67]–[69], [73]–[75], [159], [228], [229], [231], below); *R (on the application of Walapu) v Revenue and Customs Comrs* [2016] STC 1682 considered.

(3) The presumption against retrospectivity was a presumption that Parliament did not intend to interfere with vested rights, but it could be excluded by clear words. In the instant case, it would have been contrary to the statutory purpose for the statute not to operate in relation to existing cases in which tax avoidance schemes had been used. Moreover, the taxpayers' rights were to make deductions and claim repayments of tax permitted by tax law. They had no right under the common law not to be required to make some payment on account of tax considered to be due in advance of a determination

b Article 1, so far as material, is set out at [158], below).

c Article 6, so far as material, provides: 'In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

that it was due (see [79], [82], [83], below); *R (on the application of Walapu) v Revenue and Customs Comrs* [2016] STC 1682 and *Wilson v First County Trust Ltd* [2003] 4 All ER 97 applied.

(4) There was no breach of HMRC's general duty of fairness for the following reasons: delay was not a reason which of itself prevented HMRC from exercising its power to issue an APN/PPN; the mere fact that an appeal was pending did not mean that the APN/PPN could not be issued; there was nothing in the statute to prevent notices from being served close to the time of an appeal; the fact that the taxpayer had entered into a tax avoidance scheme before the statutory provisions came into force was not likely to be relevant to the duty of fairness because the notices would impose a prospective obligation to pay money and interest in default; nothing turned on the fact that repayments were made in *Rowe* as there was nothing in the statute to prevent APNs/PPNs still being issued in those circumstances; it was irrelevant to fairness that the taxpayers in the *Rowe* case were not parties to the appeal, which was conducted in the name of the partnership; and in the *Vital Nut* case, where the enquiry had been open for a significant number of years and HMRC had said that it was ready to issue closure notices, the prior issue of closure notices was not required before the issue of APNs/PPNs (see [89], [92]–[97], [154], [231], below).

(5) Fairness required as a minimum that the power to issue an APN/PPN was exercised in accordance with the rules of natural justice. The duty of fairness required that taxpayers had the right to make representations on the effectiveness of the scheme, and not simply the amount of any APN/PPN, since it was the designated officer's obligation to form a view on the effectiveness of the scheme before an APN/PPN could be issued. It also followed that HMRC should have explained the basis of the taxpayers' liability to pay APN/PPN. However, in both of the instant cases the taxpayers had been in no doubt about the basis on which HMRC had not accepted that the schemes in their cases had not been effective (see [106], [111], [112], [154], [231], below); *Wiseman v Borneman* [1969] 3 All ER 275 applied.

(6) In *Rowe*, when HMRC had made an enquiry into the return of the partnership for the loss year, that operated as a deemed enquiry into the taxpayer's tax return, including the statement of his share of the relevant loss for the same period. HMRC did not need to open any other enquiry into the standalone claim for relief. Even where the claim for loss relief was a carry back claim, an individual partner still had to include in his tax return for the loss year his share of the partnership's losses. The information was a necessary part of his return for the loss as it was information required for the purpose of establishing the amounts in which the taxpayer was chargeable to income tax for that year of assessment. HMRC could enquire into a claim without instituting an enquiry into the individual taxpayer's return, and the enquiry would operate as a deemed enquiry into the individual taxpayer's return. Although there were two separate methods for making loss relief claims and for enquiries into them, the real issue was not how the taxpayer in *Rowe* had made his claim, but whether the relevant tax became due and payable if HMRC opened an enquiry into the affairs of the partnership alone and reached the conclusion that the claimed losses were not trading losses (see [138]–[143], below); *R (on the application of De Silva) v Revenue and Customs Comrs* [2017] STC 2483 applied; *R (on the application of Derry) v Revenue and Customs Comrs* [2017] STC 1723 distinguished.

(7) It was not necessary to decide whether A1P1 was engaged by the APN/PPN regime, because even if it was engaged, the interference was suitably provided by law and proportionate in all the circumstances. The interference was sufficiently foreseeable to be prescribed by law. Regarding the issue of retrospectivity, it was untenable to suggest that if they had known that participating in the DOTAS scheme meant that money might be reclaimed from them at short notice prior to assessment, that would have made it unlikely that they would have participated. The risk for the taxpayers was whether they would have to repay at all, not when they might have to repay. It was known to them that the matter was not irrevocably closed by the repayments that they had received and that provision ought wisely to have been against a demand that could have arisen at any time. As to proportionality, in the areas of taxation legislation, contracting states had a wide margin of appreciation, and the instant case concerned a scheme enacted by primary legislation, after public consultation. The impact of the advance payment scheme was part of a proportionate endeavour by the

legislature to deal with cases which were acknowledged to be on the boundaries of efficacy and which potentially deprived the public purse of significant sums for lengthy periods. Moreover, subject to issues of hardship, which HMRC would have to consider conscientiously and rationally in any individual case, there was nothing disproportionate in using a new statutory power, when it became available, even after a lapse of time (see [5], [146], [147], [158], [161], [185], [188], [189], [199], [200], [202]–[204], [231], below); *AXA General Insurance Ltd v Lord Advocate* (2011) 122 BMLR 149, *R (on the application of Walapu) v Revenue and Customs Comrs* [2016] STC 1682 applied; *Bulves AD v Bulgaria* [2009] STC 1193, *James v UK* (1986) 8 EHRR 123 and *Allan v Revenue and Customs Comrs* [2015] STC 890 considered; *Hentrich v France* (1994) 18 EHRR 440 and *R Sz v Hungary* [2013] ECHR 41838/11 distinguished.

(8) The availability of the procedure for the making of representations against the issue of notices, backed by judicial review of any decision made, was sufficient to satisfy the requirements of art 6. The procedure was not dissimilar to the review procedure in housing cases, backed by judicial review, which according to settled authority satisfied the requirements of the article (see [146], [152], [214], [231], below); *Runa Begum v Tower Hamlets London BC* [2003] 1 All ER 731 considered.

Notes

For accelerated payment notices, see Simon's Taxes A7.248.

For the Finance Act 2014, see the Yellow Tax Handbook 2014–2015, Part 1c, p 1869.

Cases referred to

Allan v Revenue and Customs Comrs [2015] UKUT 16 (TCC), [2015] STC 890.

AXA General Insurance Ltd v Lord Advocate [2011] UKSC 46, (2011) 122 BMLR 149, [2012] AC 868.

Bank Mellat v HM Treasury [2013] UKSC 38, [2013] 4 All ER 495, sub nom *Bank Mellat v HM Treasury (No 2)* [2014] AC 700.

Bendenoun v France (1994) 18 EHRR 54, [1994] ECHR 12547/86, ECt HR.

British Oxygen Co Ltd v Minster of Technology [1970] 3 All ER 165, [1971] AC 610, HL.

Bulves AD v Bulgaria (Application 3991/03) [2009] STC 1193, ECt HR.

Doody v Secretary of State for the Home Dept [1993] 3 All ER 92, sub nom *R v Secretary of State for the Home Dept, ex p Doody* [1994] 1 AC 531, HL.

Ferrazzini v Italy [2001] STC 1314, (2002) 34 EHRR 1068, [2001] ECHR 44759/98, 3 ITLR 918, ECt HR.

Gasus Dosier-und Fördertechnik GmbH v Netherlands (1995) 20 EHRR 403, [1995] ECHR 15375/89, ECt HR.

Hentrich v France (1994) 18 EHRR 440, [1994] ECHR 13616/88, ECt HR.

James v UK (1986) 8 EHRR 123, [1986] ECHR 8793/79, ECt HR.

Jussila v Finland (App No 73053/01) [2009] STC 29, 9 ITLR 662, ECt HR.

Kopecký v Slovakia (2004) 41 EHRR 944, [2004] ECHR 44912/98, ECt HR.

Lithgow v UK (1986) 8 EHRR 329, [1986] ECHR 9006/80, ECt HR.

McInnes v Onslow-Fane [1978] 3 All ER 211, [1978] 1 WLR 1520.

P v Secretary of State for the Home Dept [2017] EWCA Civ 321, [2017] 2 Cr App R 123.

Pye (JA) (Oxford) Ltd v UK (2007) 23 BHRC 405, (2007) 46 EHRR 1083, [2007] ECHR 44302/02, ECt HR.

R (on the application of De Silva) v Revenue and Customs Comrs [2014] UKUT 170 (TCC), [2014] STC 2088; *affd in part* [2016] EWCA Civ 40, [2016] STC 1333; *affd* [2017] UKSC 74, [2017] STC 2483, [2017] 1 WLR 4384, [2018] 1 All ER 280.

R (on the application of Derry) v Revenue and Customs Comrs [2017] EWCA Civ 435, [2017] STC 1723.

R (on the application of Huitson) v Revenue and Customs Comrs [2011] EWCA Civ 893, [2011] STC 1860, [2012] QB 489, 14 ITLR 90.

R (on the application of Khatun) v Newham London BC (Office of Fair Trading, interested party) [2004] EWCA Civ 55, [2004] LGR 696, [2005] QB 37.

R (on the application of Khatun) v Newham London BC (Office of Fair Trading, interested party) [2004] EWCA Civ 55, [2004] LGR 696, [2005] QB 37.

R (on the application of St Matthews (West) Ltd) v Her Majesty's Treasury, sub nom R (on the application of APVCO 19 Ltd) v Her Majesty's Treasury [2015] EWCA Civ 648, [2015] STC 2272.

R (on the application of T) v Chief Constable of Greater Manchester, R (on the application of JB) v Secretary of State for the Home Dept [2014] UKSC 35, [2014] 4 All ER 159, [2015] AC 49.

R (on the application of ToTel Ltd) v First-tier Tribunal (Tax Chamber) (HM Treasury, interested party) [2011] EWHC 652 (Admin), [2011] STC 1485, [2012] QB 358.

R (on the application of Walapu) v Revenue and Customs Comrs [2016] EWHC 658 (Admin), [2016] STC 1682, [2016] 4 All ER 955.

R Sz v Hungary [2013] ECHR 41838/11, ECt HR.

Revenue and Customs Comrs v Cotter [2013] UKSC 69, [2013] STC 2480, [2013] 1 WLR 3514, [2014] 1 All ER 1.

Runa Begum v Tower Hamlets London BC [2003] UKHL 5, [2003] 1 All ER 731, [2003] 2 AC 430.

Solar Century Holdings Ltd v Secretary of State for Energy & Climate Change [2014] EWHC 3677 (Admin), [2014] All ER (D) 98 (Nov); *affd* [2016] EWCA Civ 117, [2016] All ER (D) 31 (Mar).

Sunday Times v UK (1979) 2 EHRR 245, [1979] ECHR 6538/74, ECt HR.

Vistins v Latvia (2014) 59 EHRR 817, [2014] ECHR 71243/01, ECt HR.

Wilson v First County Trust Ltd [2003] UKHL 40, [2003] 4 All ER 97, [2004] 1 AC 816.

Wiseman v Borneman [1969] 3 All ER 275, [1971] AC 297, 45 TC 540, HL.

Appeals

R (on the application of Rowe and others) v Revenue and Customs Comrs

Nigel Rowe appealed against the judgment of Simler J dated 31 July 2015 ([2015] EWHC 2293 (Admin), [2015] All ER (D) 12 (Aug)) dismissing his claim for judicial review in respect of the decision of the Revenue and Customs Commissioners to issue a partnership payment notice under the Finance Act 2014. The facts are set out in the judgment of Arden LJ.

R (on the application of Vital Nut Co Ltd and others) v Revenue and Customs Comrs

Vital Nut Co Ltd appealed against the judgment of Charles J dated 19 July 2016 ([2016] EWHC

1797 (Admin), [2016] 4 WLR 144) dismissing its claim for judicial review in respect of the decision of the Revenue and Customs Commissioners to issue an accelerated payment notice under the Finance Act 2014. The facts are set out in the judgment of McCombe LJ.

Jessica Simor QC, *David Southern QC* and *Rebecca Murray* (instructed by *Pinsent Masons LLP*) for the taxpayers in both appeals.

James Eadie QC, *Sam Grodzinski QC*, *Gemma White QC* and *David Yates* (instructed by the *Solicitor for Revenue and Customs*) for HMRC.

Judgment was reserved.

12 December 2017. The following judgments were delivered.

ARDEN LJ.

1. Advance Payment Notices for tax—the issues on these appeals

[1] These appeals concern accelerated payment notices ('APNs'), or their partnership equivalent, partner payment notices ('PPNs'), which were served by the respondents ('HMRC') under the Finance Act 2014 ('FA 2014'). The object of APNs and PPNs is to change the financial benefit of tax avoidance arrangements by ending the economic benefit to taxpayers of retaining an amount equal to the disputed tax until the issue is finally determined against them (if the arrangements are ultimately held to be ineffective). APNs and PPNs thus require the persons on whom they are served (whom I shall call 'taxpayers') to pay disputed tax in advance of that final determination on the basis that the sums will be repayable with interest if the arrangements are held to be effective. I explain the statutory scheme in more detail below.

[2] The nature of the anticipated tax liability of the appellant taxpayers is not material to this judgment.

[3] The appeals are, in the case of Rowe, from the order of Simler J dated 31 July 2015 ([2015] EWHC 2293 (Admin), [2015] All ER (D) 12 (Aug)), and, in the case of Vital Nut, from the order of Charles J dated 19 July 2016 ([2016] EWHC 1797 (Admin), [2016] 4 WLR 144).

[4] There are six principal grounds of appeal. The appellants contend that HMRC's decision to issue APNs/PPNs was in each case under appeal:

(i) unreasonable, disproportionate and otherwise unfair, and based on an erroneous assessment of the statutory purpose (Ground 1: the unreasonableness ground).

[2018] STC 462 at 469

(ii) beyond the powers conferred on HMRC by the FA 2014 in so far as HMRC sought to apply the provisions of the FA 2014 retrospectively to steps taken before that Act came into force (Ground 2: the retrospectivity ground).

(iii) not in accordance with the principles of natural justice (Ground 3: the natural justice ground).

(iv) (Rowe appeal only) in breach of the FA 2014 in that there was no 'understated partner tax' as required by FA 2014, s 228 and Sch 32, para 4 because no tax was due and payable in the majority of cases where partners had made 'carry back' claims (Ground 4: 'no tax due and payable').

(v) in breach of art 1 of the First Protocol ('A1P1') to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) ('the Convention') and arts 6 and 7 of the Convention (Ground 5: the Convention ground).

(vi) (Vital Nut appeal only) in breach of FA 2014 in that the decision to issue APNs was ultra vires because it was not in accordance with FA 2014, ss 219 to 223 (Ground 6: the 'designated officer' ground).

[5] This judgment is the lead judgment of this court on grounds 1 to 4 and (in part) 6. The judgment of McCombe LJ is the lead judgment on grounds 5 and (in part) 6. His judgment also explains the material facts in *Vital Nut* and the material parts of the judgment of Charles J. Before I turn to the grounds of appeal, I shall explain in summary form the statutory framework for issuing APNs/PPNs and the power of HMRC to open enquiries into tax returns and repayment claims.

2. Statutory framework for APNs/PPNs

[6] APNs/PPNs were introduced by FA 2014, ss 219 to 233 and Schs 30 to 33 to that Act, which came into force on 17 July 2014. These provisions were designed to deprive taxpayers of the benefit of the statutory provisions on self-assessment, which is that normally a taxpayer is able to claim the effect of the tax advantage until any enquiry and subsequent appeal to the First-tier Tribunal ('FTT') is resolved. The provisions of the FA 2014 authorise HMRC to give APNs in certain circumstances before any dispute, or appeal, is concluded.

[7] The statutory framework for APNs/PPNs is linked to the disclosure of tax avoidance arrangements. The Finance Act 2004 introduced provisions (since amended), known as DOTAS, which require the disclosure to HMRC of tax avoidance schemes. This disclosure gives HMRC information about tax avoidance schemes at an early stage, and enables HMRC (among other steps) to issue APNs/PPNs. Treasury regulations specify the forms of arrangements which must be notified. In general, it has been said that schemes disclosed under these provisions must be expected not to give rise to a tax advantage, but it must be recognised that HMRC may fail to show that this is so in a significant percentage of cases.

[8] HMRC may give an APN to a taxpayer if each of the following conditions (described by the FA 2014 as Conditions A to C) is met:

> (i) HMRC is enquiring into the taxpayer's return or claim (an enquiry case) or the taxpayer has brought an appeal that has not been determined (FA 2014, s 219(2)) (Condition A).
>
> *[2018] STC 462 at 470*
>
> (ii) The taxpayer made the return, claim or appeal on the basis that a particular tax advantage arises from the arrangements implemented (FA 2014, s 219(3)) (Condition B).
>
> (iii) One of three further conditions is met, of which the most relevant is that the arrangements are DOTAS arrangements, for which HMRC has issued a scheme reference number ('SRN'), or are substantially the same as arrangements already notified (this is called collectively Condition C).

[9] There are requirements as to the content of an APN/PPN. In particular, it must specify the amount of the disputed tax (called 'the understated tax'). Utilising the provisions in issue in the Rowe case (an appeal case, not an enquiry case), the APN/PPN had to specify the 'disputed tax' (s 221(2)(b)). The amount of the disputed tax was the amount of the tax in issue in the appeal required to counteract what the designated officer determined as the denied advantage (s 221(3)). The denied advantage was the amount of the asserted advantage which was not a tax advantage (ss 221(4) and 220(5)(b)).

[10] In *Vital Nut*, HMRC argued that the designated officer did not have to reach any view as to the effectiveness of the tax avoidance scheme in issue. Vital Nut is a case where the APNs/PPNs were served while enquiries were pending but that makes no difference to the point I am about to make. Having analysed the statutory provisions, Charles J considered that the statutory requirement on the designated officer was as follows:

> '[29] Writing in the relevant definitions (and in italics what they represent in these cases), the relevant requirement relating to the validity of an APN (the Notice Requirement) is that it must specify as the sum to be paid an amount equal to:
>
> “what the designated HMRC officer determines, to the best of that officer's information and belief, to be so much of the asserted advantage (*the claimed relief from corporation tax*) as is not a relief from tax (*corporation tax*) which results from the chosen arrangements (*the EFRBS*).” '

[11] Charles J held that HMRC's interpretation led to remarkable results and held that the designated officer did not have to reach a positive view that the scheme was ineffective but he had to reach the view that he was not satisfied that the scheme was effective:

> '[35] In my view, the factors listed in the last paragraph support the view on both a linguistic and purposive approach that the Notice Requirement for the issue of a valid APN cannot be satisfied unless, to the best of his information and belief, the designated officer is of the view that he is not satisfied that as a matter of law and fact the claimed tax advantage is lawfully

> available and so should be allowed and so, in that sense, the designated officer has determined that the claimed tax advantage is disputed. I shall refer to this as the determination.'

[12] This holding is important as, although HMRC now accept it, the appellants contend that it does not go far enough. I shall deal with this submission below (paras [56]–[69] below).

[13] This amount is determined by a designated HMRC officer (hereafter a 'designated officer'), unhelpfully defined as an officer designated by HMRC for this purpose (FA 2014 s 229) and in practice (as we are informed) a senior

officer. The amount represents the additional tax that the designated officer determines, to the best of his information and belief, to be due on the assumption that the relevant tax advantage is counteracted. The notice must also explain the effects of the notice including the taxpayer's rights to make representations, and the time limits for doing so (FA 2014, ss 220 and 221).

[14] The taxpayer has 90 days beginning with the date on which the APN/PPN is given to send written representations to HMRC objecting to the notice. The taxpayer may object but only on the basis that the Conditions for issuing the notice were not met and on the amount of the accelerated payment (FA 2014, s 222).

[15] HMRC must consider the taxpayer's representations. HMRC must then either confirm (with or without amendments) or withdraw the notice (if the Conditions were not met). The officer will confirm or amend the amount of the payment. The taxpayer has no right of appeal if HMRC confirms the APN or confirms or amends the amount of the payment (FA 2014, s 222). If the taxpayer wishes to challenge the validity of the APN, he must proceed by way of judicial review.

[16] Where the taxpayer makes no representations, the due date for payment is the 90th day beginning with the day on which the APN/PPN is given, but the payment is deferred where the taxpayer makes representations. Where there is an appeal against an assessment, the taxpayer does not receive a notice to pay but is prevented from having any postponement of payment pending the outcome of the appeal. For PPNs, this is treated as a payment on account due to the mechanism of FA 2014, Sch 32. For appeal based APNs, by contrast, it is an actual payment of tax since all that has been removed is the right of postponement (which causes the original closure notice or assessment to become payable: see FA 2014, s 224.

[17] There are special rules for partnerships. No APN is issued but HMRC may issue PPNs instead to the partners. These have the same effect as APNs with necessary modifications. The requirements as to the content of PPNs are set out in FA 2014 s 228 and Sch 32. A PPN has to state the amount required to be paid under para 6, which is called 'the understated partner tax' (Sch 32, para 4). The definition of 'understated partner tax' is key to ground 4 of the appeal as it contains the words 'due and payable'. The relevant parts of para 4 provide as follows:

> '4 … (2) The payment required to be made under paragraph 6 is an amount equal to the amount which a designated HMRC officer determines, to the best of the officer's information and belief, as the understated partner tax.
>
> (3) "*The understated partner tax*" means the additional amount that would become due and

payable by the relevant partner in respect of tax if—

…

(b) in the case of a notice given by virtue of paragraph 3(5)(b) (cases where the DOTAS arrangements are met), such adjustments were made as are required to counteract so much of what the designated HMRC officer so determines as the denied advantage as is reflected in a return or claim of the relevant partner;'

[18] The issue of APNs/PPNs falls within HMRC's practice in hardship cases. In para 25 of her witness statement of 5 March 2015, Miss Julie Elsey, Deputy Director (Policy and Technical) of Counter Avoidance Directorate of HMRC,

explains that in appropriate circumstances, where a taxpayer cannot immediately pay an amount due, HMRC may agree to payments being made over a period of time. These arrangements allow taxpayers who cannot pay the full amount of their liability on the due date to make payments over a period that may be agreed with HMRC.

3. Facts of the Rowe Appeal

[19] *Rowe* is the lead case for some 81 taxpayers who participated in schemes established by Ingenious Media plc. These schemes involved partnerships. The schemes were disclosed under DOTAS.

[20] Mr Nigel Rowe is a member of Ingenious Film Partners ('IFP'). He contends that IFP carried on the trade of film production. In the tax year ended 5 April 2005 Mr Rowe contributed £750,000 to IFP made up of a cash sum of £270,000 and a full recourse loan of £480,000. In the same tax year (to which I refer below as 'the loss year'), IFP suffered losses, of which £675,000 were allocated to Mr Rowe. After the end of the loss year, IFP submitted a partnership return under s 12AA of the Taxes Management Act 1970 ('TMA'). That return would have included a partnership statement under TMA, s 12AB showing the share of the losses of each of the partners, including Mr Rowe.

[21] The taxpayers in the various appeals grouped with *Rowe* made 'carry-back' claims, 'sideways claims' or a combination of such claims in respect of their share of partnership losses. I use the terms 'carry back', 'sideways' and 'carry forward' to denote the use by a taxpayer of his losses in a particular tax year against income in the prior year, same year and future years respectively, but they are not statutory terms.

[22] There is some lack of clarity about how Mr Rowe made his claim, which on his case is important. His case is that his original tax return for the year ended 5 April 2005 did not make any reference to his share of partnership losses but shortly afterwards Mr Rowe submitted additional information which claimed to carry back his share of the partnership losses suffered in that year to the year ended 5 April 2002. The amount involved was £675,370. Mr Rowe's chronology in the High Court described this as a standalone claim. That document is not before the court.

[23] HMRC processed his claim quickly and made a repayment of £270,148 in June 2005. The appellants accepted below (see the judgment of Simler J, [94]), and the judge held, that making the repayment claim did

not prevent HMRC from opening an actual or deemed enquiry into the losses.

[24] HMRC did not enquire into Mr Rowe's claim, and made a tax repayment. They did, however, open an enquiry into the 2004/5 tax return of the partnership on 14 June 2006. The opening of an enquiry into the partnership's tax return constituted a deemed enquiry into the individual tax returns for the same period: s 12AC(6). The material provisions of s 12AC are as follows:

> **'12AC Notice of enquiry**
>
> (1) An officer of the Board may enquire into a partnership return if he gives notice of his intention to do so ("notice of enquiry")—
>
> (a) to the partner who made and delivered the return, or his successor,
>
> (b) within the time allowed …
>
> (6) The giving of notice of enquiry under subsection (1) above at any time shall be deemed to include the giving of notice of enquiry—
>
> *[2018] STC 462 at 473*
>
> (a) under section 9A(1) of this Act to each partner who at that time has made a return under section 8 or 8A of this Act or at any subsequent time makes such a return …'

[25] HMRC subsequently issued a closure notice in respect of those enquiries. The closure notice amended the partnership return pursuant to TMA, s 28B(2)(b) and this led to the amendment of the individual partners' returns. The effect of the amendment to Mr Rowe's tax return following the closure notice was to remove his entitlement to a share of any losses derived from the partnership. On 4 February 2010, HMRC assessed Mr Rowe to tax under TMA, ss 29 and 30. Mr Rowe appealed against the tax liability resulting from the amendment to his return. The partnership also appealed. That appeal failed in 2016 and is currently on appeal. HMRC of course accepts that the legality of the notices has to be judged at the time the notices were issued, not taking account of the fact that the FTT has dismissed Rowe's appeal.

[26] In October 2014, HMRC wrote to the taxpayers who had engaged in the Ingenious scheme, including Mr Rowe, warning them that they would shortly be issuing PPNs in respect of the partners' loss claims. HMRC then sent each of them a PPN requiring payment of an amount equal to the amount of the relief which they had claimed.

[27] HMRC took a policy decision to issue APNs/PPNs in all cases whenever the taxpayers had implemented a scheme on the DOTAS list to which HMRC had assigned a number, unless it was, for instance, obsolete or accepted to be effective for tax purposes. I will refer to the content of this decision as the 'Policy'.

[28] In *R (on the application of Walapu) v Revenue and Customs Comrs* [2016] EWHC 658 (Admin), [2016] STC 1682, [2016] 4 All ER 955 (at [47]) another case involving a challenge to APNs issued by HMRC, Green J helpfully summarised (on the basis of the evidence filed by HMRC in that case, which I understand is not disputed in this case) the process by which HMRC determines to issue an APN as follows:

'(i) Stage 1: HMRC publishes upon its website a list of DOTAS schemes on which advanced payments might be charged. HMRC excludes from that list schemes which are accepted to be effective, and obsolete schemes with no users. The first list was published on 15 July 2014 and has been updated subsequently on 30 October 2014 and on 30 January 2015.

(ii) Stage 2: The officer responsible for overseeing the investigation of a particular scheme completes the internal “survey”. The survey requires answers to questions designed to enable HMRC to rank the scheme according to its suitability for the earlier issue of APNs …

(iii) Stage 3: Schemes are then ranked into a preliminary order and placed into categories according to the range within which their score falls. Thereafter, schemes are prioritised within categories by reference to the answers to particular survey questions.

(iv) Stage 4: Each identified scheme is then subject to a more detailed review the purpose of which is to identify any reasons why notices should not be issued to users including whether the particular circumstances of any user are such that, exceptionally, no APN should be issued. In the present case no circumstances were identified in relation to the claimant. Copies of the Detailed Review Template (“DRT”) used for this exercise were before the court.

[2018] STC 462 at 474

(v) Stage 5: Following the completion of the detailed review each scheme is considered by the Workflow Governance Group. The minutes of the meetings of this Group relevant to the schemes in issue were also before the court. The Group exercises, from the perspective of a wide range of expert disciplines, supervision of the information collection process ensuring good governance.

(vi) Stage 6: The Designated Officer thereafter determines the amount of the understated tax to the best of his/her information and belief. The officer reviews a “Designated Officer Authorisation form” and computations provided by the official responsible for issuing the APN. If satisfied the official countersigns the Designated Officer Authorisation form. The relevant forms relating to the claimant were once again before the court. These set out the understated tax. The document has attached to it a “Calculation Summary”. This provides the details of the computation. The claimant was provided with tax calculations relating to all relevant tax years when he was issued with the APN.'

[29] There is nothing in this summary about the designated officer forming any view on the effectiveness of the scheme.

[30] The taxpayers issued judicial review proceedings challenging HMRC's decision to issue PPNs. Those proceedings were heard by Simler J and in consequence Simler J gave her judgment now under appeal. Each of the grounds in issue on the Rowe appeal was in issue before her. Simler J dismissed the application for judicial review. I will deal with her reasoning under each of the relevant grounds on this appeal.

4. HMRC'S POWERS TO OPEN ENQUIRIES

[31] TMA 9A(1) (or, in the case of a partnership return, s 12AC(1)) enables HMRC to enquire into a tax return, usually within 12 months of the filing date. If the party serving the return is a partnership, the giving of

the notice of enquiry is deemed to include notice of enquiry under TMA, s 9A(1) 'to each partner who at that time has made a return' under TMA ss 8 or 8A or subsequently makes such a return.

[32] At the end of an enquiry an officer of HMRC may issue a closure notice, stating that he has completed his enquiries and setting out his conclusions, make consequential amendments to the return (TMA s 28A or, in the case of partnerships, s 28B). The taxpayer may appeal against a closure notice (TMA, s 31).

[33] The taxpayer has remedies if the enquiry is delayed for no good reason. TMA, s 28A(4) provides that the taxpayer may apply to the FTT for a direction requiring the issue of a closure notice within a specified period. The FTT must give that direction unless it is satisfied that there are reasonable grounds for not doing so.

[34] Where a claim for relief is made outside a tax return, TMA s 42(11) and TMA Sch 1A apply. The Rowe appellants contend that an enquiry may be made into such a claim only if notice of enquiry is given under TMA, Sch 1A, para 5(1) to the taxpayer making that claim. In respect of Mr Rowe's claim for loss relief in respect of the losses of IFP, that would mean that it would not be sufficient for HMRC to have opened an enquiry into IFP's tax return. This is relevant to the 'no tax due and payable' ground of appeal.

5. GROUNDS 1 and 2: UNREASONABLENESS AND RETROSPECTIVITY

A. Introduction

[35] The appellants in Rowe and Vital Nut argued a large number of points under this head which can I think be summarised sufficiently in the following five propositions:

> (1) It was no part of the statutory purpose of the FA 2014 that APNs/PPNs should be served on persons, such as the appellants in the Rowe appeals, who had completed their tax-avoidance transaction before the legislation was passed. It would in addition be an abuse of power to use APNs/PPNs as an alternative to getting on with enquiries and appeals.
>
> (2) The designated officer must be satisfied that the scheme is not effective for tax purposes before issuing or confirming the issue of an APN/PPN. The test put forward by Charles J in *Vital Nut* (see para [11] above) wrongly reversed the onus of proof and placed the onus of proof on the taxpayer.
>
> (3) HMRC's Policy failed to take account of all relevant factors in that it failed to take account of the need for HMRC to be satisfied on the information then available that the scheme was ineffective.
>
> (4) The provisions of the FA 2014 about APNs/PPNs were not retrospective in their effect and accordingly PPNs should not have been served in the Rowe case.
>
> (5) The issue of the APNs/PPNs in the Rowe case was unfair for diverse reasons, particularly because of the delay on HMRC's part, the lack of the appellants' participation in the appeal proceedings (conducted by IFP), and the retrospective application of the FA 2014.

[36] In essence, HMRC's case is that the APNs/PPNs were issued by HMRC within FA 2014, consistently with its statutory purpose, following a fair procedure specifically prescribed by the legislation, pursuant to rational and proportionate exercise of HMRC's discretion and the notices did not involve any unlawful interference with the appellants' rights under the Convention.

[37] I will first summarise the material parts of the judge's judgment and, on the designated officer point, the judgment of Charles J. I will then turn to the submissions and my conclusions.

B. Judgment of Simler J

[38] On statutory purpose, the judge held that it was not the only purpose of the FA 2014 to disincentivise people from entering tax avoidance schemes. The purpose of the legislation was also to remove the cashflow benefit of doing so (see judgment, [146], [147]).

[39] As to the Policy, the judge concluded that there was nothing wrong with a general policy when the statutory criteria were met. She found that HMRC applied its policy in a manner which took account of the exceptional cases. The discretion was exercised by issuing the notice, save in exceptional circumstances. Accordingly, the judge held that HMRC had not acted unreasonably or irrationally when it decided to give payment notices. The judge's detailed reasoning is contained in the following passage:

> '[102] Here, the Claimants are correct that the approach adopted by HMRC as reflected in Julie Elsey's statement, demonstrates that in the overwhelming majority of cases where HMRC consider that the statutory conditions are satisfied, HMRC will exercise the powers conferred by FA
>
> *[2018] STC 462 at 476*
>
> 2014
>
> by giving APNs or PPNs, and the question is generally one of when, not whether, they will be given. However, that does not mean that HMRC's discretion has been unlawfully fettered or turned into a rule without exception. In my judgment, it has not.
>
> [103] A fair reading of Ms Elsey's witness statement demonstrates recognition by HMRC of the statutory discretion conferred by the legislation, the adoption and application of a policy to be applied to the generality of cases, and express consideration as to whether users of the Ingenious scheme in particular, should be treated as falling into an exceptional category so as to justify not issuing notices in their cases.
>
> [104] Ms Elsey explains that HMRC excluded from the list of DOTAS schemes liable to be affected, schemes which HMRC accepted were effective and obsolete schemes with no users: 20. The remaining schemes were ranked in terms of priority for issuing notices: 21 and 22. The question whether notices should be issued when litigation and/or settlement was imminent was considered by the Accelerated Payments Steering Group at a meeting on 10 June 2014. The paper put to the Steering Group addressing the implications of issuing notices in such cases

recommended, for the reasons set out, the issue of notices regardless of when the scheme would be litigated and where potential settlement was imminent. The Steering Group approved the recommendations: 23.

[105] At para 24 Ms Elsey states:

"Following the prioritisation exercise I have described above each scheme identified was subject to a detailed review by the technical lead, with input from other officers, for example those responsible for the particular specialist issues raised by the challenge to a scheme. The purpose of that review was to identify any reasons why notices should not be issued to users of an identified scheme. No such reasons were identified for the Ingenious schemes. I note that the Claimant suggests that the notices ought not to have been issued because the hearing of the Ingenious tax appeals was imminent. Consistently with the decision of the Steering Group to which I have referred above, HMRC decided that this was not a reason to delay issuing notices."

[106] Given the nature and purpose of PPNs (namely to accelerate the payment of tax considered to be due, by removing the cash flow advantage and requiring a payment on account of the disputed tax to be made before resolution of the underlying dispute), there is nothing wrong in my judgment, with a general rule that when the statutory criteria are met, the discretion will be exercised by issuing the notice, save in exceptional circumstances.

[107] So far as the asserted materially relevant considerations contended for by the Claimants are concerned, as Mr Eadie submits there is a danger in circumstances where HMRC have an obligation to treat like cases consistently, that the suggested consideration if accepted becomes a mandatory one and undermines the legislation. If Parliament had intended to limit the APN/PPN regime to new investments in tax avoidance schemes made only after the enactment of FA 2014, it could easily have done so; but it did not. The prior existence of the Claimants' scheme was not a relevant consideration within the "statutory lexicon" ([*R (on the application of Khatun) v Newham London BC (Office of Fair Trading, interested*

party) [2004] EWCA Civ 55, [2004] LGR 696, [2005] QB 37]). The same point is true in relation to the fact that HMRC met repayment claims some years ago. There is nothing in the legislative scheme to justify a conclusion that FA 2014 was intended to work differently depending on whether carry back, rather than sideways, loss relief tax avoidance schemes are in issue. Further, as already indicated, the Claimants do not and cannot assert that the making of repayments prevented HMRC from subsequently opening enquiries into the efficacy of their tax avoidance schemes. Moreover, at the time the repayment claims were met, there was no power to issue PPNs even if there were other statutory provisions available affording HMRC power to postpone repayment. As for appeals in these cases being well advanced, this was in fact recognised and addressed by HMRC before issuing the PPNs. As Ms Elsey explains, HMRC concluded that this was not a sufficient reason to refrain from giving PPNs, and this view cannot be described as irrational.'

[40] As to retrospectivity, the judge held:

'[96] … The legislation, on its face, makes clear that it was intended to apply to existing as well as post-enactment schemes. FA 2014 expressly removes rights that previously existed under s 55 TMA in respect of all appeals (whenever made); and expressly extends the accelerated

payment regime to all DOTAS schemes, irrespective of when those schemes were adopted, notified or when investments into them were made. The definition of “tax appeal” makes clear that it is not limited to appeals post enactment (see s 203 and Sch 32 para 3(2)(b)). Similarly so far as the definition of DOTAS arrangements is concerned, there is nothing in FA 2014 to restrict its application to DOTAS arrangements invested in only after enactment: see ss 219(5) and (6). The definition extends for example to “notifiable arrangements to which HMRC has allocated a reference number” save for the express carve out in sub-s 6. Parliament has accordingly legislated for taxpayers such as the Claimants, who have chosen to participate in DOTAS arrangements (likely to be tax avoidance schemes), so as to remove the cash flow advantage of holding onto the disputed sums during a dispute concerning the efficacy of the avoidance scheme.'

(1) No part of statutory purpose to issue APNs/PPNs in appellants' cases?

[41] Ms Jessica Simor QC, who presents the oral argument for the appellants in both appeals, save on ground 4, draws a parallel between APNs and the related system for 'follower notices'. Follower notices are used where there are appeals which are effectively determined by an earlier appeal in a case involving the same tax avoidance scheme. She submits that, just as that the purpose of a follower notice was effectively to prevent the individual from stringing out the appeal process in order to obtain a cash-flow benefit during a period when the legal question had effectively been determined, so the true purpose of the accelerated payment legislation was to deal with the situation in which HMRC and the tribunals had a backlog of 65,000 open enquiry cases and pending appeals. She submits that HM Treasury took the view that the money could be obtained immediately without HMRC having to conclude enquiries and without having to wait for the tribunals to reach a final determination as to whether tax was in fact due. This would, in the short term at least, increase public funds and significantly reduce the budget deficit.

[42] Ms Simor relies on the following published documents:

(i) *Lifting the Lid on Tax Avoidance Schemes* (HMRC, July 2012). This pointed out the centrality of the DOTAS arrangements, which would warn HMRC of loopholes in the legislation which they might need to close.

(ii) *Raising the stakes on tax avoidance* (HMRC, August 2013). Ms Simor submits that this consultation document shows that HMRC's primary aim is to bring in the money from those who have used DOTAS arrangements and disincentivise taxpayers from using the appeal process. HMRC indicated that they would be issuing notices to around 33,000 individuals and 10,000 businesses. In cases where there has been no assessment, like that of Mr Rowe, Ms Simor submits that the taxpayer obtains no cash flow advantage because HMRC has not made an assessment. Thus, she submits, it is wrong in principle for HMRC to deprive the taxpayer of his money at this stage. All HMRC seem to be saying is that they will not issue an APN if it is unlawful to do so (or, as it was put by the respondents in oral argument, unless it was a 'slam dunk' case, that is, a case in which effectiveness is decisively shown). Ms Simor stresses that many people would choose not to take their cases to the FTT at all. Before the APNs were issued, HMRC made settlement proposals to investors in the Ingenious film scheme on the express basis that any taxpayer who did not accept it would receive an APN.

(iii) *Budget 2014: policy costings* (March 2014, HM Treasury), which estimated that the value of the APNs that will be issued was £7.1bn, adjusted for existing cases by assuming 80%

success in existing cases where substantive liability to tax was disputed (the '80% win rate'). The document states that that percentage was based on HMRC's success rate in 'associated avoidance cases' in 2010 to 2013. *Budget 2014: policy costings* also states that the inflow into the national budget of £1.2bn for 2015/16 for accelerated payments as a result of the extension to disclosed tax avoidance schemes and the GAAR. Ms Simor notes that the 80% win rate has been applied to determine the value to the exchequer of APNs, even though the Conditions for service of those notices do not involve any 'litigation test'. Ms Simor submits that this is an irrational assumption because, if HMRC win 80% of the cases they litigate, that is not the same as saying that they will win 80% of all cases irrespective of whether they have actually decided to make an assessment in relation to them. APNs are capable of being issued even if there has been no decision to litigate. In those cases, there is no incentive for HMRC to complete its enquiries or for the tribunals to be funded sufficiently to reduce a significant backlog of cases. HM Treasury will have secured all the money by way of APNs/PPNs, and the longer it can retain those funds the better for its budgetary purposes.

At the same time, and this is an important part of the appellants' case, the effect on the individuals concerned may be draconian. If they have had to sell assets, those sales may trigger capital gains tax liabilities. The individuals may have to borrow monies. The provision for hardship cases, submits Ms Simor, applies only in exceptional circumstances.

(iv) *Briefing note* about users of tax avoidance schemes being required to make advance payments of tax (HMRC, November 2014). This stated that HMRC expected to issue payment notices to 43,000 taxpayers involved in

avoidance schemes who were currently under dispute with HMRC. Of these taxpayers, around 33,000 were individuals and 10,000 businesses. The average income of an individual whom might receive a notice was £262,000. HMRC added that some cases involved wealthy individuals trying to avoid over £10m of tax through the use of tax avoidance schemes. HMRC also stated that it expected to have sent the vast majority of notices to avoidance scheme users over the course of 2014/2015 and 2015/2016. It had given a first warning by publishing a list of the tax avoidance schemes disclosed under DOTAS whose users might be required to make an accelerated payment of tax. This was a first warning for avoidance scheme users that they might need to prepare for a payment notice.

(v) *Tackling Marketed Tax Avoidance* (HMRC, 2014) This explained that: (1) some 65,000 people and businesses had used marketed tax avoidance schemes that needed to be investigated and litigated; (2) the current system, which enabled taxpayers to hold on to disputed tax, incentivised taxpayers and scheme promoters to sit back and delay as long as possible, despite evidence that in the vast majority of cases, when a dispute is resolved, tax is due; and for instance, there are some 6,300 users of Employment Benefit Trusts, which diverted remuneration via a trust to avoid paying PAYE and NICs. HMRC stated that they proposed to change the economics of tax avoidance arrangements by using the new powers, detailed in the document, and the responses document also published, to drive cases towards resolution more quickly. The document also set out a proposal for accelerating payment. In the summary of responses, HMRC explained that APNs were not retrospective:

'The measure creates a new non-retrospective obligation after Royal Assent and relates to who holds the money during the dispute, rather than whether the tax scheme is effective or not.'

[43] In Mr Rowe's case, HMRC did not seek any specific information. HMRC has not issued any assessment (save as indicated in para [25] above), even though they decided to issue closure notices as long ago as November 2013. Instead, HMRC has relied on their discretionary power to demand monies within 90 days without even completing or closing their enquiries. Ms Simor submits that, while taxpayers can seek an order that HMRC close an enquiry and issue a closure notice, that puts the individual taxpayer to cost which under FTT rules of procedure cannot be recovered from HMRC if the application is successful.

[44] Ms Simor also relies on the fact that the internal decision-making templates for the designated officer issued by HMRC include the following question:

> 'Based on the information provided by the technical lead and your knowledge of the scheme, are there any grounds for not issuing Accelerated payments notices at this time?'

[45] The same templates ask whether there were any realistic doubts that HMRC would actually challenge the scheme in litigation. They also ask whether HMRC would be content to challenge cases using a particular scheme where the fact pattern was sufficiently different to give rise to realistic doubts that those cases could be challenged in litigation.

[46] Ms Simor submits that the APN regime puts taxpayers who had made deductions on the basis of arrangements declared under DOTAS into a worse position than a taxpayer making such deductions otherwise than in a context of DOTAS. If it is found that the deduction is wrong, they will have to make repayment of tax repaid to them, plus interest. If, however, a taxpayer used a DOTAS arrangement that was notified, the taxpayer would have to pay immediately, subject to penalties. Even though HMRC has to issue notices and invite representations, and even though it is only if the representations are rejected that the APN is issued, there is, on Ms Simor's submission, no case-specific analysis.

[47] The procedure was, on Ms Simor's submission, in any event unfair, unreasonable and disproportionate because HMRC have not decided whether further tax is due, it has been guilty of delay in the conduct of enquiries and its discretion is being used for other than the statutory purpose. She contends that it is an abuse of power for Treasury to raise money in this way.

[48] Mr James Eadie QC, for HMRC, who presents the oral argument for HMRC on all issues save ground 4, submits that the APNs could not rationally or sensibly be said not to pursue the legislative purpose. The appellants adopt too narrow a conception of the legislative purpose and fail to analyse the nature, effect and impact of operating the legislation in accordance with its terms. It is not arbitrary.

[49] Before the judge, the appellants unsuccessfully ran a legitimate expectation argument that the appellants in Rowe could postpone a payment of disputed tax until the tax was determined by the FTT. It is only in exceptional circumstances that a legitimate expectation will succeed as against HMRC. Although the appellants have abandoned their case on legitimate expectation in this court, Mr Eadie submits that it has come back in through rationality. The answer, he submits, to the rationality challenge is the same as the judge gave to any legitimate expectation. HMRC did not say that they accepted the effectiveness of the scheme. If the appellants abandoned legitimate expectation it is difficult in principle to see how they can maintain rationality on this basis. In addition, the FA 2014 clearly provides for APNs/PPNs to work as they now do and there is nothing irrational or unfair about operating a scheme in accordance with its terms. Subject to any Convention challenge, once the legislation has been enacted, it is final.

[50] Although I do not consider that the service of a PPN on Mr Rowe was outside the statutory purpose of the new regime or precluded by it, I consider that the breadth of the powers contained in this regime call for caution. In a case such as Mr Rowe's, if the provisions of the FA 2014 are applied without limitation, the result may be that Parliament imposes a disadvantage on citizen A in order to deter citizens B, C, D, E and F from acting in a similar way. That is on the face of it a remarkable result. In principle, it is possible for Parliament to impose such an obligation, but the court will expect the legislation to be expressed in clear language if it is to achieve that effect. I approach the issues of statutory interpretation arising on this appeal on that basis.

[51] Ms Simor's submission is that the issue of a PPN to Mr Rowe was outside the statutory purpose in FA 2014 because the aim of the legislation was to disincentivise the use of tax avoidance schemes. In his case, the tax incentive scheme had been used before FA 2014 was passed. I would reject the submission as to statutory purpose. The object of the powers is to enable HMRC by exercising them to disincentivise other taxpayers from entering into

such schemes. Tax avoidance schemes were viewed as undesirable, as the documents which Ms Simor relied on show, because they consume an undue amount of HMRC's scarce resources. On this basis, it must also be part of the statutory purpose that taxpayers should be deterred from stringing out appeals. For the reasons given by Mr Eadie, there is no basis for saying that Parliament had some ulterior motive of enabling HM Treasury to seek taxpayers' monies and allow HMRC to drag its heels in any appeal or enquiry.

[52] In the circumstances, I do not accept that the PPN served on Mr Rowe was beyond the purpose of the regime in FA 2014.

[53] The rationale of the scheme as appears from the various documents relied on by Ms Simor is in my judgment to change the economics of marketed tax avoidance schemes. Parliament clearly intended that the new regime would change taxpayers' behaviour so as to deter or reduce the use of these schemes. It is the premise of the new regime that the use of such schemes is in effect anti-social behaviour. However, what is or is not behaviour of this kind is quintessentially a question for Parliament, and the courts should not seek to undermine its conclusion on that matter unless there is clearly no basis for it. What is clear from the long series of documents which Ms Simor relied on is that the new regime was very carefully considered and consulted on before being enacted. I see no basis on which it could be said that the concept of an APN/PPN is necessarily arbitrary and unconstitutional.

[54] There was also a suggestion in the appellants' written argument, which was not pressed orally, that the use which HMRC made of APNs/PPNs was in effect the purported exercise of the power to tax, but in the circumstances it is unnecessary for me to deal with that submission.

[55] I accept that it would be an abuse of power for HMRC to use APNs/PPNs instead of properly pursuing enquires because they lacked the resources to do so, but the evidence does not support any argument that that has been the reason for the issue of APNs/PPNs.

(2) Scope of Designated officer's determination

[56] The issue here is whether the designated officer must form a view as to the effectiveness of the underlying tax avoidance scheme.

[57] After Simler J decided the *Rowe* case, there was the important ruling on this issue by Charles J in his judgment in *Vital Nut* that I have set out in para [11] above.

[58] HMRC have, perhaps unwillingly but also not altogether surprisingly, accepted the holding of Charles J on this point for the purposes of this appeal (see para [11] above). Their position is that they need not consider the underlying merits of the scheme in question unless (as it was described during the course of oral argument) it is a 'slam dunk' case. (This is a consequence of their acceptance that the Policy had to allow for exceptional cases when the general policy was that APNs/PPNs should be served where the scheme is a DOTAS scheme with a registered number). Their position means that taxpayers have to surmount a high hurdle to defeat an APN/PPN on the grounds that the scheme which was used was effective.

[59] Mr Eadie submits that it is for the designated officer of HMRC to recognise the existence of a dispute but it is not for him to determine those disputes. His responsibility is to see if the taxpayer has a 'knockout' blow. The fact that a scheme is on the DOTAS list is a strong starting point. Then HMRC has to see whether they are satisfied that the tax advantages are available on the

basis of those arrangements. They might not be satisfied for a number of reasons, including the fact that they have to do further investigations. The designated officer may be interpolated into the process because the generic view of HMRC would have to be applied to the facts of a particular case. The designated officer must also calculate the amount in any particular taxpayer's case. (On Mr Eadie's submission, HMRC can feed their views on the scheme into the designated officer's process.) Parliament has not cast HMRC or the designated officer into the role of final arbiter. The test in FA 2014 s 220(3) is: does the tax advantage flow from the arrangements? Under FA 2014 s 220(5), only calculation of the amount is required, and, only if it is clear at the stage the investigation has reached that the tax advantage is duly obtained is the designated officer prevented from issuing an APN. The ultimate issue is whether HMRC can rationally and properly conclude that it does not accept the scheme as being effective.

[60] Ms Simor, however, submits that Charles J's interpretation does not go far enough because it reverses the onus of proof about effectiveness and places it on the taxpayer.

[61] The starting point must in my judgment be to identify the principle at stake on this appeal. The recipient of an APN/PPN, whether served during appeal proceedings or during an enquiry, is not a person against whom liability to tax has been finally determined. On the other hand, it is as I see it open to Parliament to impose a new obligation on certain groups of taxpayers to make a payment on account of tax potentially due. However, it is implicit in the new regime that it is not a power to impose that extra obligation simply because the tax collecting arm of the state subjectively considers that the citizen ought to pay tax. The courts are entitled to approach these unusual powers on the basis that (unless the legislation clearly provides the contrary) Parliament would not confer power to serve an APN/PPN unless there were reasonable grounds for concluding that the tax would ultimately be found to be payable. That would result in APNs/PPNs only being capable of being used in a proportionate manner when the interests of the state and of the taxpayers involved are fairly balanced. The contrary proposition would involve allowing the state arbitrarily to deprive individuals of their property, even only in anticipation of an obligation that has not yet become complete in law.

[62] In my judgment, the test propounded by Charles J is more generous to HMRC than the statutory language permits. As I see it, the statutory language requires the designated officer to be positively satisfied on the information that he then has that the scheme is not effective. This is because FA 2014 s 221(3) requires the designated officer positively to determine, to the best of his information and belief, 'the denied

advantage'. Otherwise he cannot compute the amount of the adjustments needed to counteract that advantage. The definition of 'tax advantage' in FA 2014 s 220(5) applies (s 221(4)). This defines 'the denied advantage' as 'so much of the asserted advantage as is not a tax advantage which results from the chosen advantages or otherwise' (my underlining). None of this language suggests that it is enough that the officer is simply not satisfied that the scheme is effective and that the taxpayer has to prove the contrary.

[63] My interpretation also provides the taxpayer with protection against the HMRC simply failing to address the issue as to efficacy or ignoring relevant information. In addition, it is in line with a ministerial statement cited by Charles J that HMRC would assess whether the scheme was effective (see judgment of Charles J, [22]) It does not render the powers incapable of exercise

because the designated officer is entitled to reach a view on information and belief. So, the fact that the designated officer takes the view that there has not been full disclosure does not preclude him from reaching a view about the effectiveness of the scheme.

[64] Mr Eadie submits that the provisions dealing with APNs apply even in cases which are in 'the foothills of investigation' because Condition A shows that Parliament has permitted at least the notice to be issued from the first stage of enquiries when it may be impossible to reach any final view about the effectiveness of the relevant tax avoidance scheme. The first time when it is possible to make a balance of probabilities assessment about that will be at the closure notice stage, and not before. It may take time for an officer to complete his inquiries because the scheme may be complex. (The designated officer may rely on information provided by other officers of HMRC.)

[65] Mr Eadie points out, correctly, that there are other routes for determining the merits of the scheme, namely an appeal to the FTT. Parliament could clearly decide to put in place a deterrent and, in the circumstances, it could properly have decided to give priority to that, and that the merits should be of little relevance at this stage. However, in my judgment, the statutory language is clear in the other direction.

[66] Moreover, submits Mr Eadie, the taxpayer can 'play hide and seek' (see per Green J in *Walapu* at [91]: 'The succession of consultation exercises in this field makes very clear that the game of hide and seek played between scheme promoters and the Revenue is one of long duration and is a game the rules of which are well understood by those who devise and promote such schemes.') Mr Eadie postulated that a taxpayer could provide a pantechnicon of documents on the last day that an APN can be issued and say to HMRC that, until HMRC has gone through the entire lorry load, they cannot issue an APN because they cannot reach a positive balance of probabilities conclusion on the substantive tax liability issue. But there was no evidence that this occurred in practice, or that HMRC did not have sufficient powers to obtain information by informal request or by notices served during an enquiry to enable them to minimise this kind of problem.

[67] As I see it, Parliament has taken the view that the new powers to exact accelerated payments should only be available if the designated officer forms the view that the tax scheme does not work having diligently weighed up to the appropriate extent all the information available and not before, and the designated officer has no reason to doubt that information.

[68] HMRC contend that the standard of review for the exercise by HMRC of their statutory powers to issue APNs/PPNs is one of unreasonableness. For a challenge to be successful on this ground (which assumes that there is no violation of any Convention right), the decision must be outside the limits within which a reasonable decision-maker would act. This is a high hurdle, but it does not really address the appellants' complaint. It is as I have explained that the exercise by HMRC of their statutory powers was not in

accordance with the FA 2014, and for the reasons given above I consider that their argument is correct so far as the requirement for a determination on effectiveness is concerned. If the exercise had been carried out, the standard of review would then be one of unreasonableness, or irrationality.

[69] In conclusion, I agree with Ms Simor that Charles J's test reverses the onus. Moreover, it is not enough for the designated officer to take the view that there is a dispute. I appreciate that this interpretation makes the legislation less easy for HMRC to operate but that is not a reason for departing from the

statute's meaning as I understand it to be. It can, moreover, equally be said that it is difficult to see why Parliament would have legislated for the interpolation of a designated officer, a senior officer of HMRC, if it was not intended that HMRC should have to take a view on effectiveness.

(3) HMRC wrong to exclude from their Policy any consideration of the scheme's effectiveness?

[70] One aspect of the duty of fairness is that, in general, a decision-maker may not fetter his discretion. However, it is well established in public law that a decision-maker may formulate a policy to enable him to exercise a discretion consistently provided that it is not applied so rigidly that it precludes the proper exercise of discretion in each case. As Lord Reid, with whom the majority of the House agreed, held in *British Oxygen Co Ltd v Minster of Technology* [1970] 3 All ER 165 at 170–171, [1971] AC 610 at 625:

> 'a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that provided the authority is always willing to listen to anyone with something new to say …'

[71] The judge held that the appellants would have to show that their circumstances were exceptional. HMRC submit that the taxpayer has to show that its approach is manifestly unreasonable. Ms Simor submits that this makes the protection afforded by judicial review meaningless. There never was an assessment of the effectiveness of the arrangements in this case on the correct basis. The appellants were never properly informed of HMRC's view on effectiveness. Ms Simor further submits that HMRC did not follow its own procedure, but we were not taken to the evidence to support this and it was not addressed by HMRC in their submissions and so I do not consider that this Court can deal with that submission. Finally, HMRC could not answer the question whether there were any exceptional reasons why an APN should not be issued since the decision-maker did not have the relevant material before him.

[72] Mr Eadie submits that, on general public law principles, it is open to HMRC to have a general policy about issuing APNs/PPNs which is subject to exceptional cases and that it is for the person who wields the discretion to make rational judgments about what matters are, or are not, to be taken into account in exercising that discretion (see *R (on the application of Khatun) v Newham London BC (Office of Fair Trading, interested party)* [2004] EWCA Civ 55, [2004] LGR 696, [2005] QB 37).

[73] HMRC has applied the new regime to all cases where the scheme that was used had a DOTAS number without discriminating between them, save to weed out the obsolete schemes or schemes which HMRC accepted were effective to save tax. I agree with the judge that it was not wrong in law for HMRC to adopt a general policy of this kind provided sufficient provision was made for cases which ought not properly to fall within it. HMRC has a policy of excluding cases where there are exceptional circumstances, which they do not exhaustively define. They are clearly right on the authorities to do this, but it leaves the question whether

HMRC go far enough.

[74] HMRC's policy is to issue APNs and PPNs in every case where the Conditions have been fulfilled, save in exceptional circumstances. The

appellants say that HMRC should have explained how they exercise their discretion to determine what circumstances were exceptional. This has not occurred and the appellants go so far as to say that this was a violation of the duty of candour to the court.

[75] In my judgment, the circumstances which are likely to constitute exceptional will be varied and case-specific. It is sufficient that the legislative scheme provides for disclosure to HMRC and an opportunity to make representations. It is sufficient that HMRC have formulated the Policy in the terms explained above. The Policy cannot affect the function of the designated officer, which has to be performed independently of the Policy. I have held that this requires him to form a view about the effectiveness of the scheme. However, the stages described by Green J and the terms of the templates indicate that HMRC do in fact take steps to satisfy themselves as to ineffectiveness of any scheme before proceeding to issue APNs/PPNs.

(4) Do the statutory provisions about APNs/PPNs apply retrospectively?

[76] Ground 2 (retrospectivity) concerns the question whether HMRC could fairly apply the APN/PPN regime retrospectively to those taxpayers who had entered into marketed tax schemes before the FA 2014 was enacted. There is a presumption that the courts apply in relation to statutory interpretation that a statute does not have retrospective effect.

[77] Ms Simor submits that the APN regime retrospectively removed legal entitlements that taxpayers who use DOTAS arrangements had at the relevant time, subject to later determination by the Revenue or the FTT. The legislation created a new requirement that anyone who had claimed the tax advantage in the context of a registered arrangement, whether they were entitled to do so or not, immediately forfeited that advantage or entitlement pending a determination from HMRC as to whether that advantage was lawful. This is so, on her submission, even if the delay is entirely down to HMRC and has nothing to do with the taxpayer.

[78] Ms Simor further submits that there is no requirement that the statute should be applied retrospectively and there is no deterrent purpose either in applying it retrospectively.

[79] The judge's approach was to say that there was nothing to indicate that the legislation was not to apply where enquiries have been instituted or appeals entered before the regime came into force (see [96], cited at para [40] above). Green J in *Walapu* came to the same conclusion as the judge but used different reasoning:

> '[97] The claimant also argued that the change was unfairly retroactive. I will deal with this briefly. HMRC submits that it is not retroactive since the basis for the imposition of tax has not changed; all that is new is the point in time at which payment must be made. In my judgment the change in the Finance Act 2014 is retroactive only in the very limited sense that there are new payment rules being applied which alter the position that taxpayers hitherto were subject to. It is doubtful whether this is properly to be categorised in law as retroactivity since it merely changed the consequences of acts and/or omissions from those which would have been expected at the time (see by way of analogy per Floyd LJ in [*Solar Century Holdings Ltd v Secretary of State for Energy & Climate Change* [2016] EWCA Civ 117, [2016] All ER (D) 31

(Mar) ("*Solar Energy*")] at [71]). But even if it is retrospective it operates at the very lowest point of severity. In the

context of tax avoidance it is a change justified by a legitimate policy and it is fair and reasonable in all the circumstances (see *Solar Energy* at [91]–[98] in the High Court, endorsed as the test in the Court of Appeal at [73], [74]). Indeed, as already observed, it would defeat in a substantial way the Parliamentary purpose of introducing the legislation which covered "legacy" disputes if it could not be applied to extant notified schemes. The principle is also said to be, at heart, one of statutory construction. On this basis there can be little doubt but that in the Finance Act 2014 Parliament intended the new regime to apply to extant legacy tax avoidance schemes.'

[80] Ms Simor submits that, at the time when the appellants in the group of cases represented by Mr Rowe claimed losses or made deductions from their income, they were entitled to make those claims or deductions subject to the normal possibility that deduction might at a future date be found not to have been permissible and at that point it would be repayable with interest. However, the new APN regime retrospectively removed that entitlement.

[81] On Ms Simor's challenge on the basis of retrospectivity, Mr Eadie submits that the presumption against retrospectivity is simply a principle of statutory interpretation. In this case it is plain that the legislation applies to investments in tax avoidance schemes made prior to FA 2014 coming into force. There is no retrospective effect as regards interest as Parliament did not require taxpayers to pay interest retrospectively.

[82] In my judgment, the reasoning of the judge is impeccable and I would adopt it. I note that in *Walapu* at [97], Green J made (among other points) the valuable point that it would have been contrary to the statutory purpose for the statute not to operate in relation to existing cases in which tax avoidance schemes had been used.

[83] As Lord Rodger held in *Wilson v First County Trust Ltd* [2003] UKHL 40, [2003] 4 All ER 97, [2004] 1 AC 816 (at [186]–[197]), in this context, the presumption against retrospectivity is a presumption that Parliament did not intend to interfere with vested rights. It is only a presumption and it can therefore be excluded by clear words. In this case, however, the taxpayers' rights are to make deductions and claim repayments of tax permitted by tax law. They have no right under the common law not to be required to make some payment on account of tax considered to be due in advance of a determination that it is due. There must be limits on the obligations to pay money which can be imposed on a person, but it has not been suggested that there is any applicable limit under the general law in these circumstances. The judgment of McCombe LJ deals with the effect of the Convention.

(5) HMRC's decision to issue APNs/PPNs in breach of duty of fairness for other reasons?

[84] The appellants rely on the well-known passage about the duty of fairness from the speech of Lord Mustill in *Doody v Secretary of State for the Home Dept* [1993] 3 All ER 92 at 106, [1994] 1 AC 531 at 560, with whom the rest of the House agreed. He summarised the law as follows:

'My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is

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> fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'

[85] Lord Mustill's para (5) is also known as the principles of natural justice, which are the subject of ground 3 (below, paras [98]–[113]).

[86] The duty of fairness means that HMRC have to consider all the circumstances of a case. It brings together many points which I have dealt with elsewhere. The particular matters with which I deal at this point are the delay between opening enquiries and the service of APN/PPNs, the fact that they were served shortly before the hearing of an appeal and the fact that they were served in respect of tax avoidance schemes implemented before the FA 2014 came into force.

[87] As to delay, Mr Eadie submits that this does not prevent the issue of an APN/PPN. The person who loses out is HM Treasury since the cash flow advantage remained with the taxpayer. In any event, the taxpayer can always apply for a closure notice and under the relevant statutory provisions the onus lies on HMRC to justify the delay. The witness statements of Ms Elizabeth Marshall, a member of HMRC staff in its Counter-Avoidance Directorate, shows that the enquiries in some cases take several years. The effect of issuing a closure notice is that the taxpayer can see the light at the end of the tunnel.

[88] Mr Eadie explains why delay may have occurred. He points out that HMRC have limited resources and have to prioritise cases. So, they have to select which cases to challenge with a view to decisions in those cases having a 'ripple-out' effect. There are provisions for group litigation orders and so on. So even if closure notices had been issued earlier, there would still be a need for case management. HMRC may decide properly not to proceed to make amendments to a return if they know that points of principle are involved which are being litigated in some other case. Obviously, they have to act reasonably in this regard. If there is a settlement offer, it is not possible for HMRC to decide which cases to litigate until the last time for accepting the offer is over. I accept that these reasons indicate proper reasons for delay and that there are no doubt other factors which affect the speed with which HMRC can act in any case.

[89] I accept that delay is not a reason which of itself prevents HMRC from exercising its power to issue an APN/PPN. There must be some material factor which makes its exercise unfair. Service of the APN/PPN will not normally have prejudiced the taxpayer, and at least following the FA 2014 the taxpayer

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will have known that there was a risk he would be served with such a notice. If he succeeds at the end of the day, he will obtain repayment with interest. (There has been no complaint in this appeal that the interest rate is unfair.)

[90] Mr Eadie relies on the hardship rules for cases where taxpayers are in financial difficulty in meeting an APN/PPN. We were not taken to these save in passing. I would like to leave open the question whether the application by HMRC of its usual hardship rules is necessarily sufficient. As Ms Simor points out, HMRC's 80% win rate is an assumption. The basis for it is given in *Budget 2014: policy costings* (see para [42](iii) above). It was needed to enable an estimate of the financial impact of APNs on the exchequer to be given. There is nothing to suggest that it was an unreasonable assumption to make for this purpose.

[91] However, what the 80% win rate seems to me to show is that there are a significant percentage of cases where HMRC does not succeed in showing that the scheme is ineffective for tax purposes. Moreover, HMRC may be dealing with individual taxpayers on whom an APN/PPN may have a draconian effect. Some may be wealthy taxpayers but others may have to sell their homes or make decisions about involvement in that business and about that financial expenditure which may turn out to have been unnecessary if the scheme in question is effective. I therefore agree with Ms Simor that it is not necessarily enough for HMRC to point to the hardship provisions which apply where a taxpayer has become liable to pay tax. In deciding whether to issue or confirm an APN/PPN, HMRC may, in performance of their duty to act fairly, have to take into consideration that there is a significant failure rate (20%), and that taxpayers should not be required to comply with APNs/ PPNs where the result would be arbitrary or oppressive, as where a taxpayer is forced to sell his home and is not given enough time to do so in a way that will produce a good price or leave him with an acceptable alternative.

[92] Ms Simor relies on other matters. However, in my judgment, the mere fact an appeal is pending does not mean that the APN/PPN cannot be issued. The statutory powers are not restricted in that way. As Mr Eadie submits, it was not irrational not to wait until the resolution of the appeal before the FTT as that date was uncertain. Moreover, the case might be appealed further.

[93] Furthermore, there is nothing in the statute to prevent notices from being served close to the time of an appeal. The timing of the service of an APN/PPN is a matter for the exercise of statutory discretion by HMRC. The provisions of the regime in FA 2014 provide for representations to be made and thus for HMRC to identify any reasons why they should withdraw notices issued to taxpayers in particular circumstances. HMRC was entitled to take the view that the fact that there was a pending appeal was not a reason for not issuing APNs/PPNs.

[94] I do not consider that in the ordinary way the fact that the taxpayer entered into a tax avoidance scheme before the FA 2014 came into force is likely to be relevant to the duty of fairness because the notices will impose a prospective obligation to pay money and interest in default.

[95] Further, nothing turns on the fact that repayments in this case were made in *Rowe*. There is nothing in the statute to prevent APNs/PPNs still being issued in those circumstances. The fact of the repayments is now of no relevance to this appeal given the fact that the appellants' argument below on legitimate expectation has been abandoned.

[96] It is irrelevant to fairness that the appellants were not themselves party to the appeal, which was conducted in the name of the partnership. That

followed from the fact that the partnership was the vehicle used for the purposes of the tax scheme, and obviously the appellants would have contractual rights against the managers of the partnership.

[97] In *Vital Nut*, the appellants say that in the circumstances of the case, where the enquiry had been open for a significant number of years and HMRC said that it was ready to issue closure notices, it was an improper exercise of HMRC's discretionary power under s 219(2)(a) to issue APNs/PPNs without first issuing closure notices. I accept the submission of HMRC that the prior issue of closure notices is not required: see FA 2014, s 219(2)(a). In my judgment, there is no limitation of this kind in the statutory scheme. Nor were HMRC prevented from issuing an APN or PPN because they had issued PAYE/NIC assessments on a precautionary basis. It is further said by the appellants that in the circumstances of this case HMRC needed to make assessments. There is again no requirement for this in the FA 2014 or any reason why it should be a requirement in the FA 2014. As already explained, if HMRC do not complete their enquiries with reasonable despatch, taxpayers have a separate remedy for this because they can apply for a closure notice under FA 1998, Sch 18.

6. GROUND 3: BREACH OF NATURAL JUSTICE

A. Judgment of Simler J

[98] Before the judge, the taxpayers argued that HMRC had to explain the basis of the asserted tax liability and to provide them with a proper opportunity to rebut the claims before the APNs/PPNs were served. The judge rejected this argument and held that the common law did not require such additional obligations to be imposed for the following reasons:

> (i) APNs/PPNs dealt with the question who should hold the tax pending resolution of the dispute. The FA 2014 contained safeguards. Taxpayers had the right to make representations to HMRC before any payment obligation arose. They could challenge HMRC's decision to issue APNs/PPNs and the amount of tax due on the narrower basis of rationality, but natural justice did not require taxpayers to be able to make representations about the efficacy of the scheme itself. That was a matter for the statutory appeal process.
>
> (ii) APNs/PPNs did not deprive the taxpayers of their statutory right to challenge the underlying tax liabilities by way of appeal to the FTT and they had done so. A taxpayer may suffer hardship but that was not a matter relevant to the fairness of the provisions of the FA 2014, only to the mechanics of payment. '[T]hat hardship was always a risk that might materialise in the case of a taxpayer entering a tax avoidance scheme without making provision for payment of the tax if the scheme failed' ([62]).
>
> (iii) If a taxpayer succeeded on his appeal, HMRC would be bound to refund his money with interest. If a taxpayer failed before the FTT, he was not entitled to have the cash flow benefit of holding the money.
>
> (iv) The taxpayer could always challenge the decision to issue an APN/PPN by way of judicial review.

[99] So, the judge concluded that the courts could not impose additional procedural protections. To do so would complicate the operation of the new statutory scheme and thus frustrate the purpose of its adoption.

B. Submissions

[100] On this appeal, Ms Simor relies on *Bank Mellat v HM Treasury* [2013] UKSC 38, [2013] 4 All ER 495, [2014] AC 700. In that case, HM Treasury used its powers under the Counter Terrorism Act 2008 to require the UK financial services sector to cease all business with *Bank Mellat* with immediate effect. By a majority, the Supreme Court held that the implication of the rules of natural justice into a draconian power depended on the particular circumstances in which the power was exercisable and that, unless the statute expressly or impliedly excluded the duty, or consultation was impracticable or would frustrate the purpose of the power, fairness required that the person affected should be able to make prior representations. In *Bank Mellat*, the power could only be exercised after the event and was insufficient to meet the requirement for fairness. The majority therefore held that the rules of natural justice, which Parliament had not excluded, should be implied.

[101] Ms Simor also relies on *McInnes v Onslow-Fane* [1978] 3 All ER 211 at 218, [1978] 1 WLR 1520 at 1529, and *R (on the application of Khatun) v Newham London BC (Office of Fair Trading, interested party)* [2004] LGR 696, [2005] QB 37. She submits that a requirement to follow the principles of natural justice will more readily be implied where the taxpayer is liable to have the use of his property removed.

[102] Ms Simor submits that the question for the court is whether, in the absence of specific provision in the statutory scheme and bearing in mind the draconian consequences of the exercise of the relevant power, this court should imply the common law requirements of natural justice. She accepts that the answer depends on the factual issues and the statutory framework. She points out that the taxpayer cannot argue with HMRC whether the tax scheme works and that to issue an APN when the scheme works would be irrational. Ms Simor submits that the principles of natural justice require HMRC to inform the taxpayer why his scheme is not effective so that he could take legal advice. Finally, she submits that judicial review does not provide an adequate remedy because it takes place after the APN/PPN has had effect and the taxpayer has had to liquidate his assets. Interim relief is not available save in hardship cases.

[103] Ms Simor submits that the appellants must be given the opportunity to satisfy the designated officer as to the case being made against them. Her submission is that in this case the appellants were not informed of the matters concerning their particular arrangements.

[104] Mr Eadie submits that it is uncontroversial that the court can imply procedural processes and protections into statutory schemes and that the courts readily do so when it is necessary to do so because a scheme would otherwise be unfair. Natural justice may require different things: see also the cases cited by Simler J. But the courts should be slow to impose a further set of obligations where Parliament has prescribed a set of procedural protections. Here Parliament has set out the procedures and protections. The obligation to pay does not arise under the legislative scheme until the representation process has been exhausted. So it does not matter that the APN/PPN has already been issued.

[105] Mr Eadie submits that at the stage of representations the relevant provisions do not exclude the possibility of representations about the effectiveness of the underlying scheme but the test which the designated officer has to apply is effectively the same, namely whether the representations produce the result that the scheme is effective with some 'slam dunk' reason

which would preclude HMRC from rationally concluding that there was still something to fight about in the FTT. HMRC do not have to get over a hurdle of being able to make some form of positive assessment based on a test of balance of probabilities. Otherwise there is a real risk of undermining the statutory scheme.

D. My conclusions on Ground 3

[106] Fairness requires as a minimum that the power to issue an APN/PPN is exercised in accordance with the rules of natural justice. That means that the process adopted must be fair, and that means that the taxpayer must be able to make representations. The precise content of the duty to act fairly will depend on the circumstances of the case. That is not in dispute. What is in dispute is the content of the duty in the case of an APN/PPN.

[107] The courts may imply an additional duty to act fairly even in cases where Parliament has prescribed a procedure for some consultation and written representations, especially where the result was unfair (see per Lord Sumption in *Bank Mellat* at [35]–[36]). Nonetheless, even in that situation it must be clear that the statutory procedure is insufficient to achieve fairness and that the implication of the principles of natural justice would not frustrate the purpose of the legislation: se per Lord Reid in *Wiseman v Borneman* [1969] 3 All ER 275 at 277, [1971] AC 297 at 308:

> 'Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard and fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.'

[108] Lord Morris of Borth-y-Gest went a little further than this in the same case when he delivered the following oft-quoted words ([1969] 3 All ER 275 at 278, [1971] AC 297 at 308–309):

> 'My Lords, that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only “fair play in action”. Nor do we wait for directions from Parliament. The common law has abundant riches: there may we find what Byles J. called “the justice of the common law” …'

[109] In the same vein, Lord Neuberger held in *Bank Mellat*:

> '[164] Judges have no more important function than that of protecting individuals and organisations from abuse or misuse by the executive of its considerable and extensive powers—even, as is almost always the case, when such abuse or misuse does not involve bad faith. The substantial adverse financial consequences for Bank Mellat of the giving of the direction in this case provide a good example of the importance of this function. On the other hand, the judiciary's power to review decisions of the executive must be exercised bearing in mind that responsibility for the decision lies with the executive, not the judiciary, and judges do not have the relevant expertise or experience of those responsible for the decision. In the

> present case, the importance and relevance of expertise and experience in international relations, national security and financial regulation, is self-evident …
>
> [179] In my view, the rule is that, before a statutory power is exercised, any person who foreseeably would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power is to be exercised would render it impossible, impractical or pointless to afford such an opportunity. I would add that any argument advanced in support of impossibility, impracticality or pointlessness should be very closely examined, as a court will be slow to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute.'

[110] HMRC's position is that the duty of fairness is satisfied by giving the taxpayer the right to make representations on the amount of any APN/PPN. In general, on HMRC's submission, the duty of fairness only requires a person affected by the decision to have the right to make representation on the matters actually decided, which in this case excludes the question whether the scheme is effective. But it is implicit in the decision that HMRC has a case which as a public body it can properly pursue at that stage and so in my judgment the duty to act fairly means that the taxpayer must have the right to make representations at that level.

[111] The crucial question is whether the taxpayer can make representations on the question of effectiveness. In my judgment, the duty of fairness requires that he can do so since I have concluded that it is the designated officer's obligation to form a view on this (on the information available to him) before an APN/PPN can be issued. As I see it, the FA 2014 does not say that a taxpayer cannot make any further representations, and, when Parliament limits the designated officer's knowledge base to the best of his information and belief, it does not say that the information can only be provided by HMRC. In those circumstances, it seems to me that it must follow that a taxpayer can provide further representations on this point although the designated officer, of course, must reach his own view and is not bound to accept the contentions made by the taxpayer.

[112] The appellants contend that HMRC should have explained the basis of their liability. This must in principle follow from the fact that in my judgment they are entitled to make representations on the question whether their scheme was effective for tax purposes. However, I do not accept that the appellants were in doubt about the basis on which HMRC did not accept that that was so in their cases. In Rowe, the appellants know the nature of HMRC's

case as their cases have reached the stage of appeal proceedings. In the case of Vital Nut also, HMRC had already given a warning through Spotlight 6 and there could be no doubt thereafter as to HMRC's opinion on the effectiveness of the scheme in question.

[113] Contrary to a submission by Ms Simor, I do not consider that the exercise of considering representations from taxpayers and deciding to issue a PPN/APN can be dismissed as a 'tick box exercise' simply because HMRC decides on a rational basis to proceed to issue an APN/PPN despite having received submissions on the merits of the scheme.

7. GROUND 4: NO 'TAX DUE AND PAYABLE'

A. Introduction

[114] It is common ground that an APN/PPN must state the amount of the understated tax (FA 2014, s 220(4), Sch 32 para 4(3)). The definition of that expression includes a requirement that the unpaid tax is 'due and payable': FA 2014, Sch 32, para 4(3) (set out in para 17 above). Mr Rowe's simple point is that there could be no tax due because HMRC never opened an enquiry into his tax return for the right year. Because, on his submission, Mr Rowe made his claim for loss relief outside his tax return, that is, under TMA, Sch 1A and not TMA, s 9A applied. As explained below, Mr Rowe contends that HMRC had to launch an enquiry into his standalone claim by which carry back relief was claimed, and not his return for the loss year.

[115] As explained above (para [22]), it is not entirely clear how Mr Rowe communicated his claim for loss relief to HMRC. Mr David Southern QC, who presents the case for Mr Rowe on this ground, submits that Mr Rowe's evidence covered the format of the claim since he refers to having made a claim in May 2005, that is, after the filing of the tax return. (There was no enquiry into Mr Rowe's claim because the repayment of tax was made almost immediately.) Mr Southern submits that he made a claim outside his return and that accordingly the only enquiry that could be made into the claim was under TMA, Sch 1A.

[116] HMRC no longer have the document by which the claim was made but Mr Grodzinski submits that the form of that document does not matter. It seems to me that this court must proceed on the basis that Mr Rowe made his repayment claim in a separate document after he had filed his tax return, and not in his return. If HMRC had considered the point important, they could have exercised their powers to obtain the documentation which Mr Rowe has and which they no longer have.

B. Judgment of the judge

[117] Simler J rejected the 'due and payable' argument. She summarised Mr Southern's arguments for Mr Rowe as follows:

> '[76] In his submission, FA 2014 recognises the difference between returns and claims and makes a basic structural distinction between the two types of enquiry available under the TMA: enquiries into claims and enquiries into returns. Partnerships can only make returns; they cannot make claims that are not included in returns. Whereas partners can make claims that are not included in returns. He submits that Sch 32 para 3(3) recognises this. The particular arrangements giving rise to the asserted advantage are those contained in the partnership return and transmitted to the relevant partner's self-assessment tax return. The legislation anticipates
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> that a tax advantage for the relevant partner may arise from the partnership loss but that is only for current year claims. A carry back claim cannot be included in the relevant partner's self-assessment tax return and the chosen arrangements in the partnership return cannot therefore feed through into the individual partner's return in such a case. The tax advantage accordingly, only results from the partnership arrangements in the case of current year claims. In the case of carry back or stand-alone claims, it results from the separate claim made by the individual partner. He submits that there are good policy reasons for this distinction: it respects the integrity of the tax system and the structural principles on which it is based.'

[118] The judge held that there is no basis for any distinction, so far as the power to issue a PPN was concerned, between cases where HMRC made a repayment and cases where the taxpayer obtained the benefit of set-off. The taxpayer received the same economic benefit:

> '… after the filing date for the tax return, Claimants who received a repayment and those who received a set-off were in the same economic position. Both received a tax advantage whether the share of losses was used in a carry back claim or in a current year claim. It is difficult to see any reason or policy justification why the legislation should exclude from its scope the right to issue a PPN where one rather than the other is used.'

[119] In rejecting the appellants' arguments, the judge followed the decision of Sales J in *R (on the application of De Silva) v Revenue and Customs Comrs* [2014] UKUT 170 (TCC), [2014] STC 2088 both as a matter of judicial comity and also because in her judgment it was correct. *De Silva* concerned a partnership and an enquiry into the tax affairs of the partnership for the loss year gave rise to a deemed enquiry into the individual partners' own affairs for the loss year. The judge agreed with Sales J that that was sufficient to enable HMRC to challenge the loss relief claimed by the partner, howsoever claimed. The disallowance of the loss relief claim was a disallowance for all purposes, which would include the purposes of the individual partner's return for the loss year. She distinguished the decision of the Supreme Court in *Revenue and Customs Comrs v Cotter* [2013] UKSC 69, [2013] STC 2480, [2013] 1 WLR 3514, where the 'critical point' was that a carry back loss relief claim did not relate to the year for which it was claimed but the loss year.

C. Subsequent decision of this court in De Silva

[120] Subsequent to the decision of the judge, this court ([2016] EWCA Civ 40, [2016] STC 1333) affirmed the decision of Sales J. The reasons which this court gave are set out in the judgment of Gloster LJ, with which Simon LJ and I agreed. Gloster LJ set out paras [27], [31]–[33] and [38]–[63] of the judgment of Sales J. She agreed with the conclusions of Sales J in those paras in almost every respect. Importantly she accepted the analysis of Sales J in para [39] of his judgment that a standalone claim was an inchoate claim which would only be validated when the partnership losses were included in the individual partner's return for the later period, reflecting the partnership statement for that period. Sales J continued that claims for carry back relief 'could as a matter of substance only ultimately be made good if the [individual partners] included their shares of the partnership trading losses in their own individual returns for the periods in which the losses actually arose'. Sales J went on to explain how

his decision was consistent with the TMA, particularly Sch 1B, the scheme for partnership profits and losses to be assessed on the partners and not the partnership and the obligation imposed on HMRC by TMA s 50(9) where the tribunals make an adjustment to a partnership return to make consequential amendments to the partners' return. Sales J also held that his conclusion was not inconsistent with the decision of the Supreme Court in *Cotter*.

[121] Gloster LJ agreed with Sales J that the decision of the Supreme Court in *Cotter* was not relevant to the issue in *De Silva*. Her conclusion on the question whether HMRC could properly open an enquiry into the partnership's return for the year in which the partnership reported the loss, the subject of a claim by the individual partner's claim for carry back or sideways relief, was as follows:

> '[49] Second, the Appellants' approach fails to recognise that, no matter how a claim for relief has initially been “made”, the claim for relief is nonetheless *required to be included* in the return of the individual taxpayer for the year in which the losses were actually made by the partnership (ie here the later year—Year 02). That obligation is imposed by ss 8(1B) and 9 of

> the TMA and s 380 of ICTA. That is because the claim, if valid, will affect the tax chargeable and payable in the later year: see para 2(3) of Sch 1B. Losses, which may be carried back from a later year to an earlier year, cannot be given effect to in law in that earlier year; in other words they may not be relieved against the tax liability of that earlier year, despite the fact that the quantum of the claim will be calculated by reference to the earlier year. Thus, the correct procedure for making a Sch 1B claim is either to make it in the return for the loss-making year in question (the Year 2 return), or to make an earlier (or indeed later) Sch 1A standalone claim, which is then, subsequently, nonetheless required to be included in the return for the later year.'

D. Submissions

[122] On this appeal, Mr Southern submits that the PPNs were outside the statutory framework because HMRC failed to open the correct form of enquiry within the statutory time limit (which expired on his submission on 5 April 2007) and therefore the individual's claims to carry back trading losses from 2004/5 to earlier years of assessment could not be the subject of a fresh assessment (see the statutory provisions summarised at para [31] above). Therefore, no PPN could be issued. Mr Southern submits that Simler J erred in holding that a PPN could be issued in Mr Rowe's case.

[123] Mr Southern submits that his contentions are consistent with the decision of the Supreme Court in *Cotter* and the decision of this court in *De Silva*, which was handed down after the judge's judgment. He further submits that *De Silva* is distinguishable because the carry back claims in that case were included in the self-assessment tax returns. Therefore, it was sufficient in that case for HMRC to enquire into the self-assessment tax return.

[124] Mr Southern submits that claims to loss relief which are not included in a tax return do not relate to the year in which such losses are made. One of the protections for the taxpayer is the fact that HMRC cannot make an assessment after a certain period of time. HMRC must open an enquiry if they want to make such an assessment.

[125] Mr Southern submits that (as I have held it must be treated) the claim to loss relief in this case was a standalone claim and not a claim made in a

return. The appeal procedure in relation to a claim made in a tax return is contained in TMA 1970, s 42(2). That sub-section does not apply to a standalone claim: see TMA s 42(11)). Nor does it apply to claims for carry back relief which are governed by TMA Sch 1B (see TMA, Sch 1B, para 2(2)). So, on his submission, all carry back claims outside a return come within Sch 1A. Only sideways claims for relief can fall within a tax return. That is because sideways relief reduces the tax charged on the return for that year of assessment. Where, therefore, claims fall outside TMA s 42 because of s 42(2), HMRC must give notice of an enquiry into the claim.

[126] Mr Southern submits that, in *Cotter*, the Supreme Court held that, for a claim to be included in a tax return, two matters had to be satisfied:

> '(a) The claim had to be included in the return: see per Lord Hodge at [20] and [21] where he held:

> "A claim is not included in a return for certain statutory purposes simply because it appears on the face of the tax return form. They have to establish the amounts for which a person is chargeable to tax for the relevant year of assessment and the amount payable by him by way of income tax for that year."
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> and
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> (b) The claim had to alter the tax charged on the assessment for the year.'

[127] Mr Southern further submits that *Cotter* is authority for the proposition, which is not in issue, that if the taxpayer in fact uses his claim in his calculation of the tax payable by him in his self-assessment tax return ('SATR') to reduce the tax charged in that year then he has made a claim included in a return: see per Lord Hodge at [27].

[128] Mr Southern submits that the statutory provisions support his contentions. Mr Southern also submits that *De Silva,* [49], a passage relied on in this appeal by HMRC, can be distinguished because the taxpayer made both carry back and sideways claims for relief and therefore his claims affected the amount of profits in the year subject of the return. An enquiry into a year of assessment will include an enquiry into carry back claims derived from the loss reported in the personal self-assessment return derived from the partnership statement in these circumstances.

[129] Mr Southern submits in the alternative that para [49] of *De Silva*, on which HMRC rely, is inconsistent with the subsequent decision of this court in *R (on the application of Derry) v Revenue and Customs Comrs* [2017] EWCA Civ 435, [2017] STC 1723.

[130] Mr Southern submits that, as a result of *Derry*, an enquiry into a loss in a particular year incurred by a partnership leads to a deemed enquiry into the returns of the individual partners for the same year but it cannot attract a carry back claim. Mr Southern submits that *Derry* decides that by virtue of s 42(2) all carry back claims must be made in the return. HMRC could not amend his claim for relief from losses made in a later year because he had made the claim against losses in an earlier year, and they had not opened an enquiry in respect of that year.

[131] Mr Southern also submits that Mr Rowe's claim had no effect on the computation of his tax for 2004/5. It did not form part of his self-assessment calculation for that period. So, his claim had no effect on any figure in his return for 2004/5. The same applied for any claim for sideways relief since such

a claim would be within TMA s 59B(1)(a) (amount of tax shown by a person's SATR) and therefore outside TMA Sch 1B, para 2(6). It followed that this court's decision in *De Silva* did not apply.

[132] Mr Sam Grodzinski, who presents the case for HMRC on this ground of appeal, submits that the starting point is that, under TMA s 12AA(1), (2) and (3), HMRC can require the partnership to file a partnership tax return. TMA s 12AB(1)(b) requires the partnership to include in its return a statement of the allocation of the loss to the partners. TMA s 8(1B) requires partners to include their share of a partnership's losses in their individual tax return. Under TMA s 12AC HMRC may open an enquiry into a partnership return and this takes effect as a deemed enquiry into the returns of the partners for the relevant period: TMA, s 12AC(6). He further submits that the crucial point is that this court held in *De Silva* that an enquiry into the

tax affairs of an individual for the period in which the statement of his share of the partnership loss must be included is a valid means of enquiry into a claim for carry back relief utilising that loss. Therefore, the essential point is that Mr Southern's submission is wrong as a matter of law. In this case, therefore, it was sufficient that HMRC opened an enquiry into the partnership's tax affairs for 2004/5. It would have been the same if the claim had been for sideways relief.

[133] Mr Grodzinski submits that, by virtue of TMA, Sch 1B, para 2 a carry back claim in law relates to the later year in which the loss is made. One of the issues in *De Silva* was whether the carry-back claim could be enquired into as a standalone claim or whether it had to be enquired into via a deemed enquiry. TMA Sch 1B, para 2 provides:

> '(1) This paragraph applies where a person makes a claim requiring relief for a loss incurred or treated as incurred, or a payment made, in one year of assessment ("the later year") to be given in an earlier year of assessment ("the earlier year").
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> (2) Section 42(2) of this Act shall not apply in relation to the claim.
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> (3) The claim shall relate to the later year …
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> (6) Effect shall be given to the claim in relation to the later year, whether by repayment or set off, or by an increase in the aggregate amount given by section 59B(1)(b) of this Act, or otherwise …'

[134] Mr Grodzinski accordingly submits that, even if Mr Rowe's claim were a standalone claim, HMRC could still enquire into it by means of a deemed s 12AC(6) enquiry into the individual's return.

[135] Mr Grodzinski further submits that there is a fundamental difference between the facts in *Derry* and *De Silva*. The crucial point in *Derry* was that Mr Derry intimated that he would be making a claim in his return for the year in respect of which he subsequently claimed carry back relief whereas Mr Rowe did not. Mr Southern does not argue that HMRC should have opened an enquiry into Mr Rowe's return for the years in respect of which carry back relief was claimed. HMRC could not have opened an enquiry into Mr Rowe's affairs for that year because they did not then know about the carry back relief claim.

[136] The passages in *Cotter* on which Mr Southern relied were therefore not relevant to the issue in this case, and indeed Mr Grodzinski submits that they support HMRC's case.

[137] Therefore, submits Mr Grodzinski, the question is whether the loss in question is included in the self-assessment calculation (and HMRC had not

accepted the contrary, as had been suggested). The question is whether any claim was required to be included in the self-assessment return for the year of loss.

E. My conclusions on Ground 4

[138] Since the hearing of this appeal, the Supreme Court has unanimously dismissed the appeal from this court's decision in *De Silva*: see [2017] UKSC 74, [2017] STC 2483, [2017] 1 WLR 4384. Both parties were given the opportunity to file any further submissions but both decided that there was nothing further that they wished to add.

[139] Before the decision of the Supreme Court was pronounced, I had already reached the conclusion that this ground was precluded by this court's decision in *De Silva* unless Mr Southern could show that some different conclusion should apply in the case of a standalone claim (which I considered that he could not do). In fact, as I read it, the judgment of the Supreme Court makes it clear that the same conclusion must apply to a standalone claim because what matters is that there was a requirement for the individual to include his share of the loss in his return for the loss year. That statement would be amended by HMRC if the result of the enquiry was that this was not a trading loss and this amendment would mean that the loss relief claims were wrongly made.

[140] The judgment of the Supreme Court was given by Lord Hodge, with whom Lord Neuberger, Lord Kerr, Lord Reed and Lord Hughes agreed. Lord Hodge held that, even where the claim for loss relief was a carry back claim, an individual partner still had to include in his tax return for the loss year his share of the partnership's losses ([24], [28]). This information is a 'necessary part of his return for [the loss year] as it is information 'required for the purpose of establishing the amounts' in which the taxpayer is chargeable to income tax for that year of assessment: s 8(1).' ([28]). This was also the case if he claimed sideways relief ([27]).

[141] Lord Hodge held that HMRC could enquire into a claim under TMA, s 8 or 8A without instituting an enquiry under Sch 1A in order to challenge the taxpayers' claims: [30]. If an enquiry was opened into the partnership's return for the loss year, this would operate as a deemed enquiry into the individual taxpayer's return (TMA, s 12AC(6)) (see [32]). Lord Hodge considered that the earlier decision of the Supreme Court in *Cotter* was distinguishable because it did not address the possibility of an enquiry into the tax return in the loss year.

[142] In those circumstances, it is not necessary for me to set out my reasons as formulated before the Supreme Court's decision was handed down. I will, however, refer to one point not dealt with in *De Silva*, namely the effect of *Derry.* In my judgment, it does not assist Mr Southern to point to *Derry* as this was a case where an individual made a loss relief claim and as this court there explained ([62]) the relevant provisions were different. The facts of the case were also different for the reason which Mr Grodzinski explains in his submissions.

[143] As it seems to me, a major part of Mr Southern's argument derives from the fact that there are two separate methods of making loss relief claims and for enquiries into them. But this bifurcation in the procedure for making claims misses the relevant point. It leads Mr Southern to focus his submissions on the way Mr Rowe made his claim. The real issue in my judgment is not how he made his claim, but whether the relevant tax became due and payable if

HMRC opened an enquiry into the affairs of the partnership alone and reached the conclusion that the claimed losses were not trading losses. Despite TMA, s 42(11) the taxpayer had to include his share of those losses in his tax return for the loss year. In my judgment, when HMRC made an enquiry into the return of the partnership for the loss year, this operated as a deemed enquiry into Mr Rowe's tax return, including the statement of his share of the relevant loss for the same period. Therefore HMRC did not need to open any other enquiry into the standalone claim for relief.

8. APPLICATION TO ADDUCE FRESH EVIDENCE

[144] The appellants filed a witness statement from Mr Steven Porter, which related to matters not before HMRC when it made the decisions of which the appellants sought judicial review. The respondents also filed the further witness statement of Elizabeth Marshall in relation to the Vital Nut appeal. The appellants also sought to place before this court certain correspondence between solicitors. This court decided to read this further evidence de bene esse and rule on its admission in this judgment. Ms Simor submits that much of the evidence in the HMRC's witness statements should have been disclosed before the High Court and that therefore it should be in front of this court pursuant to the duty of candour in any event.

[145] As the witness statement of Steven Porter deals mainly with events after the decision which is under challenge, I do not consider that it is admissible on this appeal. If my Lord and my Lady agree, I would reject the application for its admission on this appeal. It follows that I would also not admit in evidence on this appeal the witness statements of Ms Marshall and Ms Elsey in response to that of Mr Porter.

9. APPLICATION OF A1P1 AND ARTICLE 6 OF THE CONVENTION

[146] I have had the benefit of reading in draft the judgment of McCombe LJ and agree with it save as indicated below.

[147] I would add a footnote to what my Lord holds on A1P1 and proportionality. In agreement with my Lord, I consider that the relevant provisions in the FA 2014 for the service of APNs/PPNs are proportionate because, for the reasons set out in the materials summarised in para [42] above, the state considers it to be in the general interest to deter taxpayers from using DOTAS and other tax avoidance schemes by instituting the new provisions for accelerated payments. In addition, the relevant provisions have been carefully calibrated so as to strike a fair balance in terms of the payment of interest (at a rate which the appellants have not challenged) if the ultimate tax liability is not established and the right to make representations before any amount becomes payable under the APN/PPN.

[148] For my own part, though it makes no difference in this case as to the outcome save in one respect, I would regard the provisions in question as provisions for the control of use of property and securing the payment of taxes within the second indent in A1P1, which reads:

> 'The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

[149] On the face of it, the second limb of that indent (securing the payment of taxes) duplicates the first limb (control of use). *Gasus Dosier-und*

Fördertechnik GmbH v Netherlands (1995) 20 EHRR 403 is an example of a case where the second indent in A1P1 was applied. It concerned a complaint under A1P1 arising out of the seizure by a Dutch tax collector of a concrete mixer to pay the purchaser's tax debts. This was despite the German applicant seller's reservation of title clause. In a passage which refers to the British contribution to the drafting of the Convention, the European Court of Human Rights ('the Strasbourg Court') explained that the reason for the second limb was as follows. The drafters of the Convention thought that it was particularly important to lay down the right of the state to take measures to secure the payment of taxes, provided that they were not

arbitrary, ie were proportionate even at the expense of repetition. The passage reads:

> 'Against this background, the most natural approach, in the Court's opinion, is to examine Gasus's complaints under the head of “securing the payment of taxes”, which comes under the rule in the second paragraph of Article 1 (P1–1). That paragraph explicitly reserves the right of Contracting States to pass such laws as they may deem necessary to secure the payment of taxes. The importance which the drafters of the Convention attached to this aspect of the second paragraph of Article 1 (P1–1) may be gauged from the fact that at a stage when the proposed text did not contain such explicit reference to taxes, it was already understood to reserve the States' power to pass whatever fiscal laws they considered desirable, provided always that measures in this field did not amount to arbitrary confiscation (see Sir David Maxwell-Fyfe, Rapporteur of the Committee on Legal and Administrative Questions, Second Session of the Consultative Assembly, Sixteenth Sitting (25 August 1950), Collected Edition of the Travaux préparatoires, vol. VI, p. 140, commenting on the text of the proposed Article 10A, ibid., p. 68).'

[150] In the circumstances of this case, it is, as my Lord says, unnecessary to decide whether A1P1 is engaged in this case, but, in my judgment, the second indent applies so that there is no violation in these cases.

[151] The question of the engagement of art 6 in tax matters raises the issue of the boundaries of the Convention. In *Ferrazzini v Italy* [2001] STC 1314, (2002) 34 EHRR 1068, the Strasbourg Court held that the Convention should be interpreted as a whole and that the second indent of A1P1 was an important indication as to the meaning of civil rights and obligations in art 6 of the Convention (right of access to court), which is restricted to the enforcement of civil and criminal obligations. The Strasbourg Court's reasoning makes clear why tax matters fall outside art 6: see para 29 of its judgment, which states:

> '29. In the tax field, developments which might have occurred in democratic societies do not, however, affect the fundamental nature of the obligation on individuals or companies to pay tax. In comparison with the position when the convention was adopted, those developments have not entailed a further intervention by the state into the “civil” sphere of the individual's life. The court considers that tax matters still form part of the hard core of public authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant. Bearing in mind that the convention and its protocols must be interpreted as a whole, the court also observes that art 1 of Protocol 1, which concerns the protection of property, reserves the right of states to enact such laws as they deem necessary for the purpose of securing the
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> payment of taxes (see, mutatis mutandis, *Gasus Dosier-und Fördertechnik GmbH v Netherlands* (1995) 20 EHRR 403 at 434, para 60). Although the court does not attach decisive importance to that factor, it does take it into account. It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer.'

[152] The procedures for the issue of APNs/PPNs with which we are concerned are intimately bound up with the process for assessing tax and do not involve the exercise by the state of its punitive powers. They require the advance payment of tax, and are not sanctions for the non-payment of tax (cf *Jussila v Finland* (App No 73053/01) [2009] STC 29, 9 ITLR 662, cited by the appellants). Accordingly I consider that those provisions of FA 2014 fall outside the scope of art 6. But I respectfully agree with McCombe LJ that judicial

review provides the taxpayer with equivalent protection to that to which he would have been entitled if art 6 of the Convention had applied.

10. Overall conclusion

[153] For the reasons given in this judgment, I would dismiss these appeals.

McCOMBE LJ.

[154] I am grateful to Arden LJ for setting out the background circumstances leading to these proceedings and for summarising the grounds of appeal that have been presented. She has dealt with grounds 1 to 4 and, with her judgment on those grounds, I agree and have nothing that I wish to add.

[155] It is for me to address Ground 5 (the Convention ground) and, so far as raising any additional points, Ground 6 (the designated officer ground).

[156] I turn first to Ground 5, which raises issues under three heads of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) ('ECHR'), namely art 6 of the ECHR and art 1 of the First Protocol to the Convention ('A1P1'). While a point under art 7 was signalled in the Grounds of Appeal, no argument was presented on it by the appellants, either in the skeleton arguments or in the oral submissions. It is convenient to address the points under A1P1 first.

[157] In each of the cases, the appellants contend that the issue of the APNs/PPNs infringed their rights under A1P1 and accordingly that the issue of the notices was a breach of s 6 of the Human Rights Act 1998.

A1P1

[158] A1P1 provides:

> **'Article 1**
>
> ***Protection of property***
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

[2018] STC 462 at 502

[159] Three issues arise: (1) Is the article engaged at all, in this case, by interfering with the 'peaceful enjoyment of … possessions'? (2) If so, is the interference with possessions 'provided for by law'; and (3) Is the interference 'proportionate'?

[160] In the Rowe cases, Simler J decided that the answer to issue (1) was, 'No' ([2015] EWHC 2293 (Admin), [2015] All ER (D) 12 (Aug)). She also decided (2) that, if that was wrong, the interference was appropriately provided by the law; and (3) that the interference was proportionate. In Vital-Nut, Charles J decided that, in the light of the decision of Simler J (and of Green J in *R (on the application of Walapu) v Revenue and Customs Comrs* [2016] EWHC 658 (Admin), [2016] STC 1682, [2016] 4 All ER 955), the ground for review on the basis of a breach of A1P1 had to fail and that the matter should be left for this court to consider ([2016] EWHC 1797 (Admin), [2016] 4 WLR 144).

[161] I agree with the conclusions of Simler and Green JJ on issues (2) and (3), for reasons to which I return a little later in this judgment, and in view of those conclusions, it is not necessary for me to say much about issue (1). However, I would not wish to leave the case without observing that I have had some doubts as to whether Simler J and Green J were correct in deciding that A1P1 was not engaged at all on the facts of these cases, and on the facts of the Vital-Nut case in particular. I, therefore, explain those doubts now, leaving the matter over for further consideration in an appropriate case.

Issue (1)

[162] Simler J started her analysis (at [116]), not surprisingly, with the decision of the ECtHR in *Kopecký v Slovakia* (2004) 41 EHRR 944). Her summary of that case was this:

> '116. It is common ground that the general principles to be applied in determining whether A1P1 is engaged are set out in *Kopecký v Slovakia* (2005) 41 EHRR 43 (see [42] to [52]). The Strasbourg Court held that a possession can be an existing asset or a claim in respect of which an applicant can argue that he has a legitimate expectation that the claim will be realised. However the Court concluded that its case-law did not contemplate the existence of a “genuine dispute” or an “arguable claim” as a criterion for determining whether there is a “legitimate expectation” protected by A1P1 but rather, “where the proprietary interest is in the nature of a claim it may be regarded as an “asset” only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it”: [52].'

[163] I have no difficulty with this short summary. However, the factual background to the *Kopecký* was very different from the facts of the present cases. Indeed, in some ways, as it seems to me, the facts of that case were the precise opposite of the facts of the cases before us.

[164] In *Kopecký* the applicant's father had been convicted in 1959 of an offence relating to the retention of a number of gold and silver coins. The coins were confiscated as part of his sentence for the offence. Thirty-three years later, in 1992, in the context of rehabilitation laws, the conviction and consequential orders were quashed. The applicant then claimed restitution of the coins under a statute called (in English translation) the Extra-Judicial Rehabilitations Act 1991. After the applicant's success at first instance in the

Slovakian courts, the government's appeal was allowed 'on the basis that

although the applicant could show that the coins entered the possession of the Regional Administration … he had been unable to show the location of the coins at the date the 1991 Act came into force': see the headnote loc cit. A further appeal to the Slovakian Supreme Court was dismissed. The applicant complained of a breach of A1P1.

[165] Simler J correctly said that the court found as stated at [116] in her judgment. However, as it seems to me importantly in the context of the case, the court in *Kopecký* stated the following general principles at para 35:

> 'The following relevant principles have been established by the practice of the Convention institutions under Art.1 of Protocol No.1:
>
> (a) Deprivation of ownership or of another right *in rem* is in principle an instantaneous act and does not produce a continuing situation of "deprivation of a right".
>
> (b) Article 1 of Protocol No.1 does not guarantee the right to acquire property.
>
> (c) An applicant can allege a violation of Art.1 of Protocol No.1 only in so far as the impugned decisions related to his "possessions" within the meaning of this provision. "Possessions" can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a "possession" within the meaning of Art.1 of Protocol No.1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition.
>
> (d) Article 1 of Protocol No.1 cannot be interpreted as imposing any general obligation on the Contracting States to restore property which was transferred to them before they ratified the Convention. Nor does Art.1 of Protocol No.1 impose any restrictions on the Contracting States' freedom to determine the scope of property restitution and to choose the conditions under which they agree to restore property rights of former owners.'

The court continued with its findings as to whether the applicant had "existing possessions" and/or an "asset" for A1P1 purposes and began its consideration of those questions at paras 41 and 42 as follows:

> **'(b) Whether there were** "**existing possessions**"
>
> 41. The applicant based his restitution claim on the provisions of the Extra-Judicial Rehabilitations Act 1991. It is not suggested that title to the property he sought to recover vested in him without the intervention of the courts. The proprietary interest invoked by the applicant is therefore in the nature of a claim and cannot accordingly be characterised as an "existing possession" within the meaning of the Court's case law. This was not disputed before the Court.

(c) Whether the applicant had an "asset"

> 42. It therefore remains to determine whether that claim constituted an "asset", that is whether it was sufficiently established to attract the guarantees of Art.1 of Protocol No.1. In this context it may also be of relevance whether a "legitimate expectation" of obtaining effective enjoyment of the coins arose for the applicant in the context of the proceedings complained of.'

[2018] STC 462 at 504

[166] It is only necessary to refer to the court's final conclusions on these points. At para 52, the court said this about 'legitimate expectation' in the context of this case:

> '52. In the light of the foregoing it can be concluded that the Court's case law does not contemplate the existence of a "genuine dispute" or an "arguable claim" as a criterion for determining whether there is a "legitimate expectation" protected by Art.1 of Protocol No.1. The Court is therefore unable to follow the reasoning of the Chamber's majority on this point. On the contrary, the Court takes the view that where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case law of the domestic courts confirming it.'

[167] On the question of 'asset', at para 58 the court said:

> '58. … In particular, the Court notes that the applicant's restitution claim was a conditional one from the outset and that the question whether or not he complied with the statutory requirements was to be determined in the ensuing judicial proceedings. The courts ultimately found that that was not the case. The Court is therefore not satisfied that, when filing his restitution claim, it can be said to have been sufficiently established to qualify as an "asset" attracting the protection of Art.1 of Protocol No.1.'

[168] The applicant himself had never had any property right in the coins, prior to confiscation, and was seeking to assert such a right, as conferred by the legislation, for the first time. It was a 'right' which was significantly in dispute between him and the government. His mere claim was not, therefore, a 'possession' within A1P1. Here, by contrast, the state seeks to obtain from the appellants money which is not its property. Under the APN/PPN procedures, it simply has a money claim conferred on it by legislation, in anticipation of a possible future tax liability which may or may not be established. It makes no claim whatsoever to the money as tax. The appellants' money remains their money. It is to turn the matter around 180 degrees to say that it is the appellants who only have a *claim* to keep their money because of the demand made by the state to deprive them of it.

[169] To compare these cases with *Kopecký*, it is as if the appellants had all their money in cash in their respective equivalents of Fort Knox. It seems to be a difficult contention, in principle, to say that the cash was not their property or 'possessions'. It is difficult to see how the state's statutory claim prevents the cash being a 'possession' of the appellants. I do not consider that the matter is different if the relevant 'cash' is in fact represented by credits in the appellants' bank accounts.

[170] The submission of HMRC on this point is encapsulated in para 43 of their skeleton argument as follows:

> '43. The money required to be paid by the Notices cannot be regarded as the Appellants' A1P1

> possessions, given the existence of at least an arguable claim that the money was owed as tax and so does not belong to the Appellants at all. This conclusion is strongly supported by both domestic and Strasbourg case law.'

In contrast, Ms Simor QC, for the appellants submitted that this amounts to an argument that a simple demand by the state to an individual that he/she

should pay money, without more, would mean that (pro tanto) the individual's cash in possession was no longer either his/her property or his possession for the purposes of A1P1. In principle, I consider that this submission of Ms Simor is correct. A mere demand by the state that a citizen should pay money should not remove from that citizen's cash its status as a 'possession' for the purposes of A1P1.

[171] HMRC supported their submission by reference to *Kopecký* which, as I have said, is far removed on its facts from this case, and in my judgment, is far removed from this case in the application of the relevant principles which it laid down and which I have quoted above. *Kopecký* is the precise reverse of our facts.

[172] The domestic cases, upon which HMRC relied, were: *R (on the application of Huitson) v Revenue and Customs Comrs* [2011] EWCA Civ 893, [2011] STC 1860, [2012] QB 489; *R (on the application of ToTel Ltd) v First-tier Tribunal (Tax Chamber) (HM Treasury, interested party)* [2011] EWHC 652 (Admin), [2011] STC 1485, [2012] QB 358 and *R (on the application of St Matthews (West) Ltd) v Her Majesty's Treasury, sub nom R (on the application of APVCO 19 Ltd) v Her Majesty's Treasury* [2015] EWCA Civ 648, [2015] STC 2272.

[173] *Huitson* was a case in which HMRC had revised the claimant's tax assessments to reverse a claim of double taxation relief. The claimant sought judicial review in respect of the retrospective element of s 58 of the Finance Act 2008 and his liability to pay additional tax accordingly. It was said that the liability to pay the additional tax infringed A1P1. This court held, on the present point, that on the true construction of the legislation, which had existed prior to the enactment of s 58 of the 2008 Act, the claimant did not have a sufficiently established claim to tax relief to give rise to a legitimate expectation that would attract protection under A1P1. The focus of the argument was on whether the claimant was being deprived of a proprietary interest in a sufficiently established *claim* to relief as to amount to a legitimate expectation that would attract the protection of A1P1: see the argument of Mr Elvin QC, summarised by Mummery LJ at [62]. On that point, Mummery LJ (with whom Sullivan and Tomlinson LJJ agreed) said at [69]:

> '[69] On that fresh approach to the point on legitimate expectation, the nature of the “claim” asserted has to be examined. The “claim” to tax relief under the DTA is one which has neither been accepted by HMRC nor has it been made out in any tribunal or court. All that has been established is the existence of a genuine dispute about whether the scheme based on the claim for tax relief under the DTA worked.'

[174] That case, therefore, was dealing with a question whether a prospective claim to tax relief was sufficiently established as to amount to a possession. It was that claim that was said to constitute the relevant 'possession'.

[175] *ToTel* involved, among other issues, a challenge under A1P1 to the appellant's obligation to pay an assessed sum by way of VAT as a pre-condition of bringing an appeal against the assessment. The assessment related to the recovery of input VAT previously credited to the applicant. The challenge was

rejected by Simon J (as he then was).

[176] In a very short passage dealing with the question of whether A1P1 was engaged, Simon J said this (at [122]):

> '[122] … First, in the *Bulves* case [*Bulves AD v Bulgaria* (Application 3991/03) [2009] STC 1193] the court was able to identify the applicant
>
> *[2018] STC 462 at 506*
>
> company's right to claim a deduction of input VAT as legitimate expectation of obtaining the effective enjoyment of a property right which amounted to a possession. In the present case the court cannot identify such a right. Whether or not the claimant has complied with all the conditions for claiming input tax is the substantive issue between the claimant and the commissioners. Until that issue is resolved it is difficult to see how the claimant can have a legitimate interest which could amount to a property right.'

Again, the asserted right to quiet enjoyment of possessions seems to have been founded upon a perceived legitimate interest in the claim to deduction of input VAT. It was not based upon a claimed right of the state to take from a person some of his money to meet an anticipated tax liability, which seems to me to be of a different quality altogether. If the claimant wanted to appeal, he had to put the money up first. In the present cases, however, the claim to payment can be made whether or not there is a liability and independently of whether the taxpayer wishes to invoke a right of appeal.

[177] The decision of Simon J was reversed on other grounds in this court: [2013] STC 1557.

[178] In my judgment, the 'possession' in issue in these cases is not of quite the same character as those in issue in *Huitson* and in *ToTel*. It seems that the better focus was that actually postulated by Simler J at [120] in her judgment as follows:

> '[120] The question in these circumstances is whether the money representing the reduced tax liability (or loss relief claim) held by the claimants pending the determination of the dispute is an existing asset or possession for A1P1 purposes. So far as the money itself is concerned, that is affected by the argument as to whether it is payable to HMRC. As Vos LJ held in *APVCO 19 Ltd and others v HM Treasury & Anor* [2015] EWCA Civ 648 at [46]:
>
> "Of course, the money is a possession in one sense, but it is a possession impressed with an arguable claim by HMRC, which prevents it being properly regarded as a possession for A1P1 purposes."
>
> Both sides claim to be entitled to the money but nobody yet knows to whom it properly belongs, and the mere fact that it is held for the time being by the taxpayer does not make a difference.'

[179] A little later in her judgment (at [125]) Simler J said:

> '[125] Furthermore, the decision in *APVCO 19 Ltd and others v HM Treasury & Anor* is binding, clear authority that legislation can remove without any interference with possessions, a taxpayer's argument that had existed previously (that HMRC was not entitled to the money)

> with the result that tax is payable and the money in the taxpayer's hands must fund it. In those circumstances it is difficult to see why a different result should follow from the lesser step of legislation requiring the disputed sum to be paid on account of the tax (but without finally determining liability) pending resolution of the dispute.'

[180] It is with the last sentence of the last quoted passage from the learned Judge's judgment that I hesitate to express complete agreement.

[2018] STC 462 at 507

[181] In *APVCO* legislation had (in two stages) brought about an end to any argument as to whether liability to stamp duty land tax ('SDLT') had been incurred by certain transactions entered into by the claimants. The legislation had put the disputed question beyond argument in the Revenue's favour and the tax was undoubtedly due. The question was whether that retrospective action amounted to the deprivation of a possession. It was held that it was not.

[182] The impact of this decision is rendered somewhat difficult because there were slight differences in the reasoning of the learned Lords Justices and the learned Lady Justice who decided the case. Our present problem was not before them. The differences between the members of the court are summarised by Black LJ (as she then was) in para [80], where she said this:

> '[80] The routes by which Floyd LJ and Vos LJ conclude that the appellants have failed to establish an A1P1 claim are, I think, subtly different. Vos LJ focuses on whether the money can be said to be a possession. In essence, he considers that the fact that, at the relevant time (namely at the time of the legislative changes), it was impressed with an arguable claim by HMRC prevents this. Floyd LJ focuses on whether, assuming the money is properly classed as a possession, the appellants have been deprived of it, and concludes that they have not established this. If they are right in their argument about the efficacy of their scheme, they have indeed been deprived of it by the legislative changes; if not, they were going to lose it anyway by operation of the existing statute. Arguably being right is not sufficient to establish the required deprivation.'

Thus, Black LJ agreed with both judgments.

[183] In agreeing with Vos LJ on the 'possessions' point, therefore, it seems that Black LJ summarised the ratio of the majority decision by saying that because, at the time of the legislative changes, the claimants' money was impressed with an arguable claim by HMRC it was prevented from being a 'possession'.

[184] Under the APN/PPN regime, however, notices can be served in some cases even before it is known whether a claim (arguable or otherwise) exists at all, simply because HMRC has started an enquiry. As Simler J said (at [125] vide supra), in *APVCO* the taxpayers' argument that the money was not payable had been entirely removed by statute with the result that the tax *was* payable and the money in the taxpayers' hands had to fund it. HMRC's claim to the money was not only arguable, it was unimpeachable. That is not the case where a sum may be required to be paid 'upfront', whether or not there is a liability and whether or not there is even a *claim* to the money as tax. This seems to me to be a rather different situation.

[185] As I have said above, however, I am in no doubt that, even if the APN/PPN regime does engage A1P1, the interference is suitably provided by law and is a proportionate one in all the circumstances. It is not necessary, therefore, to decide issue (1) finally, and I have said sufficient to explain my view that that issue is

not concluded, one way or the other, in a case of this type, by any of the authorities cited to us.

Issue (2)

[186] It was argued for the appellants that Simler J was wrong to decide that the interference with possessions (if such it was) was sufficiently foreseeable to be 'prescribed by law' and to ignore its retrospective consequences. It was said

that exceptional justification was required for measures which were retrospective in operation. Further, it was said that the notice regime imposed after the schemes had been adopted disabled the appellants from being properly able to foresee the consequences of their decisions at the times that they were taken. Reliance was placed upon *Vistins v Latvia* (2014) 59 EHRR 817 and *Hentrich v France* (1994) 18 EHRR 440 in the ECtHR. Criticism is levelled at the basis upon which the judge distinguished these authorities.

[187] The judge, undoubtedly with accuracy, summarised (at [128]) the applicable principles underlying this aspect of A1P1 cases enunciated in the judgment of Lord Reed in *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46, (2011) 122 BMLR 149, [2012] AC 868 (at [116] et seq). The passage from Lord Reed, which the learned judge had in mind, was no doubt that at [119]–[120] as follows:

> '[119] The Strasbourg court has itself interpreted conformity to the rule of law as requiring, amongst other things, that the relevant domestic law must be adequately accessible and sufficiently precise to be foreseeable in its effects (*Lithgow v UK* (1986) 8 EHRR 329, para 110), and that it should not operate in an arbitrary manner: *Hentrich v France* (1994) 18 EHRR 440, para 42. The criteria of accessibility and foreseeability are not absolute; nor is the prohibition of arbitrariness incompatible with the existence of discretion. The court has often said that the effect of these requirements in a given situation depends upon the particular circumstances: see eg *Sunday Times v UK* (1979) 2 EHRR 245, para 49.
>
> [120] In the criminal sphere, the Convention allows only a limited scope for retroactive legislation: the principles encapsulated in the maxim nullum crimen sine lege, nulla poena sine lege are reflected in art 7. The position is different in the civil sphere. Changes in the law, even if resulting from prospective legislation or judicial decisions, will frequently and properly affect legal relationships which were established before the changes occurred. Changes in family law, for example, are not applicable only to families which subsequently come into existence, but affect existing families, even although the changes may not have been foreseeable at the time when individuals married or had children. Similarly, a person who buys a house, or a company that employs staff, cannot expect the law governing the rights and responsibilities of homeowners or employers to remain unchanged throughout the period of ownership or employment. The same point could be made in respect of other types of right and obligation of a civil character. As Lon Fuller observed in *The Morality of Law* (1969, revised edn) p 60: “If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.” '

[188] 'Adequately accessible', 'sufficiently precise to be foreseeable in effect', 'not arbitrary'; and that the prohibitions should not be incompatible with A1P1 because of the existence of a discretion; the effect of the requirements should depend upon the particular circumstances of each case: all this is clear. In my judgment, what the statutory regime enacts here is entirely accessible, clear and foreseeable in effect; the discretion does not render the scheme arbitrary, even if its application in a given case may be so. In this

respect, I bear in mind also the decision of the Supreme Court in *R (on the application of T) v Chief Constable of Greater Manchester, R (on the application of JB) v Secretary of State for*

the Home Dept [2014] UKSC 35, [2014] 4 All ER 159, [2015] AC 49 and of this court in *P v Secretary of State for the Home Dept* [2017] EWCA Civ 321, [2017] 2 Cr App R 123.

[189] The learned judge was correct, in my view, in dealing with the argument on retrospectivity. It is untenable to suggest as the appellants did (and do) that, if they had known that participating in the scheme (notifiable under DOTAS) meant that money might be re-claimed from them at short notice prior to assessment, would have made it unlikely that they would have participated. The risk for the taxpayers was whether they would have to repay at all, not when they might have to repay. It was known to them that the matter was not irrevocably closed by the repayments that they received and that provision ought wisely to have been made against a demand that could have arisen at any time.

[190] I have no hesitation is rejecting the appellants' appeal grounds on this issue.

Issue 3

[191] I turn to the related issues of the necessity for, and the proportionality of, the measures. Some of the arguments raised under this head overlap with issues raised as to rationality/proportionality and natural justice at common law, which are covered by Arden LJ in her judgment, with which I agree. In this part of the judgment, I address the points that are discrete to the issue under A1P1.

[192] In their skeleton argument on this issue the Rowe appellants raise three specific points in rebuttal of HMRC's justification of the APN/PPN schemes. First, they say that the legislation cannot produce the disincentive to enter into avoidance schemes as claimed by HMRC. This is because these appellants entered into the schemes well before the APN/PPN scheme was enacted. Secondly, they say that it is/was unnecessary and disproportionate to require payment of sums which had not even been assessed as owing and there is no right of appeal or means of showing that the sums are not due. Thirdly, they say lengthy time has passed since the schemes were entered into and the repayments were made. In such circumstances, it is unjust (and ergo, disproportionate) to require the appellants to realise assets and/or be put in danger of bankruptcy in pursuit of what may turn out to be a temporary advantage of cash flow.

[193] The Vital-Nut appellants contend that in their cases, there has been no conclusion as to whether any tax is owed and HMRC have been 'indolent' in pursuing their enquiries. There has been no 'cash flow' advantage to the appellants as HMRC contend; it is simply a case where a potential expense incurred has been properly deducted from a tax liability and there is only a cash flow advantage if the deduction was impermissible.

[194] In oral argument, which Ms Simor QC presented for both sets of appellants on this issue, it was submitted that HMRC had not taken into account the element of retrospectivity in the claims made by the notices. The search simply for registered schemes under DOTAS amounted to an arbitrary application of the advance payment scheme provided for by the legislation and that HMRC could not justify service of such notices on the basis, as they sought to do, by the fact that they had had an 80% success rate in contesting the validity of such schemes before the Tribunals.

[195] In my judgment, there are wide and narrow answers to these submissions.

[2018] STC 462 at 510

[196] The wide answer is that given by Simler J, with reference again to Lord Reed's judgment in *AXA* at [126]. Lord Reed's statement of the principle was this:

> **'The proportionality of the interference**
>
> [126] In order for an interference with possessions to be compatible with A1P1, it must not only be lawful and in the general interest, but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. This involves an assessment of whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights: the individual should not be required to bear an individual and excessive burden: *James v UK*, para 50. In making that assessment at the international level, the Strasbourg court has allowed national authorities a wide margin of appreciation: see eg *JA Pye (Oxford) Ltd v UK* (2007) 46 EHRR 1083, para 75).'

[197] As Simler J also pointed out (at [139]), in areas of taxation legislation and policies, the contracting states have a wide margin of appreciation: *Bulves AD v Bulgaria* (Application 3991/03) [2009] STC 1193 (at para 63). In such matters, the public authority is better placed than the courts to determine how community interests and those of the individual are to be balanced: again *James v UK* (1986) 8 EHRR 123 (at para 50). Tax measures are entitled to particular deference: see per Barling J in *Allan v Revenue and Customs Comrs* [2015] UKUT 16 (TCC), [2015] STC 890.

[198] In my judgment, Simler J was also correct in distinguishing the two cases in which the ECtHR had found that the state's margin of appreciation had been exceeded in this area, viz *Hentrich v France* (supra) and *R Sz v Hungary* [2013] ECHR 41838/11: see the judgment on appeal at [142].

[199] I consider that Mr Eadie QC for HMRC was correct to stress that this case concerns a scheme enacted by primary legislation, after public consultation. The legislation specifically identifies 'DOTAS arrangements' as one of the triggering conditions for giving a notice. The legislation was enacted to meet a specific public interest issue, namely the pursuit of the closing of technical loopholes in the general taxation legislation.

[200] I think it is also material in this context to remember the second paragraph of A1P1 itself, already quoted above. The paragraph specifically envisages the control of the use of property to secure the payment of taxes. Legislation which regulates where money sits, in cases where tax questions are in issue, is hardly likely to be arbitrary. I agree in this respect with what Green J said at [121] in his judgment in *Walapu*.

[201] Turning to the narrow reason for rejecting the appellants' arguments, I consider that on the facts of the present cases, it cannot be said that the service of the notices was disproportionate.

[202] In the case of the Rowe appellants, as I have summarised, they say that no proportionate end could be achieved in their case by way of disincentive to enter such schemes, as they had entered their schemes before this legislation was enacted. Arden LJ has addressed this point in the context of the common law issue as to the statutory purpose of any PPNs in their case and it seems to me that the answer to this point under the Convention is the same. It is not disproportionate to decide that the economics of marketed tax avoidance schemes should be altered in the way that PPNs seek to achieve. The large scale

tax avoidance, which the schemes seek to achieve, is a legitimate target of legislation such as this and I can see nothing disproportionate in treating the normal run of DOTAS schemes in the same manner, whatever the date of the inception of any particular scheme. The appellants had the benefit of the initial repayments, with the knowledge that the claims might later be challenged. The legislative object remains the same whether or not the scheme came into being before or after the advance payment provisions were enacted. It seems to me that whether or not the individual scheme participant could have been under a disincentive to enter into the scheme by the possibility of a demand of an advance payment is nothing to the point.

[203] As to these appellants' second point, similarly the impact of this advance payment scheme is part of a proportionate endeavour by the legislature to deal with cases which are acknowledged to be on the boundaries of efficacy and which potentially deprive the public purse of significant sums for lengthy periods. The complaint about the absence of a right of appeal in this context is merely a repeat of the arguments as to procedural fairness which are no different in a Convention context from such considerations when viewed through the prism of the common law which Arden LJ has also addressed. The arguments and the answers to them seem to me to be essentially the same.

[204] The final argument centres upon the passage of time between the initial loss claims and the repayments on the one hand and the issue of the notices on the other. For my part, subject to issues of hardship (which HMRC would have to consider conscientiously and rationally in any individual case) there is nothing disproportionate in using a new statutory power, when it becomes available, even after a lapse of time. Any potential sudden need for a taxpayer to realise assets, with a resultant real hardship, or a risk of bankruptcy could not be simply swept aside as a consideration for HMRC when representations are made to them, when they are exercising the functions which Arden LJ has analysed. If such 'hardship' representations were ignored or rejected irrationally, a public law challenge would lie. Subject to such considerations, I do not see that a relatively late issue of a PPN would be disproportionate to the legitimate aim sought to be achieved.

[205] In my judgment, Simler J analysed this issue entirely correctly and in stating my own short reasons for reaching the same view, I am not in any way wishing to detract from her analysis.

[206] Turning to the Vital-Nut appeal, the point made was that the issue of the notices was disproportionate because HMRC's approach to the cases had been 'indolent' in taking the entire period from 2010 up to and including the hearing before Charles J in May 2016 and up to his judgment in July 2016 to issue closure notices and thereby trigger appeals to the First-tier Tribunal. In formal terms, there had been no decision at all by HMRC as to whether, in their view, the appellant's claims to relief from corporation tax in respect of payments made to EFRBS were proper or not. The point of statutory construction as to whether these payments were 'qualifying benefits' was thought by the judge not to be complicated in principle and, on one occasion (on the handing down of his judgment on 19 July 2016) he expressed the view that the appellant's argument in the construction point was 'quite a good one' and was 'not a rubbish point' while HMRC's interpretation had 'some difficulties if you just read the words': see Transcript p 6B-C (CB2/15/685).

[207] Charles J was clearly unhappy with the delay in the case (see paras [52]–[58] of his judgment) and he was dissatisfied with the explanations

given to him at the hearing on 19 July 2016. At the hearing before us the parties had rival contentions as to where fault (if any) lay as between them for what had happened (or, perhaps more accurately, what had not

happened). There was some evidence on the point available to Charles J, including a witness statement from Ms Elizabeth Marshall of HMRC 'Counter Avoidance Directorate'. Further new evidence was generated on the point for the purposes of the appeal, to which Arden LJ has referred to in her judgment. As she records, we saw this new material de bene esse, but Arden LJ takes the view (and I agree) that it should not be admitted formally as evidence on the appeal. On the basis of these various witness statements, the parties addressed submissions to us and, in particular, Mr Eadie sought to dispel the criticisms which Charles J had made of his client: see the Transcript for Day 3 (20 July 2017) pp 60–77.

[208] In the circumstances, given the fact that in spite of his dissatisfaction at the delay as it appeared before him, Charles J dismissed the judicial review claim and since we have not had any fuller picture of the underlying facts, I do not think that it would be right to find now, on the ground of delay, that the issue of the notices in the Vital-Nut case was a 'disproportionate' exercise of the statutory power which infringed the appellant's Convention rights.

Article 6

[209] In the Rowe cases, Simler J held (at [151]) that the money due under a PPN was in substance 'tax' and thus excluded from the ambit of art 6: *Ferrazzini v Italy* [2001] STC 1314, (2002) 34 EHRR 1068. She quoted the judgment at para 29, which included the following:

> '[150] …
>
> "The court considers that tax matters still form part of the hard core of public authority prerogatives, with the public nature of the relationship between the taxpayer and the tax authority remaining predominant. Bearing in mind that the convention and its protocols must be interpreted as a whole, the court also observes that art 1 of Protocol 1, which concerns the protection of property, reserves the right of states to enact such laws as they deem necessary for the purpose of securing the payment of taxes (see, mutatis mutandis, *Gasus Dosier-und Fordertechnik GmbH v Netherlands* (1995) 20 EHRR 403 at 434, paragraph 60). Although the court does not attach decisive importance to that factor, it does take it into account. It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer." '

[210] Having said that it was the substance that mattered rather than classification, she continued at [152] as follows:

> '[152] That rationale applies equally to a PPN. FA 2014 Sch 32 para 6(3) provides that the accelerated partner payment is to be treated as a payment on account of the understated partner tax; and to the extent that the understated partner tax is paid before the accelerated partner payment, the latter is treated as having been paid to the same extent at the same time. The amounts due are as a matter of substance, payments on account of tax.'

She noted further that there was a statutory right of appeal against any penalty imposed under the 2014 Act and that this satisfied any art 6 obligation in that regard.

[211] In addition, the judge said that, in any event, persons issued with PPNs had recourse to judicial review which satisfied the art 6 right in any event: see *Runa Begum v Tower Hamlets London BC* [2003] UKHL 5,

[2003] 1 All ER 731, [2003] 2 AC 430.

[212] The arguments presented by the appellants on these points were short: see the skeleton arguments, in the Rowe appeals, paras 54–57 and in the Vital-Nut appeal, paras 75–78. The oral submissions were equally short: Transcript Day 2 (19 July 2017) pp 112–116.

[213] It was argued that the judge's finding that the advance payment claims were in substance claims for tax contradicted HMRC's repeated insistence that the demands were not demands for tax. Reference was made to the government's response to its consultation of March 2014 at paras 3.50, 3.53 (sic, there is no 3.53) and 4.7 and to a document called Budget 2014 Policy Costings at Column 492. These passages read respectively:

> (1) '3.50. As noted already, this measure affects taxpayers who have used avoidance schemes in the past, but it is not a retrospective change to the substance of the issue. The measure creates a new and prospective obligation after Royal Assent and relates to who holds the money during the dispute, rather than whether the tax scheme is effective or not.'
>
> (2) '4.7. The Government rejects the contention that this is retrospective legislation. Whilst it imposes a new obligation on certain taxpayers that they did not expect when they entered into these schemes, the Government is not changing the legislation that determines whether the scheme used is effective. These proposals change the circumstances where tax is held by the Exchequer during a dispute and puts all taxpayers in dispute on an avoidance scheme on an equal footing.'
>
> (3) 'Col. 492. Clause 216 sets out what happens when a notice is given during an open inquiry. The accelerated payment is a new form of payment. It will be treated as a payment on account of the final liability, which means that interest will stop running on the amount paid from the date that the taxpayer pays it over. This is emphatically not any form of determination of the final tax liability, which will still be subject to all existing appeal rights.'

[214] For my part, I would not wish to extend the *Ferrazini* principle further than necessary in removing from the subject the protection of art 6. The notices are not a claim to tax as such. However, I consider that HMRC are correct in their contention that the availability of the procedure for the making of representations against the issue of notices, backed by judicial review of any decision made, is sufficient to satisfy the requirements of art 6 in the present case. The procedure is not dissimilar to the review procedure in housing cases, backed by judicial review, which was held to satisfy the requirements of the article in the *Runa Begum* case. I agree with Simler J on this point and am unable to see why the judicial review remedy is not satisfactory for present purposes.

[215] As I have noted above, this ground of appeal formally raises the point that the issue of the notices infringes art 7 of the Convention (No punishment without law). Article 7(1) provides as follows:

> '1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time where it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

[216] It may be that this argument was meant to comprehend the objection to the issue of the notices based upon the possibility of penalties being imposed for non-payment of the sums demanded. In the Rowe appellants' skeleton argument, in the section dealing with art 6, the following appears in para 57:

> '57. Further and in any event, since penalties are payable for non-payment of amounts set out in PPNs, Article 6 necessarily applies in this regard too, it being well established since *Bendenoun v. France* (1994) 18 EHRR 54 that proceedings relating to tax disputes are "criminal" if tax fines, surcharges, etc., with a deterrent and punitive purpose are imposed or even if there is a risk that they may be imposed Article 6 applies: *Jussila v. Finland*: Application No. 73053/01 [2009] STC 29, judgment 23 Nov 2006. The Judge was wrong to find that the possibility of appealing against these penalties was sufficient: §153.'

[217] At [153] of her judgment Simler J answered this point as follows:

> '[153] Save so far as penalties are concerned it is not even arguable that criminal charges are involved. So far as penalties are concerned however, there is a statutory right of appeal to the FTT against any penalty under FA 2014 and Sch 32 para 7 read with s 226 Finance Act 2012 and paras 9–18 of Sch 56 FA 2009. This satisfies any art 6 obligations in that regard.'

[218] As I have said, however, no further argument was addressed to us on the appeal concerning art 7. However, as a matter of principle, it does not seem to me that the APN/PPN scheme infringes that article. The only circumstance in which a penalty arises, as I understand it, is upon failure to comply with the requirements of a notice. Such a penalty would arise from an omission known to attract the potential for penalisation at the time when it occurred; there is no retrospective penalty for an omission at a time when the relevant law was not in force.

[219] For these reasons, I would reject the Convention ground of these appeals.

Ground 6: The Designated Officer Ground

[220] I turn now to the 'designated officer' ground of appeal, as it affects the Vital-Nut appellants. In her judgment, Arden LJ has covered much of this ground in paras [56]–[69] and I agree respectfully with her analysis of the 'designated officer's' function. In particular, I agree with what she says in para [62] as to the requirement for the designated officer to be positively satisfied that the scheme under consideration is not effective in the manner claimed by the taxpayer. I also agree that the test formulated in para [35] of the judgment of Charles J reverses the relevant onus. I would add that I cannot see that the statutory requirement of a 'designated officer' should mean that that officer should be a mere cipher. He/she must be there to exercise a function and to shoulder responsibility, ie a responsibility to be satisfied that on all the information with which he is furnished from the various sources available to

him that the scheme in issue does not provide the tax advantage claimed by the taxpayer and that the sum to be determined for the purpose of a notice is, therefore, a particular amount. Otherwise, the statutory requirement of a designated officer would serve no purpose.

[221] The factual background to the dispute between HMRC and the Vital-Nut appellants, for the purposes of this ground of appeal, can be shortly stated.

[222] In the Vital-Nut case, unlike in the Rowe cases, HMRC had not assessed the claimants to tax in respect of the disputed sums. Thus, no tax as such was due. However, the question was whether the appellants' liability to corporation tax had been properly calculated. The issue was the correct treatment of employer financed retirement benefit schemes (known as 'EFRBS') and of contributions made by employers into such schemes. In their self-assessment calculations, the appellants had deducted the amount of contributions made to EFRBS in computing their taxable profits. The question was whether such payments constituted 'qualifying benefits' in circumstances where the payments were not subject to National Insurance Contributions or PAYE when made but would be likely to become payable when payments were made out of the funds to employees.

[223] It is clear from the facts of the Vital-Nut case as from the argument of HMRC before Charles J that HMRC issued the notices in that case oblivious to the proper operation of the statutory procedure as Charles J held it to be and as, before us, they now concede it to be.

[224] In para [29] of his judgment Charles J paraphrased s 220(3) of the Act (which requires the necessary payment to be determined by the designated officer). As Charles J noted the requirement of that subsection is case specific in identifying the payment to be demanded in an individual case and it is for the designated officer to determine that amount on the facts of each case. However, HMRC argument below was summarised by the judge in paras [30]–[33] of his judgment as follows:

> '[30] This is clearly a requirement for each APN and so is case specific. Here the sum is relatively easy to calculate because it is equal to the relief claimed by reason of the payment of what are said by the taxpayer to be “qualifying benefits”.
>
> [31] At its highest the Revenue argue that the Notice Requirement requires only a calculation of the asserted advantage and that, subject to the qualification referred to in the next paragraph, an APN can be validly given without consideration of whether, on the information it has, the Revenue and / or the designated officer consider that the claim for the tax advantage (the relief) is available.
>
> [32] The qualification is that if the Revenue or the designated officer is of the view, on the information they have, that the claim to the tax advantage (the relief) is available under the taxation legislation an APN cannot properly be given.
>
> [33] So, at its highest and subject to that qualification, the Revenue argues that a valid APN can be given without any view being taken, on the information available to the Revenue, whether a claim for relief under a DOTAS arrangement is lawful and available to the taxpayer.'

[225] The judge rejected that argument, in my view rightly. He formulated his own understanding of the necessary test in his para [35] which HMRC accepted before us as being correct. As Arden LJ has said, that concession did not go quite far enough.

[226] The judge then applied the test that he had formulated in order to decide the question that he posed in para [78] of his judgment in these terms:

> '[78] That leaves the question whether the designated officer has failed to determine to the best of his information and belief that he does not accept that the Claimants are entitled to the relief from corporation tax that they claim.'

He answered the question at paras [79] and [80]:

> '[79] On the assumption that the designated officer has not himself analysed the point of statutory construction I am nonetheless of the view that under the system put in place by the Revenue he should be, and in any event is entitled to be, informed by and act in accordance with:
>
> (i) the published view of the Revenue that the Claimants' underlying argument of statutory construction is not correct, or at least is not accepted as being correct, and
>
> (ii) the present intention of the Revenue to argue the point.
>
> [80] So, although I accept that the designated officer is a particular and defined individual who has a particular statutory role, on the facts of these cases there is nothing in the point that he has not carried out a personal analysis of the relevant point of statutory construction. This is because he can act on the view and intention of the Revenue referred to in the last paragraph and so on the basis that, on the information that the Revenue and he have, the Claimants' claims for relief from corporation tax are disputed in at least the sense referred to in paragraph 35 above.'

[227] In so far as there is a difference between Charles J and myself on the application of our rather different test to the facts of the Vital-Nut case, it must follow from HMRC's understanding of the exercise to be carried out by the designated officer, at the time of the issue of the notice, that one cannot be confident that the officer in these cases reached the required independent view.

[228] However, in my judgment, given the evidence considered by Charles J which led him to his own conclusion on this point, I consider that it is highly likely that the same decision would have been reached by the designated officers in these cases, even if the correct test had been applied by him/her in specifying the sum to be paid.

[229] The battle lines of dispute were well-drawn and HMRC's view upon that dispute was firmly held: see the publication called 'Spotlight 6: Employer Financed Retirement Benefits Scheme (6 August 2010). The dispute has at all times been between a literal and a purposive approach to the construction of the legislation. While I share the view of Charles J that it is surprising that the short point of statutory construction in dispute between the parties has not yet been forced to a solution, I am confident that a similar decision as to the effectiveness of the scheme would have been taken by the designated officer(s) in these cases as to the sums to be demanded in the notices. Even if the process for determination of the demanded sums cannot be positively demonstrated to

have been properly carried out, I would, therefore, accept HMRC's submission that relief should be refused pursuant to s 31(2A) of the Senior Courts Act 1981.

Conclusions on Grounds 5 and 6

[230] For these reasons, I would reject these two grounds of appeal.

Thirlwall LJ.

[231] I have had the benefit of reading the judgments of Arden and McCombe LJJ in draft. I agree with both judgments save that I do not consider it necessary to express a view as to whether the provisions of the Finance Act 2014 in respect of the issue of APNs and PPNs fall within art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

Appeals dismissed.

Rakesh Rajani Barrister.