[2022] UKFTT 103 (TC)

TC 08434/V

INCOME TAX AND NATIONAL INSURANCE – APNs – penalties and surcharges – lead cases for 500 appellants –HMRC failure to consider some or all of the representations made – whether this failure meant that the time limit for paying the APNs had not started to run, so that there could be no penalties or surcharges – HMRC change of position during hearing – position of other appellants – role of designated officer - whether appellants believed their judicial reviews would succeed because of failures by designated officer – whether believed no obligation to pay APNs because of interim relief – whether belief objectively reasonable

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: TC/2017/08284
TC/2018/05396; TC/2016/01942
TC/2016/04789

BETWEEN

EXCLUSIVE PROMOTIONS LIMITED
MARK FOX **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ANNE REDSTON
MS CELINE CORRIGAN

The hearing of these appeals took place on 5-8 October 2021 and 22 November 2021 by video.

Prior notice had been published on the gov.uk website, with information about how representatives of the media and/or members of the public could apply to join the hearing remotely to observe the proceedings. It was therefore held in public.

Mr Conrad McDonnell and Mr Sam Brodsky of Counsel, instructed by Reynolds Porter Chamberlain LLP trading as RPC, for the Appellants

Mr Alan Hall and Mr Matthew Cawley, Litigators of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

1. Exclusive Promotions Ltd ("Exclusive") and Mr Fox ("the Appellants") received Accelerated Payment Notices ("APNs") issued by HM Revenue & Customs ("HMRC") under Finance Act 2014 ("FA 2014"), Part 4, Chapter 3, and/or under Sch 2 to the National Insurance Contributions ("NIC") Act 2015, and were subsequently issued with penalties and/or surcharges for failing to pay their APNs by the payment date. The Appellants appealed those penalties and surcharges to the Tribunal.

2. Exclusive and Mr Fox are represented by Reynolds Porter Chamberlain LLP ("RPC"), who also act for around 500 other appellants in a similar situation ("the other appellants"). The Tribunal did not issue a direction under Rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") under which Exclusive and Mr Fox would have been "lead" cases and the other appellants "follower" cases. Instead, the other appellants' appeals were stayed pending the outcome of the Appellants' appeals, with the expectation that this Decision would provide relevant guidance. Although this Decision is only legally binding on the parties to this case, we have summarised at §31 how our conclusions may affect the other appellants.

INTRODUCTION AND SUMMARY

3. Exclusive had entered into tax planning arrangements known as the Partly Paid Share Scheme (the "PPS Scheme"). Mr Fox had entered into two tax planning arrangements, known as "Penfolds" and "Hamilton", together "the Schemes". Exclusive was issued with two APNs, and Mr Fox with three APNs.

4. Both Exclusive and Mr Fox challenged the APNs by issuing judicial review ("JR") claims in the High Court. Exclusive was the lead claimant in the Exclusive JR; Mr Fox was a claimant in a separate JR in which the lead claimant was Ms Hilary Duggan ("the Duggan JR").

5. HMRC issued both Appellants with penalties for failure to pay the tax and/or NICs on the APNs by the due dates. In relation to the APNs for the year 2009-10, HMRC also issued Mr Fox with surcharges under Taxes Management Act 1970 ("TMA"), s 59C. The Appellants appealed the penalties/surcharges to the Tribunal on broadly the same three grounds, although their factual positions were different.

Issue One: whether the time limit for paying the APNs had started to run

6. The normal payment date for an APN is 90 days after it has been received by the taxpayer. However, FA 2014, s 222 provides that where a taxpayer makes "representations" to HMRC within those 90 days, HMRC have a duty to consider the representations and issue a determination; the APN payment date is then the later of (a) the 90 days and (b) 30 days after notification of the determination. If the taxpayer does not pay the APN by the payment date, he is liable to a penalty/surcharge.

7. In outline, the Appellants' first ground of appeal was they had sent representations, but:

   (1) HMRC either failed properly to consider those representations (Exclusive), so the document issued by HMRC was not a valid determination, or HMRC had entirely refused to consider the representations (Mr Fox) and so did not issue a determination at all;

   (2) as a result, the payment date for the APNs had not been triggered, and

   (3) the penalties/surcharges were invalid.

8. For the reasons explained below, we rejected this argument in relation to Exclusive, but accepted it in relation to Mr Fox. However, our findings as to Mr Fox were *obiter,* because HMRC withdrew the related surcharges in the course of the hearing, see §286ff.

Exclusive's position

9. FA 2014, s 221(3) requires a designated HMRC officer ("Designated Officer") to determine the amount of the APN to the best of that officer's information and belief. It was clear from the Court of Appeal's judgment in *R (oao Rowe) v HMRC* [2017] EWCA Civ 2105 ("*Rowe*") that the Designated Officer had a duty diligently to consider the representations made before deciding whether to confirm the APN.

10. Exclusive's representations included challenges as to whether the Designated Officer had considered the amount of the APN. HMRC ignored those representations on the basis that they fell outside the matters on which a taxpayer was allowed by s 222 to make representations. However, in *R (oao Mrs Archer) v HMRC* [2019] EWCA Civ 1021 ("*Mrs Archer*") the Court of Appeal held that s 222 should be given "a broad and non-technical construction". We therefore agreed with Mr McDonnell that HMRC should have considered Exclusive's representations about the Designated Officer.

11. We went on to find that, as a result, HMRC, a public body, had made a determination after having "refused to take into account or neglected to take into account matters which it ought to take into account", see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680 ("*Wednesbury*"). Thus, HMRC had made a decision which was flawed in a JR sense.

12. We considered whether the Tribunal had the jurisdiction to conduct a review of the flawed determination, so as to decide whether it should be upheld or set aside. Having considered the relevant case law, we decided that the Tribunal did not have the necessary jurisdiction. If Exclusive wanted to challenge HMRC's determination on the basis that it was flawed, it could only do so by making a JR claim at the High Court.

13. We went on to consider what the position would be if we were wrong, and the Tribunal did have the relevant jurisdiction. Having considered *Rowe*, we decided that the decision would inevitably have been the same, even if HMRC had considered the Designated Officer ground, and thus the penalties would have been confirmed.

14. As a result, we dismissed this ground of appeal in relation to Exclusive.

Mr Fox's case

15. Both parties accepted that Mr Fox had written to HMRC after receiving his first two APNs. He also provided a letter relating to the third APN, but HMRC did not accept that this third letter had been sent to them, and we agreed, see §293ff. Issue One was therefore only relevant in relation to Mr Fox's first two APNs.

16. His letters about those APNs were headed "Representations regarding the accelerated payments notice ('APN') issued to me…". The text stated that the letters should "be treated as containing representations in respect of the APN for the purpose of section 222(2), Finance Act 2014" on the basis that the submissions made in his JR were "repeated here in their entirety". Mr Fox's purpose and intention were thus clear.

17. However, HMRC refused to accept that those letters as representations, and as a result, did not issue determinations. We agreed with Mr McDonnell that Mr Fox's letters did contain

representations within the meaning of FA 2014, s 222, and it followed that HMRC were required to issue a determination. Unless or until they did so, the time limit for paying the APNs had not begun to run.

18. On the second day of the hearing, 6 October 2021, HMRC agreed with the analysis set out above. They withdrew the surcharges, and said they would take the same approach with the other appellants who were in the same position. Mr Fox withdrew his appeals against the surcharges.

19. The hearing was adjourned part-heard for lack of time, and resumed on 22 November 2021. HMRC then unexpectedly changed their position. Mr Hall now submitted that Mr Fox's letters were not representations; HMRC was not required to issue determinations, and the surcharges had been validly issued. Although Mr Fox's surcharges had already been cancelled, HMRC rescinded their commitment to apply the same approach to the other appellants who were factually in the same position.

20. By the time Mr Hall had notified this change of position to the Tribunal, Mr McDonnell and RPC, Mr Fox's appeals against the surcharges had been withdrawn, so the Tribunal had no remaining jurisdiction in relation to his appeals against those surcharges. However, both parties asked us to set out the conclusions we would have come to had the appeals not been withdrawn in the middle of the hearing, and we have therefore done so. As explained above, we found that Mr Fox's letters *were* representations, and the related surcharges *were* invalid. Had Mr Fox's appeals against the surcharges not been withdrawn, we would have allowed those appeals.

Issue Two: whether genuine belief in success of JR was a reasonable excuse

21. Exclusive's director, Mr Nigel Jones, believed Exclusive's JR would succeed and the APNs would be set aside; Mr Fox similarly believed that the Duggan JR would succeed. The Appellants' second ground of appeal was that these beliefs provided a reasonable excuse for not paying the APNs by the payment dates.

Exclusive's case

22. Mr McDonnell submitted that Mr Jones believed that the APNs were invalid because they contained a "procedural error", namely HMRC's failure to consider the Designated Officer points; this was the reason he considered the JR would succeed, and his belief was objectively reasonable.

23. Mr Hall asked the Tribunal to reject this ground of appeal, because in *Beadle v HMRC* [2020] EWCA Civ 562 ("*Beadle*") the Court of Appeal had held that the alleged invalidity of an APN could not form part of a reasonable excuse defence to APN penalties. Mr McDonnell responded by relying on *Shieling Properties v HMRC* [2020] UKUT 175 (TCC) ("*Sheiling*"), in which the UT had distinguished *Beadle* and found that a procedural error could form the basis for an objectively reasonable excuse.

24. We refused this ground of appeal, for the following reasons:

(1) although the UT in *Sheiling* had said there were exceptions to the prohibition in *Beadle*, this was only the position where the procedural error was "obvious or gross", such as a misplaced decimal point;

(2) belief that the JR would succeed because of the Designated Officer point was not an "obvious or gross" error, and so could not form the basis for a reasonable excuse defence;

(3) in any event, although Mr Jones had a genuine belief that the JR would succeed, his belief was based on the expertise of his advisers, and not on any understanding of the merits of the claim, let alone any understanding of the Designated Officer point.

Mr Fox's case

25. We found as a fact that Mr Fox's belief that his JR had a more than 50% chance of success was not based on his APNs containing an "obvious or gross" error. We therefore rejected this ground of appeal for Mr Fox as well.

Issue Three: whether interim relief provided a reasonable excuse

26. Mr Fox had been granted "interim relief" by the High Court, as a result of which HMRC could not enforce the APNs unless or until they succeeded in the JR claim. Exclusive applied to the Court for interim relief, and the parties agreed a consent order on similar terms.

27. Mr McDonnell submitted that the purpose of interim relief would be undermined if taxpayers, who did not pay the APN in reliance on interim relief, were subsequently liable for penalties, and it was therefore objectively reasonable for Mr Jones and Mr Fox to believe they did not have to pay the APNs while their JR proceedings were still live.

28. We rejected this ground of appeal, because:

(1) Mr Jones's and Mr Fox's beliefs that their JRs would succeed were unrelated to interim relief; and

(2) the terms of the interim relief orders did not prevent HMRC from enforcing the APNs and any related penalties after the claimants lost their JRs; instead, the orders only prevented HMRC from enforcing the APN and any related penalties unless or until the relevant JR was determined against the claimant. Given those terms, It would have been objectively unreasonable for Mr Jones and/or Mr Fox to believe that interim relief protected them from penalties.

29. It appears from the Tribunal Bundle that the Duggan JR had not been determined at the time of the hearing, although neither party referred to this in submissions or during the hearing. Assuming this continues to be the position, Mr Fox's interim relief order remains in full force and effect, so that the penalty is not due and payable unless or until the Duggan JR is determined in HMRC's favour. If that JR were to succeed, or Mr Fox's APN were to be withdrawn by HMRC, the penalty would fall away.

Overall conclusion in relation to the Appellants

30. For the reasons summarised above, Exclusive's appeals against the penalties are dismissed, as are Mr Fox's appeal against his single penalty. Had Mr Fox's appeals against the surcharges remained live, we would have allowed those appeals.

Other appellants

31. On 19 February 2020, the Tribunal informed the parties that Judge Poole had concluded that the Rule 18 procedure was not appropriate, and the appeals of the other appellants would instead be stayed behind a small number of lead cases, which he later directed were to be Exclusive and Mr Fox. Judge Poole said that the hearing of these lead case appeals would:

> "ventilate all the relevant issues fully and provide the basis for a comprehensive decision which can provide guidance for the disposition of subsequent appeals; experience suggests that it is also likely to result in the settlement of a material proportion of the follower appeals by consent or withdrawal, as well as narrowing the remaining issues (with a corresponding shortening of hearings) in the appeals which continue to a final hearing."

32. We have therefore set out below by way of guidance how the decision in the Exclusive and Mr Fox cases would apply to other appellants.

No penalties because no "determination"

33. The normal payment date for an APN is 90 days after it has been received by the taxpayer. However, where a taxpayer makes "representations" to HMRC within 90 days after the receipt of an APN, HMRC has a duty to consider the representations and issue a determination; the APN payment date then runs from the later of the original 90 days and 30 days after the issuance of the determination. If the taxpayer does not pay the APN by the payment date, he is liable to a penalty/surcharge.

34. The Appellants' first argument was that as HMRC had not issued valid determinations, the payment date for the APNs had not been triggered, so there could be no penalties or surcharges.

35. We rejected Exclusive's appeal on this ground, because HMRC had considered the letters of representation, and we found that they had issued a determination. Although that determination was flawed, it was still a determination, and the Tribunal did not have the jurisdiction (broadly, that means "the power") to set it aside. As a result, the clock had started running and penalties could be charged.

36. The position was different in Mr Fox's case. HMRC refused to accept that his letters about the APNs contained representations, and so did not issue determinations. As a result, the clock had not started running for payment of the APNs, and no penalties or surcharges could be validly levied.

37. HMRC initially agreed with the analysis set out in the preceding paragraph. They withdrew Mr Fox's surcharges and agreed to take the same approach in relation to other appellants in a similar factual position as Mr Fox. However, HMRC later changed their position, see further §306ff. For the reasons explained in the main body of this Decision, we concluded that HMRC were right to cancel the surcharges, and wrong to change their view.

38. Once HMRC have considered the reasoning set out in this Decision, they may decide to revert to their earlier position, and cancel penalties/surcharges on other appellants who are in a similar position to Mr Fox.

Reasonable excuse arguments

39. A person does not have to pay a penalty if he has a "reasonable excuse" for failing to pay the APN by the payment date. A reasonable excuse can include an objectively reasonable belief that something is the position.

40. We considered and rejected the following reasonable excuse arguments:

(1) Trust in the lawyers: we did not agree that a person had a "reasonable excuse" because he trusted legal advice that there was a more than a 50% chance of his JR

succeeding. This conclusion is consistent with the judgment of the Court of Appeal in *Beadle*.

(2) Designated Officer: we considered whether a person had a "reasonable excuse" because he believed his APN contained a "procedural error", namely that it had been issued without a Designated Officer first properly considering whether or not the APN was correct, and his JR would succeed for that reason. We found that neither of the Appellants held such a belief, and in any event this was not the type of "obvious or gross" procedural error which could provide a reasonable excuse in for not paying an APN by the payment date.

(3) Interim relief: The term "interim relief" means that the High Court had agreed that a claimant did not have to pay the APNs until after the final determination of the related JR. We considered whether it was objectively reasonable for a person to believe that interim relief protected them from penalties if they lost the JR. We found that neither Appellant held that belief, and it would also not be objectively reasonable for a taxpayer to believe interim relief meant that they would not be liable to penalties, because the terms on which the relief had been granted were that HMRC was prevented from *enforcing* APNs and penalties while the JR was in progress; but if a claimants lost the JR, the order allowed HMRC to collect penalties previously issued.

Guidance

41. We repeat that paragraphs §31-40 constitute guidance which is not binding on the other appellants or on HMRC.

THE EVIDENCE

The documents

42. The Tribunal was provided with a main Bundle of documents and a small supplemental Bundle, both supplied by RPC on behalf of the Appellants (together "the Bundle"). The Bundle included:

(1) correspondence between the parties and between the parties and the Tribunal;

(2) a determination under Reg 80 of the PAYE Regs, and two decisions under s 8 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999, all of which were issued to Exclusive;

(3) the APNs and related penalty/surcharge notices for the Appellants;

(4) the Exclusive JR claim form under reference CO/4963/2016, and related documents;

(5) the Duggan JR claim form under reference CO/2784/2015, in which Mr Fox was a claimant, and related documents;

(6) Exclusive's corporation tax return and statutory accounts for the accounting period ended 30 April 2013; and

(7) Mr Fox's self-assessment tax returns for the tax years 2009-10 and 2010-11.

43. During the second day of the hearing, Mr McDonnell handed up a document from Mr Fox headed "representations regarding the accelerated payment notice ("APN") issued to me in relation to scheme reference number 23237378" ("the Third Letter"). A related email was served by RPC on 18 October 2021. Mr Hall agreed that the Third Letter and related email

should be admitted into evidence, but asked that the Tribunal find that the former had never been served on HMRC, which we consider at §293ff below. We admitted these documents.

44. The hearing was adjourned part-heard. On 25 October 2021, HMRC filed and served a copy of "Spotlight 17" entitled "Employment Benefit Schemes using fettered payments". The hearing recommenced on 22 November 2021, and on the same morning, HMRC filed and served a supplementary bundle which included two HMRC "Designated Officer authorisation" documents relating to Mr Fox, and one relating to Exclusive. Mr McDonnell did not object to the admission of those documents, and the Tribunal agreed that they be admitted into evidence.

The witness evidence

45. Three witnesses gave evidence, Mr Fox, Matt Hall[1] and Mr Jones.

Mr Fox

46. Mr Fox provided a witness statement dated 30 April 2021. On the first day of the hearing, he gave oral evidence-in-chief led by Mr McDonnell, and Mr Hall began his cross-examination. Mr Fox remained in the witness box at the close of that day's proceedings, with cross-examination expected to continue the following day, followed by re-examination.

47. However, for the reasons explained at §286ff, Mr Fox did not continue to give evidence when the hearing resumed. He instead withdrew from the witness box and did not participate further in the proceedings. In particular, he gave no evidence about the Third Letter, see further §291-§292 and §300(2). As a result of his withdrawal only part of the evidence in his witness statement was challenged, but Mr Hall did not seek to argue that the remaining paragraphs should not be accepted. We found Mr Fox to be an honest and credible witness, who answered questions in a straightforward way.

Matt Hall

48. Matt Hall is a Chartered Tax Adviser. He was not the creator or inventor of the Schemes into which Mr Fox had entered, but after HMRC had begun enquiring into them, Matt Hall advised participants, including posting advice and guidance on a secure website. He provided a witness statement, gave oral evidence-in-chief, was cross-examined by Mr Hall and answered questions from the Tribunal. We found him also to be an honest and credible witness.

Mr Jones

49. Mr Jones was one of two directors and shareholders of Exclusive, the other being Mrs Jones. It was common ground that Mr Jones was the company's "controlling mind". He gave oral evidence-in-chief, was cross-examined by Mr Hall and answered questions from the Tribunal. He was unable to remember some things, in particular he could not recall what prompted him to make a time to pay agreement with HMRC, or why he had agreed that Exclusive would be the lead case in the JR, and he only remembered paying RPC to act in relation to that JR in response to a leading question from Mr McDonnell (to which no objection was raised). However, we agreed with Mr McDonnell that Mr Jones was an honest witness who was doing his best to remember the events in question, and Mr Hall did not disagree.

Findings of fact

50. We make the findings of fact in this Decision on the basis of the evidence summarised above. Our main findings relating to Exclusive are set out below, and those relating to Mr Fox

[1] In this decision, we refer to him as Matt Hall, to distinguish him from HMRC's litigator, also Mr Hall.

are at §245. We make further findings of fact in other parts of our decision and have identified them as such.

THE LEGISLATION

51. The APNs were issued under Part 4, Chapter 3 of FA 2014 and Sch 2 to the NIC Act 2015. No party sought to argue that the NICs legislation was different to the tax provisions in any way which was relevant to the issues in these appeals, and in this Decision we have therefore referred only to the tax provisions. All legislation is cited only so far as relevant to the issues before the Tribunal.

The APN provisions

52. FA 2014, s 219 is headed "Circumstances in which an accelerated payment notice may be given" and includes the following provisions:

> "(1) HMRC may give a notice (an "accelerated payment notice") to a person ("P") if Conditions A to C are met.
>
> (2) Condition A is that--
>
> (a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax, or
>
> (b) P has made a tax appeal (by notifying HMRC or otherwise) in relation to a relevant tax but that appeal has not yet been--
>
> (i) determined by the tribunal or court to which it is addressed, or
>
> (ii) abandoned or otherwise disposed of.
>
> (3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage ("the asserted advantage") results from particular arrangements ("the chosen arrangements").
>
> (4) Condition C is that one or more of the following requirements are met
>
> (a) ….
>
> (b) the chosen arrangements are DOTAS arrangements;
>
> (c)-(e) …
>
> (5) "DOTAS arrangements" means--
>
> (a) notifiable arrangements to which HMRC has allocated a reference number under section 311 of FA 2004,…"

53. As is clear from s 219(2), an APN can be given when a tax enquiry is in progress under subsection (2)(b), or when the taxpayer has appealed but that appeal has not yet been determined, under subsection (2)(c). The former are known as "Enquiry Cases", and the latter as "Appeal Cases". Exclusive's APNs and two of Mr Fox's APNs were Appeal Cases, while one of Mr Fox's APNs was an Enquiry Case.

54. Section 220 is headed "Content of notice given while a tax enquiry is in progress" and thus applies to Enquiry Cases. It includes the following provisions:

> "(1) This section applies where an accelerated payment notice is given by virtue of section 219(2)(a) (notice given while a tax enquiry is in progress).
>
> (2) The notice must--

(a) specify the paragraph or paragraphs of section 219(4) by virtue of which the notice is given,

(b) specify the payment (if any) required to be made under section 223 and the requirements of that section, . . .

(c) explain the effect of sections 222 and 226, and of the amendments made by sections 224 and 225 (so far as relating to the relevant tax in relation to which the accelerated payment notice is given); and

(d) …

(3) The payment required to be made under section 223 is an amount equal to the amount which a designated HMRC officer determines, to the best of that officer's information and belief, as the understated tax.

(4) "The understated tax" means the additional amount that would be due and payable in respect of tax if--

(a) in the case of a notice given by virtue of section 219(4)(a) (cases where a follower notice is given)--

(i) it were assumed that the explanation given in the follower notice in question under section 206(b) is correct, and

(ii) the necessary corrective action were taken under section 208 in respect of what the designated HMRC officer determines, to the best of that officer's information and belief, as the denied advantage;

(b) in the case of a notice given by virtue of section 219(4)(b) (cases where the DOTAS requirements are met), such adjustments were made as are required to counteract what the designated HMRC officer determines, to the best of that officer's information and belief, as the denied advantage;

(c) …

(5) "The denied advantage"--

(a) …

(b) in the case of a notice given by virtue of section 219(4)(b), means so much of the asserted advantage as is not a tax advantage which results from the chosen arrangements or otherwise, and…"

55. Section 221 is headed "Content of notice given pending an appeal" and thus applies to Appeal Cases. It reads as follows:

"(1) This section applies where an accelerated payment notice is given by virtue of section 219(2)(b) (notice given pending an appeal).

(2) The notice must--

(a) specify the paragraph or paragraphs of section 219(4) by virtue of which the notice is given,

(b) specify the disputed tax (if any) .

(c) explain the effect of section 222 and of the amendments made by sections 224 and 225 so far as relating to the relevant tax in relation to which the accelerated payment notice is given.

(3) "The disputed tax" means so much of the amount of the charge to tax arising in consequence of--

(a) the amendment or assessment to tax appealed against, or

(b) where the appeal is against a conclusion stated by a closure notice, that conclusion,

as a designated HMRC officer determines, to the best of the officer's information and belief, as the amount required to ensure the counteraction of what that officer so determines as the denied advantage.

(4) "The denied advantage" has the same meaning as in section 220(5)…"

56. Section 222 is headed "Representations about a notice" and reads:

"(1) This section applies where an accelerated payment notice has been given under section 219 (and not withdrawn).

(2) P has 90 days beginning with the day that notice is given to send written representations to HMRC--

(a) objecting to the notice on the grounds that Condition A, B or C in section 219 was not met,

(b) objecting to the amount specified in the notice under section 220(2)(b) or section 221(2)(b),

(c) objecting to the amount specified in the notice under section 220(2)(d) or section 221(2)(d).

(3) HMRC must consider any representations made in accordance with subsection (2).

(4) Having considered the representations, HMRC must--

(a) if representations were made under subsection (2)(a), determine whether--

(i) to confirm the accelerated payment notice (with or without amendment), or

(ii) to withdraw the accelerated payment notice, . . .

(b) if representations were made under subsection (2)(b) (and the notice is not withdrawn under paragraph (a)), determine whether a different amount (or no amount) ought to have been specified under section 220(2)(b) or section 221(2)(b), and then--

(i) confirm the amount specified in the notice,

(ii) amend the notice to specify a different amount, or

(iii) remove from the notice the provision made under section 220(2)(b) or section 221(2)(b)…"

57. Section 223 is headed "Effect of notice given while tax enquiry is in progress: accelerated payment" and so relates to Enquiry Cases, and includes the following provisions:

"(1) This section applies where--

(a) an accelerated payment notice is given by virtue of section 219(2)(a) (notice given while a tax enquiry is in progress) (and not withdrawn), and

(b) an amount is stated in the notice in accordance with section 220(2)(b).

(2) P must make a payment ("the accelerated payment") to HMRC of that amount.

(3) The accelerated payment is to be treated as a payment on account of the understated tax (see section 220).

(4) The accelerated payment must be made before the end of the payment period.

(5) "The payment period" means--

(a) if P made no representations under section 222, the period of 90 days beginning with the day on which the accelerated payment notice is given, and

(b) if P made such representations, whichever of the following periods ends later--

(i) the 90 day period mentioned in paragraph (a);

(ii) the period of 30 days beginning with the day on which P is notified under section 222 of HMRC's determination…."

58. Section 224 is headed "Restriction on powers to postpone tax payments pending initial appeal" and inserts new provisions into the TMA so as to prevent tax payable under an APN from being postponed, as would normally be the case, and reads:

"(1) In section 55 of TMA 1970 (recovery of tax not postponed), after subsection (8A) insert--

(8B) Subsections (8C) and (8D) apply where a person has been given an accelerated payment notice or partner payment notice under Chapter 3 of Part 4 of the Finance Act 2014 and that notice has not been withdrawn.

(8C) Nothing in this section enables the postponement of the payment of (as the case may be)--

(a) the understated tax to which the payment specified in the notice under section 220(2)(b) of that Act relates,

(b) the disputed tax specified in the notice under section 221(2)(b) of that Act, or

(c) the understated partner tax to which the payment specified in the notice under paragraph 4(1)(b) of Schedule 32 to that Act relates.

(8D) Accordingly, if the payment of an amount of tax within subsection (8C)(b) is postponed by virtue of this section immediately before the accelerated payment notice is given, it ceases to be so postponed with effect from the time that notice is given, and the tax is due and payable.

(a) if no representations were made under section 222 of that Act in respect of the notice, on or before the last day of the period of 90 days beginning with the day the notice or partner payment notice is given, and

(b) if representations were so made, on or before whichever is later of--

(i) the last day of the 90 day period mentioned in paragraph (a), and

> (ii) the last day of the period of 30 days beginning with the day on which HMRC's determination in respect of those representations is notified under section 222 of that Act."

59. In both s 223 and TMA s 55(8D) the 90 day time limit runs from the date on which the APNs "is given", and the 30 day time limit runs from the date on which HMRC's determination of the representations "is notified". HMRC accept in their published guidance CC/FS24 entitled "Tax avoidance schemes – accelerated payments" that the terms "given" and "notified" both mean the date on which the relevant document is received by the taxpayer, not the date on which it is issued by HMRC, and we agree.

The penalty provisions

60. The penalty provisions relating to Enquiry Cases are at FA 2014, s 226. That section is headed "Penalty for failure to pay accelerated payment" and includes the following:

> "(1) This section applies where an accelerated payment notice is given by virtue of section 219(2)(a) (notice given while tax enquiry is in progress) (and not withdrawn).
>
> (2) If any amount of the accelerated payment is unpaid at the end of the payment period, P is liable to a penalty of 5% of that amount.
>
> (3) If any amount of the accelerated payment is unpaid after the end of the period of 5 months beginning with the penalty day, P is liable to a penalty of 5% of that amount.
>
> (4) If any amount of the accelerated payment is unpaid after the end of the period of 11 months beginning with the penalty day, P is liable to a penalty of 5% of that amount.
>
> (5) "The penalty day" means the day immediately following the end of the payment period.
>
> (6) …
>
> (7) Paragraphs 9 to 18…of Schedule 56 to FA 2009 (provisions which apply to penalties for failures to make payments of tax on time) apply, with any necessary modifications, to a penalty under this section in relation to a failure by P to pay an amount of the accelerated payment as they apply to a penalty under that Schedule in relation to a failure by a person to pay an amount of tax."

61. In relation to Appeal Cases, as noted above, the effect of FA 2014, s 224 is to bring to an end the postponement of the tax which is under appeal, and this triggers the penalty provisions in FA 2009, Sch 56.

62. Paragraph 3 of that Schedule first sets out the taxes to which it applies; these include income tax, see subpara 1 read with para 1. The paragraph continues:

> "(2) P is liable to a penalty of 5% of the unpaid tax.
>
> (3) If any amount of the tax is unpaid after the end of the period of 5 months beginning with the penalty date, P is liable to a penalty of 5% of that amount.
>
> (4) If any amount of the tax is unpaid after the end of the period of 11 months beginning with the penalty date, P is liable to a penalty of 5% of that amount."

63. Schedule 56 thus sets out essentially the same phased 5% penalties in relation to Appeal Cases as apply to Enquiry Cases by virtue of FA 2014, s 226. Additionally, paras 9 to 18 apply to Enquiry Cases as they do to Appeal Cases, see FA 2014, s 226(7).

64. As the application of Sch 56 was not in dispute, we have not set it out here. We have cited a number of paragraphs in the course of this Decision in so far as they are relevant to the issues being discussed.

65. In cases where HMRC issued an APN for an Appeal Case relating to 2009-10 or earlier, Sch 56 was not in force; instead, if the APN was not paid, the surcharge provisions at s 59C were triggered. Although HMRC issued surcharges to Mr Fox in reliance on those provisions, those surcharges were withdrawn in the course of the hearing, see further §286ff, and in any event the related provisions were not in dispute. We decided it was not necessary to set out the surcharge legislation in this Decision.

EXCLUSIVE: FINDINGS OF FACT

66. This part of the Decision sets out our findings of fact about Exclusive at the relevant time. There are further findings of fact about Mr Jones's belief at §213 and about interim relief at §230ff.

Exclusive's business

67. Exclusive is owned jointly by Mr and Mrs Jones. Mrs Jones was responsible for book-keeping and accounts. Mr Jones dealt with marketing, advertising and other matters. At the relevant time, they were both directors.

68. Exclusive operates a call-centre for small businesses, taking calls where the owners or employees of those businesses are unable to respond. Mr and/or Mrs Jones sign written contracts with these small businesses, setting out each party's responsibilities. and Exclusive also has a contract with another company which handles Exclusive's own out-of-hours calls.

69. At the relevant time, Exclusive had 11 members of staff. Its statutory accounts were drawn up by Menzies LLP ("Menzies"), and someone from that firm visited Mr and Mrs Jones twice a year to discuss the financial side of their business.

The PPS Scheme

70. The PPS Scheme in which Exclusive participated was promoted by a business operating as "C3". The Scheme was designed to operate as follows:

> (1) an employee was paid a sum of money by their employer on condition that they used it to subscribe for a separate class of shares in their employing company; in Exclusive's case these were "B" shares;
>
> (2) however, only 1% of the money was used in that way; the employee had an obligation to use the other 99% if a specified future contingency occurred; and
>
> (3) C3 considered that the payment from the company to the employee was not subject to PAYE or NICs.

71. The PPS Scheme was registered with HMRC and given the DoTAS reference number 75714684.

The introduction and implementation of the PPS Scheme

72. The PPS Scheme was introduced to Mr Jones by a tax accountant called Mr Martin Westall. Mr Jones was not given anything in writing by Mr Westall which explained how the PPS Scheme worked, but he understood it well enough, and "checked" it with Menzies during a conversation at one of the bi-annual meetings. Menzies warned Mr and Mrs Jones that the Scheme could be challenged by HMRC. However, Mr and Mrs Jones relied instead on Mr Westall, who told them that "leading tax counsel" had confirmed that the PPS Scheme was effective from a tax perspective; Mr Westall also said that in his view, HMRC would not be successful were they to challenge it at the Tribunal. Mr and Mrs Jones decided to go ahead.

73. In the year ended 30 April 2012, Exclusive's pre-tax profits were £46,400, on which tax of £18,756 was payable. Of the balance, £25,000 was withdrawn as dividends by Mr and Mrs Jones, and retained profits were therefore £3,843.

74. Exclusive entered into the PPS Scheme during the following accounting period, which ended on 30 April 2013. The Notes to the Accounts say that £130,000 "was paid" to Mr and Mrs Jones under an agreement that the money "had to be employed in paying up B shares in the company on demand, or earlier if certain specified circumstances", and that "the B shares would have little or no value unless profits increase substantially". Of the £130,000, Mr and Mrs Jones paid £1,300 to Exclusive to subscribe for the B shares. Exclusive did not operate tax or NICs on the £130,000.

75. Largely as a result of the £130,000 payable by Exclusive to Mr and Mrs Jones, the Accounts showed a pre-tax loss of £130,444. Exclusive disclosed the PPS Scheme in its corporation tax return by including the DoTAS number. The expenses claimed included £130,000 of "directors' remuneration" of which £1,300 was treated as disallowable; this was the effective source of a claim to carry back a trading loss of £80,624.

76. Exclusive paid only around £45,000 of the £130,000 to Mr and Mrs Jones because it did not have the cash resources to pay more. The Accounts showed the balance as owing to Mr and Mrs Jones, and the Notes say that "the directors have stated that they will not seek repayment of this loan until the company is in a position to do so". Mr Jones agreed under cross-examination that the PPS Scheme had created "a paper loss" saying:

> "we didn't actually take that amount of money out. I think the idea of the arrangement was that it would be beneficial for us in terms of tax and the amount of tax we would have to pay…I think it helped us with our personal tax…we didn't actually physically take the money out…it helped us out with tax and things, our personal taxes and corporation tax."

77. In answer to a question from the Tribunal, he said:

> "it was a paper transaction, and that we would benefit from some relief in corporation tax and personal tax. But the actual − it wasn't actually pound notes, we never saw pound notes. No, we didn't."

The Spotlight

78. As noted above, Exclusive entered into the PPS Scheme during the accounting period ending on 30 April 2013. On 13 April 2013, HMRC issued "Spotlight 17" entitled "Employee Benefit Schemes: Using Fettered Payments". The Spotlight listed the DoTAS numbers for schemes within its scope, including that for the PPS Scheme; it described how the schemes operated; said that in HMRC's view the schemes did not work, and warned they would be challenged "through the courts, where appropriate".

FA 2014, HMRC's determinations and the APNs

79. FA 2014 became law on 17 July 2014. As set out earlier in this Decision, it gave HMRC the power to issue APNs.

FA 2014 and the Rowe JR

80. HMRC began issuing APNs to users of various schemes soon after FA 2014 came into force. APNs are not appealable to the Tribunal, but some APN recipients formed into groups to challenge the APNs by issuing JR claims. One of the first of these groups was formed by participants in schemes relating to Ingenious Media Plc, and the lead appellant was Mr Nigel Rowe ("the *Rowe* JR"). The claimants in the *Rowe* JR had appealed HMRC's amendments made by closure notices, and so the APNs were "Appeal Cases" rather than "Enquiry Cases".

81. On 26 March 2015, Simler J (as she then was) agreed that participants in the *Rowe* JR were entitled to interim relief. We return to the terms of the interim relief order at §230ff.

82. On 31 July 2015, Simler J decided the *Rowe* JR in favour of HMRC; the judgment is published as *R (oao Rowe) v HMRC* [2015] EWHC 2293 (Admin). Permission to appeal was granted by the Court of Appeal on 15 November 2015.

The determinations

83. On 18 April 2016, HMRC issued Exclusive with a PAYE determination under Reg 80 of the PAYE Regulations for PAYE of £38,252 in relation to the £130,000, on the basis that the sum was taxable earnings, and on the same date, issued decisions relating to Mr and Mrs Jones under s 8 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999, each of which was for NICs of £12,571.56, together "the PAYE/NICs determinations".

84. Mr Jones contacted Mr Westall, who passed the information to C3. On 12 May 2016, C3 appealed the PAYE/NICs determinations to HMRC on Exclusive's behalf. On 27 June 2016, HMRC advised Exclusive that APNs would shortly be issued.

Designated Officer approval forms

85. As noted at §44, on the final day of the hearing, HMRC provided new evidence relating to the approval of the APNs by a Designated Officer. In relation to Exclusive, there are two documents, both headed "Designated Officer authorisation of the amount of disputed tax or National Insurance Contributions". The first line says that it has been sent "To: Helena Brookes (Designated Officer)" but the person named at the bottom of the form as having approved the issuance of the APNs is Ms Tracey Bourne.

86. After identifying the taxpayer and the scheme, the text of the first document reads:

> "For the case shown above, I have calculated that the amount of the disputed tax or National Insurance contributions is £38,252
>
> My computation is enclosed.
>
> I confirm that the following conditions are met:
>
> • there is an appeal in relation to Income Tax, and that appeal has not yet been determined by the tribunal or court to which it is addressed, or been abandoned or otherwise disposed of - Section 219(2)(b) of the Finance Act 2014.
>
> • the appeal is made on the basis that an advantage ("the asserted advantage") results from particular arrangements ("the chosen arrangements"), namely the

> scheme referred to above - Section 219(3) of the Finance Act 2014 and Schedule 2 to the National Insurance Contributions Act 2015
>
> • the chosen arrangements are DOTAS arrangements - Section 219(4)(b) of the Finance Act 2014 and para 11, Schedule 2 to the National Insurance Contributions Act 2015.
>
> I have calculated the figure of disputed tax or National Insurance contributions in accordance with Section 219(4)(b) of the Finance Act 2014.
>
> Please confirm that I can issue an accelerated payment notice for £38,252."

87. The "name of case worker" is stated as "Accellerated Payments [sic]", and the date is given as 29 June 2016. Although the form says "my computation is enclosed", no computation was attached to the form provided to the Tribunal. Under the heading "Designated Officer agrees the amount shown in Part 1" is the following text:

> "In accordance with S221(3) of the Finance Act 2014, I determine, to the best of my information and belief, that the amount of the disputed tax or National Insurance contributions in respect of the avoidance scheme and the year shown in part 1 above, is as shown below [namely £38,252."

88. The text of the second form is the same other than that in the first of the bullet points, the reference to "an appeal in relation to income tax" is "an appeal relating to National Insurance Contributions"; the references to FA 2014 are supplemented by references to Sch 2 to the NIC Act 2015, and the amount is £25,143.12. The figures on both forms were identical to those on the PAYE/NICs determinations previously issued to Exclusive.

The APNs

89. The APNs were issued on 24 August 2016 by HMRC's Counter-Avoidance Team 2, and are unsigned; the figures in the APNs are the same as those in the Designated Officer forms. However, the APNs do not refer to a Designated Officer. They identify the PPS Scheme; say that the APNs are due for payment by 25 November 2016, and add that "Payment may be due on a later date if representations are made under section 222 of the Finance Act 2014". They state that the APNs have been issued because "certain conditions have been met"; those conditions substantially replicate the bullet points on the Designated Officer forms, see §86. Under the heading "penalties for not paying on time", the APNs say that if payment is not made 31 days after the due date for payment, Exclusive will be liable to penalties, and the penalty structure is explained.

The JR

90. Meanwhile, C3 had been liaising with RPC with a view to users of the PPS Scheme making a JR claim. In around July 2016, Exclusive signed a letter of engagement with RPC, and in the same month paid RPC a fee of £3,360. Exclusive agreed to be the lead claimant in the JR, but Mr Jones was unable to give clear evidence as to the reason for this. Under cross-examination he initially said "I haven't honestly got a clue why we were chosen" and later that he thought it was because Exclusive would not have to contribute to the costs, but on re-examination agreed that this was incorrect as he had paid RPC £3,360.

91. RPC obtained advice from Counsel about the JR; this advice related not only to Exclusive but also to the other claimants who were seeking to challenge APNs issued in relation to PPS Scheme or other similar arrangements using fettered payments. Mr McDonnell explained that no copy of that advice was being provided to the Tribunal, because disclosure would have breached common interest privilege.

92. On 23 September 2016, RPC filed the JR claim with Exclusive as the lead claimant. The claim asked the High Court to quash the APNs, declare them incompatible with the Human Rights Act and grant interim relief. A copy of a witness statement from Mr Jones dated 19 September 20216 was provided to support the claim for interim relief on the basis that hardship would result if Exclusive was required to pay the APNs. We make findings of fact about interim relief at §230ff.

93. Mr Jones's oral evidence as to the advice he received about the JR was muddled. We make the following findings:

(1) he said he was "a layman" with "no knowledge" and so trusted Mr Westall, C3 and RPC;

(2) he had been assured that RPC was a law firm that "specialised in this sort of thing and they had the experts";

(3) he was unable to remember what advice he had had from Mr Westall, what from C3, and what from RPC;

(4) he remembered receiving emails about "the process" C3 was following, but his only recollection about legal advice was that it was received in telephone conversations with Mr Westall, C3 and/or RPC; he had had nothing in writing;

(5) he knew the substance of the advice was that the APNs were unfair and invalid;

(6) when asked about the advice he had received as to the chances of success of the JR, he said he been told there was a good chance of the PPS Scheme succeeding. We find that he was confused as between the chances of success of the PPS Scheme and the chances of success of the JR;

(7) he initially said that it was "always made clear" that the JR "might not succeed" although "the odds were…that it was likely to succeed"; he later said he was always told that the chances of success were "pretty high";

(8) he didn't see a draft of the JR claim before it was filed because he was leaving it all to his advisers; and

(9) when asked by Mr Hall if he ever felt "like you are being the pawn on the chessboard" he replied "I do a little bit. We take the advice we are given and run with it."

94. Mr Hall invited the Tribunal to find that Mr Jones's oral evidence undermined some of that in his witness statement, in particular his statement that "C3 informed me of RPC's view of the merits of the litigation and the chances of success". We agree. Mr Jones could not remember who had advised him on what, and his belief that the JR would succeed was based on the expertise of his advisers, and not on any understanding of the merits of the JR claim. We make a linked finding of fact at §213.

Letter of representation

95. On 23 November 2016, C3 sent a letter of representation to HMRC in relation to both APNs. Mr Jones did not see this letter before it was sent as he was relying on his advisers.

96. FA 2014, s 222(2) provides that the taxpayer has 90 days to send written representations to HMRC (a) objecting to the notice on the grounds that Condition A, B or C was not met or (b) objecting to the amount specified in the notice. Under the heading "specific grounds of

objection", C3's letter included sections giving reasons why, in their opinion, the APNs did not meet Conditions A, B or C and why the amount specified in the APNs was incorrect.

97. Under the heading "General Grounds", C3's letter also included further sections under the following subheadings :

(1) the date for payment and representations was incorrect;

(2) human rights (hardship) and human rights (other); and

(3) issuing the APNs was inconsistent with HMRC's stated practice.

98. Under the heading "Judicial Review", the letter said that Exclusive had "instructed solicitors to commence JR proceedings"; that "the basis of the challenge to the APN is outlined below", and it continued as follows:

(1) The APN had been issued *ultra vires*, because it was a statutory requirement that the amount of the understated tax be that which "a designated HMRC officer determines, to the best of that officer's information and belief", but the APN did not provide:

(a) the identity of the Designated Officer;

(b) how the Designated Officer has been appointed;

(c) how the Designated Officer has determined to the best of his information and belief the sums demanded as being the 'understated tax';

(d) what information the Designated Officer relied upon;

(e) how the Designated Officer's decision-making process was carried out; and

(f) why the Designated Officer regards the resultant figure as corresponding to the statutory requirements of the APN legislation.

(2) Further paragraphs related to each of unreasonableness; breach of natural justice and legitimate expectations.

HMRC's Response to the letter of representation

99. On 22 February 2017, HMRC replied to C3's letter. To use a neutral term, we have called their reply "HMRC's Response". This stated that HMRC was "only required by legislation to consider the representations made within your letter against the conditions set out in section 222(2)", namely whether Conditions A, B and/or C ("the Conditions") were met, and in relation to the calculation of the amount. HMRC went on to reply to the paragraphs in C3's letter which had specifically referenced the Conditions and the amount.

100. In relation to the other matters raised by C3, HMRC's Response said that "these points do not constitute representations against those conditions [in s 222(2)] and I am not required to and decline to respond" but that HMRC would nevertheless "comment on a number of the points raised". Under the heading "judicial review proceedings", HMRC's Response said:

> "You have also advised that you are or intend to be a claimant in Judicial Review proceedings in respect of these APNs. You also request no action be taken to enforce the APNs as there are ongoing Judicial Reviews and Appeals in similar cases. This is duly noted, but any such claim does not delay my review of your representation under section 222, neither does legislation require HMRC to delay carrying out a review of a representation pending the outcome of other cases or hearings."

101. HMRC's Response thus did not respond to the "Designated Officer" points made under the "*ultra vires*" heading in C3's letter. It ended by upholding the APNs, together with a reference to interim relief, see further §232.

The progress of Exclusive's JR, and the penalties

102. On 17 May 2017, Exclusive's JR was stayed behind the *Rowe* JR.

103. On 19 May 2017, HMRC issued Exclusive with penalties for failure to pay the APNs by 30 March 2017. These were calculated as 5% of the APNs, being £1,912.60 for the PAYE APN, and £1,257.16 for the NICs APN. The penalty notices were sent to Exclusive at Mr and Mrs Jones's home address, and Mr Jones sent them on to C3.

104. On 14 June 2017, C3 appealed the penalties to HMRC on Exclusive's behalf. On 29 June 2017, HMRC refused the appeal. On 27 July 2017, C3 asked for a statutory review, and on 2 October 2017, a review officer upheld HMRC's decisions. On 30 October 2017, C3 notified the appeals to the Tribunal.

105. On 19 October 2017, HMRC issued further late payment penalties; these were later withdrawn for unspecified "technical reasons". They are thus not before the Tribunal for determination.

106. On 28 November 2017, the Court of Appeal issued its judgment in the *Rowe* JR, refusing the claim and upholding the APNs. We return to that judgment at §112ff. On the same day, HMRC wrote to RPC saying they would agree to consent to interim relief on terms attached to the letter, pending the determination of Exclusive's JR in the High Court. On 12 December 2017, permission to appeal the Court of Appeal's judgment in the *Rowe* JR was refused by the Supreme Court.

107. On 20 April 2018, HMRC issued further late payment penalties. These were also calculated as 5% of the APNs, so £1,912.60 for the PAYE APN, and £1,257.16 for the NICs APN. They were sent to Exclusive at Mr and Mrs Jones's home address, and Mr Jones sent them on to C3, although C3 also received a copy directly. The penalties were appealed by C3; the appeal was refused; a statutory review upheld the decisions to issue the penalties, and on 9 August 2018 C3 notified Exclusive's appeals against those penalties to the Tribunal. A brief summary of the procedural matters which preceded the listing of Exclusive's appeals is set out at §283-§284.

108. On 29 August 2018, RPC filed a "Notice of Discontinuance" at the High Court in relation to Exclusive's JR; the Notice also encompassed 18 other claimants who were party to the same claim. On 21 January 2019, Exclusive came to a "Time To Pay" ("TTP") agreement with HMRC to pay the APNs by instalments.

Mr Jones's knowledge

109. Mr Jones's witness statement stated that "I understand that the claim was withdrawn at that time because the legal issues relevant to our claim were determined in separate judicial review litigation, which had progressed on appeal to the Court of Appeal". However, it is clear from Mr Jones's oral evidence that he did not understand why the Exclusive JR had been withdrawn and had not been told in advance that this was going to happen. He said he had "no memory at all of being told that we were withdrawing from the judicial review" and also said "I was disappointed when I did discover that the judicial review had been withdrawn". He speculated that the JR had been withdrawn because Exclusive had entered into the TTP

arrangement, but this was clearly incorrect, as the Notice of Discontinuance had been filed some five months previously.

110. Mr Jones's witness statement also states: "I was kept fully informed of developments in the legal proceedings by C3, who were liaising directly with RPC on our behalf". He was asked in cross-examination whether he was "given updates on the progress" of the JR, and he responded "not that I recall, no".

111. In addition to the conflicts between the witness statement, and Mr Jones's oral evidence about the merits of the litigation (see §94), there were thus further conflicts between his witness statement and his oral evidence about the progress of the litigation. We agree with Mr Hall that the oral evidence should be preferred, and find as a fact that Mr Jones had no understanding of the progress of the JR; of the legal issues decided by *Rowe,* or why the Exclusive JR was withdrawn.

THE COURT OF APPEAL'S JUDGMENT IN *ROWE*

112. As noted earlier in this decision, the claimants in the *Rowe* JR lost their claim at the High Court, but the Court of Appeal gave permission to appeal. That Court also joined the *Rowe* JR with the onward appeal of the Vital Nut group of claimants; their JR had also failed at the High Court before Charles J, see *R (oao Vital Nut) v HMRC* [2016] EWHC 1797 (Admin). The *Rowe* JR concerned Appeal Cases and the Vital Nut JR concerned Enquiry Cases.

113. The Court of Appeal's judgment was issued under reference [2017] EWCA Civ 2105. It formed a key element of both parties' submissions. We set out the relevant parts of that judgment below, followed by our summary of the relevant principles and outcome. In this part of our decision, where we refer to "*Rowe*", we mean the Court of Appeal judgment, and our paragraph reference numbers are to that judgment unless otherwise stated. The issues in *Rowe* covered both APNs and also Partner Payment Notices ("PPNs"), but the latter are not relevant to the Appellants and for ease of reference we generally use only the term "APN".

114. In *Rowe* there were six grounds of appeal, of which the following were relevant to the appeals before the Tribunal:

(1) Ground 1 and Ground 2, which were considered together: these were that the APNs were unreasonable and had been issued *ultra vires* because of retrospectivity;

(2) Ground 3: that the APNs breached natural justice; and

(3) Ground 6: that the decision to issue APNs was *ultra vires* because it was not in accordance with FA 2014, s 219 to 223, referred to as the designated officer ground.

115. Grounds 1-3 were relied on by the appellants in both of the joined appeals, and Arden LJ gave the leading judgment; Ground 6 was relied on only by the appellants in the *Vital Nut* appeal, and McCombe LJ gave the leading judgment. Arden and McCombe LJJ agreed with each other's judgments, and Thirlwall LJ agreed with both judgments. The taxpayers' appeals were dismissed.

Points accepted by HMRC before the hearing

116. The following points were accepted by HMRC before the Court of Appeal hearing.

(1) HMRC had taken a policy decision to issue APNs in all cases whenever the taxpayers had implemented a scheme on the DoTAS list to which HMRC had assigned

a number, unless the scheme was, for instance, obsolete or accepted to be ineffective for tax purposes, see [27]. This decision was referred to as "the Policy".

(2) The following summary of the APN process had been set out in *Walapu v HMRC* [2016] EWHC 658 (Admin) at [47], and was accepted by HMRC as being correct, see [28]:

> (a) Stage 1: HMRC publishes on its website a list of DoTAS schemes in relation to which APNs may be issued.
>
> (b) Stage 2: The HMRC officer responsible for overseeing the investigation of a particular scheme completes an internal "survey", which requires answers to questions designed to enable HMRC to rank the scheme according to its suitability for the earlier issue of APNs
>
> (c) Stage 3: Schemes are 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.
>
> (d) Stage 4: Each identified scheme is 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 circumstance of any user are such that, exceptionally, no APN should be issued.
>
> (e) Stage 5: Following the completion of the detailed review each scheme is considered by the Workflow Governance Group, which supervises the information collection process ensuring good governance.
>
> (f) 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.

117. Arden LJ noted at [29], "There is nothing in this summary about the Designated Officer forming any view on the effectiveness of the scheme".

Grounds 1 and 2 (taken together)

118. Of the points considered under these headings, the one particularly relevant to these appeals was whether Charles J had been correct at first instance to decide that the Designated Officer did not have to reach a positive view that a particular scheme was ineffective, but only had to reach the view that he was not satisfied that the scheme was effective, see *R (oao Vital Nut) v HMRC* [2016] EWHC 1797 (Admin) at [12].

119. Arden LJ held at [62] that:

> "…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'".

120. She added at [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."

Ground 3: unfairness

121. Arden LJ recorded at [110] that "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". She held as follows:

> "[88] The crucial question is whether the taxpayer can make representations on the question of effectiveness [of the tax planning scheme into which they entered]. 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.
>
> [89] 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."

Ground 6: designated officer

122. McCombe LJ began his consideration of this Ground at [220], saying:

> "In her judgment, Arden LJ has covered much of this ground in paragraphs 56 to 69 and I agree respectfully with her analysis of the "designated officer's" function. In particular, I agree with what she says in paragraph 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 paragraph 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, i.e. 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."

123. He held as follows:

> "[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 section 31(2A) of the Senior Courts Act 1981."

Senior Courts Act

124. As is clear from the above passage, McCombe LJ's judgment ends by referring to the Senior Courts Act 1981 ("SCA"). Section 31 of that Act is headed "Application for judicial review", and subsection (1) provides that application for orders, declarations and injunctions are to be made in accordance with the CPR. Subsection 2 sets out the factors which the Court must consider before granting a JR application. Subsection 2A was added by s 84 of the Criminal Justice and Courts Act 2015, and came into effect from 13 April 2015. It reads:

> "The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

Points relevant to the Appellants' appeals

125. Our summary as to the principles established by *Rowe* in the context of the issues raised by the Appellants' appeals is as follows:

(1) the Designated Officer is obliged by statute to:

(a) diligently consider all relevant material, see [67] and [220];

(b) having done so, come to his own independent view as to whether the tax scheme entered into by the taxpayer works or not, see [220] and [227];

(c) issue an APN only if he has come to a positive view that the tax scheme does not work, see [62] and[220];

(d) come to his own view as to quantum to be charged by the APN, see [220]; and

(e) explain to the taxpayer the basis of his liability for the APN, see [89].

(2) HMRC's procedure for issuing APNs did not comply with the statutory requirements set out above, because it did not require the Designated Officer to form a view on the effectiveness of the scheme, see [29].

(3) The taxpayer is entitled, on receipt of the APN, to make representations as to the effectiveness of the scheme and the Designated Officer is obliged to consider those representations before confirming (or otherwise) the APN, see [88].

126. In the case of the claimants:

(1) the Court could not be confident that the designated officers in the *Vital Nut* cases had reached the required independent view, see [228];

(2) the claimants in both the *Rowe* and *Vital Nut* JRs did not receive an explanation as to the basis of their liability, see [89]; and

(3) the claimants were therefore right that HMRC had breached their public law obligations.

127. However, the Court found that the JR claims nevertheless failed, because:

(1) had the designated officers in the *Vital Nut* cases carried out the steps necessary to form an independent view, it was "highly likely" that their view would have been consistent with that in HMRC's Spotlight 6, which had stated that the tax scheme did not work, see [228];

(2) the claimants in the *Rowe* JR knew the reasons why HMRC considered that their schemes did not work because:

(a) these were Appeal Cases, so HMRC had set out their reasons when issuing the closure notices and amendments; and

(b) HMRC's view was clear from Spotlight 6, see [89];

(3) if HMRC had complied with its public law obligations, the outcome would therefore have been the same, see [89] and [229]; and

(4) it follows from SCA s 2A that the JR must be refused, see [229].

ISSUE ONE (Exclusive): WHETHER TIME LIMIT HAD STARTED TO RUN

128. As explained at §59, a penalty is payable where an APN has not been paid by the later of (a) 90 days after it has been given to the taxpayer, and (b) 30 days after the date on which "HMRC's determination in respect of those representations is notified" to the recipient of the APN, see s 223(5) in relation to Enquiry Cases and TMA s 55(8D) inserted by s 224, in relation to Appeal Cases.

129. HMRC issued the APNs to Exclusive on 24 August 2016; representations were made by C3 on 23 November 2016 and HMRC's Response was dated 22 February 2021. HMRC's case was that Exclusive was liable to penalties because it had not paid the APNs within 30 days after HMRC's Response was received by Mr Jones, and the penalties issued on 19 May 2017 and 20 April 2018 were therefore due and payable.

130. Mr McDonnell submitted that HMRC's Response was not a "determination" in respect of all the representations made by Exclusive; that as a result, the payment date for the APNs had not begun to run, and so no penalties were due. He relied in particular on *R (oao Mrs Archer) v HMRC* [2019] EWCA Civ 1021 ("*Mrs Archer*"). We return to *Mrs Archer* at §165, but Mr McDonnell's reliance on that case raised a procedural issue, as explained below.

The procedural argument

131. Mr Hall submitted that Issue One did not form part of the grounds of appeal which were before the Tribunal, and that this was clear from the procedural steps which had led up to the hearing. We first make findings of fact as to those procedural steps before setting out the parties' submissions and our conclusion.

Findings of fact

132. Exclusive's grounds of appeal were dated 27 November 2019, and had been drafted by Mr McDonnell and Mr Brodsky. Paragraph 3 of those grounds was that the Appellants were appealing on the basis that they had a reasonable excuse. Paragraph 4 read:

> "Further or alternatively, the 'payment period' as defined in s.223(5) FA 2014 had not yet expired at the various dates by reference to which the Penalties have been imposed under s.226, due to HMRC's failure properly and lawfully to make the determinations required by s.222(4) FA 2014 in response to the Appellant's representations under s.222."

133. On 29 April 2020, the Court of Appeal decided *Beadle v HMRC* [2020] EWCA Civ 562 ("*Beadle*"). The issues in *Beadle* were:

(1) whether the Tribunal had the jurisdiction, when deciding an appeal against a penalty for failure to comply with a APN, to consider whether the APN itself was legally valid; and

(2) whether Mr Beadle's belief in the invalidity of the APN was a reasonable excuse.

134. The Court of Appeal decided both those points in favour of HMRC, holding that the Tribunal did not have the relevant jurisdiction, see [43]-[55], and that belief in the invalidity of the APN was not a reasonable excuse, see [56]-[62]. On 21 December 2020, the Supreme Court refused permission to appeal that judgment.

135. On 3 February 2021, HMRC invited the Tribunal to write to RPC to confirm whether the Appellants were withdrawing their appeals as a result of *Beadle*. RPC responded objecting to HMRC "using the Tribunal as proxy in this manner".

136. On 11 February 2021, a letter was issued by the Tribunal in accordance with instructions given by Judge Poole, which included this passage:

> "…the Appellants' representatives are requested to confirm that the lead Appellants intend to continue with their appeals notwithstanding the final decision in *Beadle* (as appears, implicitly from the correspondence, to be the case)."

137. On 15 February 2021, RPC replied as follows:

> ",…the Appellants confirm that they have no intention of withdrawing their appeals in light of the Court of Appeal's decision in *Beadle*. To the extent it is necessary to do so, the Appellants submit that the Respondents' reliance on *Beadle* and consequent categorisation of the Appellants' case is misplaced

> and/or misguided. The Appellants do not seek to challenge the validity of the APNs issued to them in the context of these statutory 'reasonable excuse' appeals (as was the case in *Beadle*). The Appellants' case is confined to establishing that they had a reasonable excuse for non-payment of their APNs at the relevant payment due dates, because they had received professional advice that the APNs issued to them were unlawful and accordingly challenged the decision to issue the APNs through judicial review proceedings in the High Court."

138. RPC then referred to *Shieling Properties v HMRC* [2020] UKUT 175 (TCC) ("*Sheiling*"), in which the UT had distinguished Mr Sheiling's position from that of Mr Beadle, and then said "for the reason given above, the Appellants' case is not affected by the Court of Appeal's decision in *Beadle*".

139. In the same letter of 11 February 2021, Judge Poole had directed that the parties seek to agree a Statement of Facts and Issues ("SOAFI"), with the Appellants to prepare the first draft. On 20 March 2021, RPC served that draft SOAFI. Under "Issues", the SOAFI includes the following as point (3):

> "Whether, in any case and in particular in Mr Fox's case, the taxpayer made statutory representations under FA 2014, s.222 and HMRC have failed to provide the required statutory response (including, without limitation, any case where the purported response is *ultra vires*), this means that no penalties are due on the basis that the 'payment period' in s.223(5) has not yet expired."

140. On 12 April 2021, Mr Hall responded, saying that "the issues as presented by RPC in their draft are not necessarily those which are ultimately relevant", and setting out HMRC's "legal analysis" in seven numbered points, of which point 1 was:

> "What is the period of default to which the penalty/surcharge relates? This will include consideration of what representations were made, and whether they were valid as representations."

141. Later in the same letter, Mr Hall said that "it is also noted that some of the points in the RPC list of issues are indeed part of the analysis above: for example at RPC#3-4 are part of point 1 above".

142. On 19 May 2021, Mr Hall applied for further time to respond to the draft SOAFI; his application included this passage

> "The Respondents concur with the issues put forward by the Appellant, but hold that before those issues are able to be considered, further issues are at point [sic]."

143. Judge Poole had previously issued case management directions on 22 January 2021 which required HMRC to file and serve their skeleton arguments 21 days before the hearing, with the Appellant responding 14 days before the hearing.

144. In compliance with those directions, on 15 September 2021 HMRC filed and served their skeleton, drafted by Mr Hall and Mr Cowley. On 22 September 2021, the Appellants filed and served their skeleton, drafted by Mr McDonnell and Mr Brodsky. That skeleton was structured under three headings, namely Reasonable Excuse 1, Reasonable Excuse 2, and "Alternative ground: no expiry of the payment period"; this third section begins by saying:

> "Further or alternatively, the Appellants appeal on the basis that the statutory payment period for the APNs in each case has not expired. Accordingly,

> payment is not in fact late and no penalties/surcharges are payable pursuant to the relevant statutory provisions."

145. The skeleton goes on to expand that ground in the context of the facts of Exclusive and Mr Fox. Although the *Mrs Archer* case was referred to elsewhere in the Appellant's skeleton, it was not cited in the context of this ground of appeal.

146. On 28 September 2021, RPC filed and served the authorities bundle. Instead of *Mrs Archer* the bundle included *Archer v HMRC* [2020] UKFTT 288 (TC), a judgment about surcharges issued to Mrs Archer's husband, William Archer. The inclusion of that case in the bundle was a mistake, and RPC emailed the correct judgment to HMRC and the Tribunal on the evening of the first day of the hearing, 6 October 2021.

147. When proceedings resumed on 7 October 2021, Mr Hall said that having considered *Mrs Archer*, HMRC were withdrawing the surcharges issued to Mr Fox. There was then an adjournment for Mr Hall to take instructions as to "the precise words" to explain HMRC's position: the full text of that statement is set out at §287. So far as relevant to this procedural challenge, it included the following passage, where "we" is HMRC:

> "we accept that the broad challenges of the judicial review to matters such as condition C (DOTAS notifiability point) would need to be considered in order to confirm his APNs correctly. This broader approach in considering representations under section 222 FA14 comes from Archer [2019] EWCA Civ 1021 in the context of a costs claim."

148. Mr Hall then clarified that there was no change to their arguments on Exclusive's case. At the end of that second hearing day, Mr McDonnell made detailed submissions as to how *Mrs Archer* applied in the context of Exclusive's appeal.

149. Mr McDonnell continued on the third day, but Mr Hall intervened to object on the basis that Mr McDonnell was making submissions different from "the grounds of appeal as presented to us on 4 February 2021". We directed that Mr McDonnell conclude his submissions, and that Mr Hall explain his objection as part of his opening. This began before the lunch adjournment, but Mr Hall not refer to the objection during the afternoon. The hearing was adjourned part-heard and relisted for Monday 22 November 2021 to allow Mr Hall to complete HMRC's submissions and for Mr McDonnell to reply on behalf of the Appellants.

150. On Friday 19 November 2021, Mr Hall filed and served a document setting out detailed written submissions; these included an objection to Issue One being considered by the Tribunal, although the document went on to make detailed submissions on the Issue.

Mr Hall's submissions

151. Mr Hall said that the Appellants had amended their Grounds of Appeal when they replied to Judge Poole's letter of 11 February 2021, in which they had stated that:

> "The Appellants' case is confined to establishing that they had a reasonable excuse for non-payment of their APNs at the relevant payment due dates…"

152. Mr Hall submitted that the Tribunal should therefore not admit Mr McDonnell's submissions on Issue One, as the Tribunal was restricted to considering points within the Appellants' grounds of appeal, and it was clear from the passage above that the Appellants were only relying on reasonable excuse arguments, and not on the time limit point which formed the basis of Issue One.

Mr McDonnell's submissions

153. Mr McDonnell responded by saying that this was plainly wrong. Issue One had been within the Appellants' original grounds of appeal as an alternative argument to "reasonable excuse". Judge Poole's letter was sent in the context of *Beadle,* and RPC's reply was to be read in that context, namely that there had been no change to the grounds of appeal as a result of *Beadle*. Had the Appellants changed their grounds of appeal, they would have done so by submitting an amended document in a formal way. Moreover it was clear that Issue One remained as part of their grounds, as it was in the Appellants' skeleton argument.

The Tribunal's view

154. We agree with Mr McDonnell that the Appellants' grounds of appeal were unchanged by RPC's letter of 15 February 2020. It would plainly be wrong to read the sentence relied on by Mr Hall as being the abandonment of the Appellants' alternative ground of appeal. In any event, RPC explicitly confirmed (emphasis added) "For the reason given above, the Appellants' case is not affected by the Court of Appeal's decision in *Beadle*".

155. That this Issue remained as a ground of appeal is also plain from its inclusion in the SOAFI dated 20 March 2021, as Mr Hall acknowledged on 12 April 2021 and confirmed on 19 May 2021. And, as Mr McDonnell says, it was also clearly set out in the skeleton.

156. The Tribunal does however accept that *Mrs Archer* was not referenced in the context of Issue One in the ground of appeal, in the SOAFI or even the skeleton, and that by oversight the wrong *Archer* case was included in the Bundle. As a result, although HMRC should have known that Issue One remained part of the Appellants' case, they were not made aware until the evening of the first day of the hearing that the Appellants were relying on *Mrs Archer* as their key authority. When the Tribunal reconvened, it would therefore have been open to HMRC to make an application for time to consider the implications of *Mrs Archer*.

157. However, HMRC did not take that course. Instead, Mr Hall said that in the light of *Mrs Archer,* HMRC were withdrawing the surcharges imposed on Mr Fox, and HMRC also made a formal statement which encompassed other appellants in a similar position. It was not until the following day, after Mr McDonnell had made detailed submissions on the implications of *Mrs Archer* in the context of Exclusive's case, that Mr Hall submitted that Issue One was not properly before the Tribunal.

158. In *Tower M'Cashback v HMRC* [2011] SC19 ("*Towe*r") at [15], Lord Hope endorsed the following passage from the judgment of Henderson J (as he then was) when the case was before the High Court:

> "There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the commissioners in exercise of their statutory functions to have regard to that public interest…For present purposes, however, it is enough to say that the principle still has at least some residual vitality in the context of s 50, and if the commissioners are to fulfil their statutory duty under that section they must in my judgment be free in principle to entertain legal arguments which played no part in reaching the conclusions set out in the closure notice. Subject always to the requirements of fairness and proper case management, such fresh arguments may be advanced by either side, or may be introduced by the commissioners on their own initiative."

159. Although the subject matter of *Tower* was closure notices in the context of the Tribunal's jurisdiction to decide appeals under TMA s 50, the principle that a party may introduce new

legal arguments subject to the requirements of proper case management is not confined to that situation. For example, in *Ritchie v HMRC* [2019] UKUT 71 (TCC) at [36] the UT (Nugee J and Judge Hellier) first considered the citation above from *Tower* together with the Tribunal Rules, and then said:

> "These sources make clear that in determining what arguments the tribunal may permit to affect its decision the guiding principle must be fairness in the circumstances of the case. Fairness does not require formality, and Rule 2(2)(b) expressly requires formality to be avoided. Fairness does not require, for example, that to advance an argument not present in its statement of case or the notice of appeal a party must always formally apply to amend its earlier pleading. On the other hand it does require that the other party is given adequate opportunity in the circumstances to meet the point, whether by argument or with evidence.
>
> 38. If a new argument is a pure point of law it might be addressed, as the case may be, after: a few minutes' thought; an evening's consideration; or one or more days' research. Provided that the other party has an appropriate opportunity to meet the point, it would generally not be unfair for the tribunal to take that argument into account.
>
> 39. ….
>
> 40. On the other hand, there will be circumstances where it is simply too late for a point to be raised. Where it is not reasonably possible in the circumstances of the case – having regard in particular to the resources of the parties and the need to avoid delay – for the other party to have a fair opportunity to rebut a new point, that is likely to mean that it would be unfair for a new point to be taken."

160. Mr Hall did not submit it was "simply too late" for *Mrs Archer* to be relied on in the context of this Issue. Instead, after "an evening's consideration" of that judgment, HMRC decided to withdraw Mr Fox's surcharges. It was not until the following day that Mr Hall raised any objection to this Issue, and then for reasons which focused on the scope of the grounds of appeal rather than on the late provision of *Mrs Archer*.

161. Despite HMRC's failure to raise the point, we nevertheless considered whether it was fair as a matter of case management to allow the Appellants to rely on *Mrs Archer*, despite both the case itself, and the related submissions, having been provided late. We decided that there was no procedural unfairness. HMRC had not only considered the case overnight and taken action in response, but there had also been a five week gap between the first three days of the hearing and the final day. During that time, HMRC had considered *Mrs Archer* in detail, and Mr Hall provided detailed submissions. It was therefore clear that HMRC had had time to consider the case, and also "a fair opportunity to rebut" the arguments put by Mr McDonnell in relation to *Mrs Archer.*

Whether the time limit had started to run

162. We move on to considering the parties' submissions as to whether, as Mr McDonnell submitted, no penalties were due because HMRC's Response was not a "determination". We first set out an extract from *R (oao Glencore Energy UK Limited) v HMRC* [2017] EWHC 1476 (Admin) ("*Glencore")*, approved by the Court of Appeal under reference [2017] EWCA Civ 1716, and then summarise *Mrs Archer*.

Glencore

163. The issue in *Glencore* concerned Diverted Profits Tax ("DPT"), which had been introduced by Finance 2015. The legislation provided for a designated officer first to issue a preliminary notice, following which the taxpayer had a right to make representations on certain specified grounds. The designated officer was required to consider the representations and then decide whether or not to issue a charging notice. If a notice was issued, the taxpayer had to pay the tax within 30 days, and the designated officer had to review the decision within twelve months and issue a review decision.

164. In the course of the *Glencore* hearing, the question arose as to whether HMRC had a general duty to consider submissions about quantum, if such submissions fell outside the scope of the review process. HMRC provided a statement which is set out at [103] of the judgment, and is later referred to in *Mrs Archer*. It reads:

> "HMRC considers itself always under an obligation to consider formal submissions from a taxpayer about the liability to tax.
>
> HMRC is subject to a number of internal and external standards of conduct. HMRC has to act with integrity, fairly, objectively, promptly, and to rectify mistakes. HMRC operates an internal complaints-handling process and is subject to supervision by several external bodies.
>
> HMRC accepts its duty to fulfil its statutory functions to a high standard. This duty exists regardless of whether on a particular occasion a person may have an actionable claim for judicial review.
>
> HMRC cannot simply ignore correspondence.
>
> The answer to the Court's question is therefore Yes, HMRC would be under a duty at least to give consideration to the formal submission mentioned."

The Mrs Archer case

165. The facts of the *Mrs Archer* case, so far as relevant to these appeals, were as follows:

(1) Mr William Archer had entered into a tax avoidance scheme involving the creation of a loss. As part of the scheme, his wife Mrs Archer acquired and disposed of an option. HMRC assessed Mr Archer to tax on the basis that the loss was not allowable, and assessed Mrs Archer to capital gains tax on the disposal of the option.

(2) Both Mr and Mrs Archer were issued with APNs, and both filed JR claims within the following four weeks. Mrs Archer's JR claim included this ground (see [30] of the judgment):

> "the designated officer issuing the notices is required to determine the amount which is correctly payable 'to the best of that officer's information and belief' and in the circumstances the officer cannot have reached such a determination in these cases."

(3) Mr and Mrs Archer subsequently filed representations challenging the APNs on the basis that the Conditions were not met, and the "amount" charged by the APNs was incorrect. They stated that the representations were made "on the same basis as the application for the judicial review".

(4) HMRC subsequently withdrew Mrs Archer's APN. Mr Archer was given permission to bring his JR claim, but he later paid the tax in dispute and the claim was withdrawn.

(5) Mrs Archer applied for the costs of both JR claims to be paid, but HMRC refused, essentially on the ground that Mr and Mrs Archer had acted prematurely, and should instead have made representations under FA 2014, s 222, and waited for responses to those representations before deciding whether to commence a JR.

(6) Mrs Archer's application for costs was refused on the papers by Master Gidden, and Mrs Archer appealed to the High Court.

166. Her appeal came before Green J. Mr McDonnell represented Mrs Archer and Mr David Yates represented HMRC. Under the heading "the scope of representations", Green J said at [49] that "it is also relevant to place the statutory right of representation into the more general context of how HMRC perceives its common law duty to respond to submissions and representations made to it". He then set out the passage cited above from *Glencore* (where he had also been the presiding judge), before continuing (italics in original):

> "[50] I would observe that in any event under section 222 the taxpayer can submit "*representations to HMRC … objecting to the amount specified in the notice".* Errors in the maths deployed could lead to representations objecting to the "*amount*" but I can see no reason why other, non-computational, matters which bear upon "*amount*" to be paid should not *also* be the subject matter of representations. Parliament has defined the subject matter of the representation by reference to the end result (viz., the amount) and not by the facts which lead up to the amount being determined. Mathematical errors are only one instance of facts which might result in the "*amount*" having to be altered. I would adopt a broad interpretation of "*amount*" applying the purposive approach adopted in *Glencore*.
>
> 51. My conclusion on this is therefore that section 222 must be construed broadly and it should be rare that any representation made by a tax payer about the APN could fall outside of the ambit of that provision. But if it did then section 222 is supplemented by the broader common law and HMRC's general acceptance in *Glencore* that it should deal in good faith with proper representations made to it by taxpayers. Insofar as there is any daylight between section 222 and the arguments a taxpayer wishes to advance HMRC's general position should plug that lacuna.
>
> 52. In short, the objection that the right of representation is limited is more apparent than real. I do not consider that it is a good reason to conclude that the section 222 procedure is inapt as an alternative to judicial review."

167. At the Court of Appeal, Henderson LJ gave the only judgment with which Flaux and Floyd LJJ both agreed. At [17] he set out his preliminary view, which included this passage:

> "Bearing in mind the well-established principles…that judicial review is a remedy of last resort, to which recourse should normally be had only where there is no available alternative remedy, Parliament is likely to have intended that a taxpayer who wished to challenge an APN should (where possible) first exercise his right to make representations under section 222…the practical importance of the section 222 procedure should encourage the court to adopt a broad and non-technical approach to the permitted grounds of objection, with the object of ensuring as far as reasonably possible that all objections relating to the applicability of Conditions A, B or C, or to the amount of the understated tax, should be capable of resolution under the section."

168. At [61]-[62] he summarised Green J's judgment on the scope of representations, and set out paragraph [51] in full. He identified at [86] the "central issue raised by the appeal" as being:

> "Does the section 222 machinery provide a suitable alternative remedy, which the taxpayer should normally be expected to pursue before beginning judicial review proceedings to challenge an APN."

169. He continued at [87] by saying that, having heard the parties' submissions, he saw no reason to depart from the provisional views he had expressed at [17], and then said:

> "The APN legislation must be construed and applied as a whole, in the light of its general purpose and underlying principles of tax law and procedure. So viewed, section 222 forms an integral part of the primary legislative scheme contained in sections 219 to 229 (Chapter 3 of Part 4) of FA 2014. The right thus conferred on the taxpayer to send written representations to HMRC is unqualified, so long as the representations fall within the scope of the section,…"

170. He developed that point as follows:

> [89] …it seems clear to me that Parliament must have intended taxpayers to take advantage of the machinery in section 222 in all cases where it was available, before having resort to judicial review proceedings. The principle that judicial review is a last resort is of long standing, and has been reiterated in judicial pronouncements at the highest level. Having decided not to provide a statutory right of appeal, Parliament must have appreciated that the lawfulness of an APN could only be tested in the courts by means of judicial review (or perhaps as a public law defence to penalty or other enforcement proceedings arising from the APN). Parliament must also have realised that very many taxpayers in receipt of APNs would be likely to wish to challenge them, given their novel and unusual features, and the change in the economic benefits of tax avoidance which they were designed to bring about. Against that background, the representations machinery in section 222 fulfils an obvious purpose, by providing a relatively cheap and simple way for a taxpayer to challenge an APN, without incurring the cost of court proceedings or adding to the already very heavy burdens on the resources and expertise of the Administrative Court.
>
> [90] Indeed, it seems to me all but self-evident that section 222, read in its context, was intended by Parliament to provide the primary recourse for a taxpayer dissatisfiedwith an APN, which should normally be exhausted before judicial review proceedings are set in motion."

171. He continued by saying:

> "[94] …The duties imposed on HMRC by s 222 are heavy ones, particularly in the absence of any statutory appeal to the FTT, and it would be quite wrong for us to assume that HMRC would be likely to treat the exercise as a formality. Clearly, it is their duty to give serious and careful consideration to the representations which are made, supplemented if necessary by HMRC's acknowledged duty to deal in good faith with proper representations made to them by taxpayers, whether or not falling strictly within the scope of the APN.
>
> [95] As to the proper scope of objections which may be raised under s 222, I have already made it clear that the section should in my view be given a broad and non-technical construction, with the aim of enabling all objections to the application of the three conditions, or to the amount of the accelerated payment, to be covered if at all possible by the representations. Thus, for example, I see no reason why representations made on behalf of Mr and Mrs Archer could not refer to their joint involvement in the tax avoidance scheme, or the alleged reasons why it was unfair for HMRC to seek to recover an

> accelerated payment of approximately £6m from both of them. I accept that there will be some high level public law challenges to the APN regime which, even on the most benevolent construction, fall outside the scope of s 222, including for example most of the challenges on human rights grounds which this court considered in *Rowe*. Now that the general lawfulness of the APN regime has been established, however, I would expect such challenges to be relatively rare; and I am certainly unconvinced that any of the grounds relied on by the Archers were of such a nature as to render them incapable of resolution under the s 222 procedure.
>
> [96] For these reasons, it will be seen that I am in broad agreement with the conclusion reached by both courts below that section 222 does in general provide an alternative means of redress for the taxpayer in receipt of an APN which should normally be exhausted before the commencement of judicial review proceedings."

Mr McDonnell's submissions on behalf of Exclusive

172. Mr McDonnell submitted that HMRC's Response had not considered some of the "general grounds" set out in Exclusive's letter of representation. In particular, HMRC had not provided any of the requested information about the Designated Officer.

173. He submitted that this was similar to the position in Mrs Archer's case, as she had incorporated submissions about the Designated Officer in her representations. Henderson LJ had been "unconvinced that any of the grounds relied on by the Archers were of such a nature as to render them incapable of resolution under the s 222 procedure". The only reasonable inference from that finding, and from the Court's rejection of Mrs Archer's costs claim, was that her challenges about the Designated Officer should have been dealt with as part of HMRC's s 222 obligations.

174. He continued by saying that it must follow that the same was true of Exclusive, so that HMRC's Response was not a "determination" under s 222, but only a purported determination. Since the "payment period" for paying the amount claimed under an APN only begins to run 30 days after "the day on which [the taxpayer] is notified under section 222 of HMRC's determination", that period had not yet started. Penalties were only chargeable if payment was not made by the end of that 30 day period, see TMA s 55(8D)(b)(ii) set out at §58, and thus no penalties were due..

Mr Hall's submissions on behalf of HMRC

175. Mr Hall submitted that s 222 only required HMRC to consider the representations specifically identified as relating to the Conditions, together with submissions as to the amount. He said that the "general grounds" in Exclusive's letter of representation "had no basis in s 222" and could only be challenged by JR.

176. Mr Hall said that in the alternative, ie if he was wrong in the above submission:

(1) s 222 allows a person to make representations on the Conditions, and as to "the amount specified in the notice";

(2) the Designated Officer points cannot be part of a challenge to the Conditions but arguably fell within "the amount"; but

(3) as Exclusive is an Appeal Case, the amount in the APNs is the same as that on the Reg 80 and s 8 NIC determinations previously issued by HMRC. The questions raised in the representations about the methodology used by the Designated Officer are thus not

relevant to the "amount" on the APN, because that methodology had already been communicated.

177. Mr Hall also emphasised that in *Beadle*, the Court of Appeal had confirmed that the Tribunal had no jurisdiction to entertain, as part of a penalty appeal, a challenge to the validity of an APN.

The Tribunal's view

178. Our understanding of the *Mrs Archer* judgment is as follows:

(1) although representations must "fall within the scope" of s 222, that section must "be given a broad and non-technical construction, with the aim of enabling all objections to the application of the three conditions, or to the amount of the accelerated payment, to be covered if at all possible by the representations", see [87] and [95];

(2) in particular, "non-computational, matters" which bear upon the "amount" of tax to be paid, fall within the scope of s 222, see [61], citing [50] of the High Court judgment;

(3) given that broad approach, it "should be rare that any representation made by a tax payer about the APN could fall outside of the ambit of [s 222]", see [62], citing [51] of the High Court judgment;

(4) representations which do not fall strictly within the scope of s 222 should nevertheless be dealt with at the same time, in accordance with HMRC's general duty to consider submissions, see [94], referencing back to [103] of *Glencore*;

(5) using that approach, the judicial review claim procedure will be reserved for high level public law challenges, including for example most of those made on human rights grounds, see [95].

179. We next reminded ourselves that s 222 explicitly allowed Exclusive to make representations that:

(1) there is no tax enquiry or live appeal (Condition A);

(2) the return, claim or appeal was not made on the basis that a particular tax advantage arises from the scheme in question (Condition B);

(3) the scheme is not within DoTAS (Condition C); and/or

(4) the amount in the APN is incorrect.

180. Mr McDonnell submitted that the HMRC Response should have considered the following points:

(1) the identity of the designated officer;

(2) how the Designated Officer has been appointed;

(3) how the Designated Officer has determined to the best of his information and belief the sums demanded as being the 'understated tax';

(4) what information the Designated Officer relied upon;

(5) how the designated officer's decision-making process was carried out; and

(6) why the Designated Officer regards the resultant figure as corresponding to the statutory requirements of the APN legislation.

181. However, Mr McDonnell did not say whether in his view these points should have been considered under one of the Conditions, or in relation to the amount. Our own view is that (1) and (2) are requests for background information which should have been dealt with as part of HMRC's general duty to respond, as set out in *Glencore*, but that (3) to (6) are challenges to the "amount" of the APN, giving the term "amount", the "broad and non-technical construction" required by *Mrs Archer*. We therefore agree with Mr McDonnell that HMRC had a duty to consider the matters raised at points (3) to (6) and that HMRC's Response did not include HMRC's view of those matters.

182. However, we do not agree with him that, in consequence, HMRC did not make a "determination". In our judgment, the HMRC Response *is* a determination, albeit one which was flawed for failure to take into account matters which should have been taken into account. That failure falls squarely within the classic definition of *Wednesbury* unreasonableness namely that:

> "the court is entitled to investigate…with a view to seeing whether [the public body] has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to take into account matters which it ought to take into account."

183. Thus, the next step would be for there to be a judicial investigation as to whether HMRC's determination was vitiated by unreasonableness. If that were found to be the position, the APN would be set aside and there would thus be no penalty. However, that investigation can only be carried out by a court or tribunal which has a judicial review jurisdiction, or a supervisory jurisdiction of a similar nature.

184. In *Birkett v HMRC* [2017] UKUT 89 (TCC) at [30] the UT considered whether this Tribunal has a judicial review jurisdiction. The UT set out five points, of which the first two were that the Tribunal is a creature of statute and has no inherent JR jurisdiction; the passage then continued:

> "(3) But this does not mean that the FTT never has any jurisdiction to consider public law questions. A court or tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have…
>
> (4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.
>
> (5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction."

185. We must therefore consider the relevant statutory provisions in order to decide whether this Tribunal has the JR jurisdiction necessary to decide whether or not HMRC's determination should be set aside for unreasonableness. However, we are not approaching that question in a vacuum. A number of earlier judgments have already considered whether the Tribunal's statutory jurisdiction when deciding an appeal against an APN penalty includes the right to challenge the basis for imposing the APN.

186. The Court of Appeal judgement in *Beadle*, to which we made reference earlier in our decision, is particularly relevant. In summary, Mr Beadle been issued with a PPN, to which he had responded by making representations challenging its validity, one of which was that the

amount of "understated tax" specified in the PPN was not due as a matter of law. HMRC rejected the representations; Mr Beadle failed to pay the PPN and was issued with penalties. One of his grounds of appeal was that HMRC had been wrong to reject his representation as to the amount payable under the PPN: in his submission it should have been zero, and the penalty should also have been zero.

187. At the Court of Appeal Simler LJ gave the only judgment with which Moylan LJ and Sir Ernest Ryder both agreed. She endorsed the following passage from the UT's judgment below, see [33] and [43] of her decision:

> "Parliament has provided rights of appeal against the underlying tax assessment and against a penalty notice, but not against a PPN. In the case of a PPN, Parliament has only provided a right to make representations (within a specified time limit) which HMRC are required to consider. In our view, the absence of a right of appeal against PPNs is a clear indication that Parliament does not intend taxpayers to be able to challenge PPNs on appeal to the FTT. If taxpayers cannot do so directly, then it would be very odd to permit them to do so indirectly by way of an appeal against a penalty. The second reason, which reinforces the first, is that permitting such a challenge would be contrary to the design and purpose of the PPN regime."

188. At [48] she said:

> "…it is a clear and necessary implication of the FA 2014 scheme for PPN (and APN) notices, construed as a whole and in light of its statutory purpose, that the ability to raise a collateral public law challenge to the validity of the underlying PPN is excluded at the penalty and enforcement stages."

189. She concluded at [55] that "the FTT has no jurisdiction to entertain a public law challenge to the validity of a PPN given pursuant to the FA 2014, in the course of an appeal against a penalty notice",

190. Thus, in summary

(1) Mr Beadle made representations to HMRC as to the "amount" of tax; those representations were considered and rejected by HMRC;

(2) Mr Beadle subsequently submitted that there could be no penalty, because HMRC had been wrong on the "amount", and so the PPN was invalid; and

(3) the Court of Appeal found that the Tribunal had no jurisdiction to decide on the validity of a PPN as part of a taxpayer's appeal against the penalty; instead, those challenges must be decided by the UT or the courts as part of their normal JR jurisdiction.

191. Exclusive's letter of representation set out a number of points which relate to the "amount", when that term is given a "broad and non-technical" construction". It is clear from *Beadle* that the Tribunal has no jurisdiction to consider *a direct challenge* to the "amount" contained in an APN, and it must also follow that the Tribunal has likewise no jurisdiction to consider the more broadly based challenge to the amount which is contained within points (3) to (6) set out at §180. We therefore decide Issue One in HMRC's favour.

The Tribunal's view in the alternative

192. If, contrary to our conclusion set out above, the Tribunal *does* have the jurisdiction to decide whether the determination should be set aside for unreasonableness because of HMRC's

failure to consider the representations made about the Designated Officer, we would have found as follows:

(1) As Mr Hall said, this was an Appeal Case in which Exclusive was aware of the origin of the figures used in the APNs, because they were identical to those on the PAYE/NICs determinations that had already been issued; Exclusive was also aware of the reasons, because they had been explained in HMRC correspondence. Exclusive's position was thus the same as that of the claimants in the *Rowe* appeal who knew the reasons why HMRC considered that their schemes did not work, because these had been set out by HMRC when issuing the closure notices and amendments, see [89] of that judgment, set out at §121.

(2) On 13 April 2013, HMRC had issued "Spotlight 17" entitled "Employee Benefit Schemes: Using Fettered Payments". Had the Designated Officer considered the points raised in C3's letter of representation, her reasoning would have been consistent with that in Spotlight 17. She would thus have found the PPS Scheme did not work, just as had been the position for the claimants in *Vital Nut*, see [229] of the judgment, set out at §123.

(3) Since this is not only an Appeal Case, but also one in which HMRC had issued a Spotlight, had HMRC taken the Designated Officer points into account, the determination would inevitably have been the same. As a result, the determination would not have been set aside and the penalties would have remained in place.

(4) We would have come to that conclusion for the following reasons:

(a) In *John Dee Ltd v C&E Comrs* [1995] STC 941, the Court of Appeal issued guidance on how the Tribunal should exercise the supervisory jurisdiction relevant to that case; the nature of that jurisdiction was described as "very similar, if not identical, to the task of a court on judicial review of an administrative decision".

(b) The Court confirmed that "where it is shown that, had the additional material been taken into account, the decision would *inevitably* have been the same", the appeal against the decision can be dismissed.

(c) Thus, had we decided that the Tribunal had the necessary jurisdiction to consider whether the determination should be set aside for unreasonableness, we would have taken the approach in *John Dee*, given that the supervisory jurisdiction there described was essentially identical to a JR jurisdiction.

(d) The *John Dee* approach is the same as that taken by the Court of Appeal in *Rowe* when they followed the requirements of SCA s 32(2A), which of course does not apply to the Tribunal.

193. Thus, even if we were wrong as to the Tribunal's jurisdiction, we would have found against Exclusive on Issue One. Mr Fox's position was different and we consider it at §309. We move on to considering whether Exclusive had a reasonable excuse.

ISSUE TWO (Exclusive): WHETHER BELIEF A REASONABLE EXCUSE

194. Both parties accepted that a key authority when considering reasonable excuse was *Perrin v HMRC* [2018] UKUT 156 ("*Perrin*").

Perrin

195. In *Perrin* the UT confirmed at [70] that:

> "…the task facing the FTT when considering a reasonable excuse defence is to determine whether facts exist which, when judged objectively, amount

to a reasonable excuse for the default and accordingly give rise to a valid defence. The burden of establishing the existence of those facts, on a balance of probabilities, lies on the taxpayer."

196. The UT then said:

> "[71] In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times (in accordance with the decisions in *The Clean Car Co* and *Coales*.
>
> [72] Where the facts upon which the taxpayer relies include assertions as to some individual's state of mind (e.g. "I thought I had filed the required return", or "I did not believe it was necessary to file a return in these circumstances"), the question of whether that state of mind actually existed must be decided by the FTT just as much as any other facts relied on. In doing so, the FTT, as the primary fact-finding tribunal, is entitled to make an assessment of the credibility of the relevant witness using all the usual tools available to it, and one of those tools is the inherent probability (or otherwise) that the belief which is being asserted was in fact held; as Lord Hoffman said in *In re B (Children)* [2008] UKHL 35, [2009] 1AC 11 at [15]:
>
> > "There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities."
>
> [73] Once it has made its findings of all the relevant facts, then the FTT must assess whether those facts (including, where relevant, the state of mind of any relevant witness) are sufficient to amount to a reasonable excuse, judged objectively.
>
> [74] Where a taxpayer's belief is in issue, it is often put forward as either the sole or main fact which is being relied on – e.g. 'I did not think it was necessary to file a return", or "I genuinely and honestly believed that I had submitted a return'. In such cases, the FTT may accept that the taxpayer did indeed genuinely and honestly hold the belief that he/she asserts; however that fact on its own is not enough. The FTT must still reach a decision as to whether that belief, in all the circumstances, was enough to amount to a reasonable excuse."

197. At [81] the UT set out a recommended process for this Tribunal when considering whether a person has a reasonable excuse:

> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, the Tribunal should take into account the experience and other relevant attributes of the taxpayer and the situation in which the

taxpayer found himself at the relevant time or times. It might assist the Tribunal, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

(4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time. In doing so, the Tribunal should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.

198. The fourth stage of *Perrin* is relevant to APN penalties, because FA 2009, Sch 56, para 16(2)(b) provides:

> "where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased."

199. Before considering the steps set out in *Perrin,* we first set out the parties' submissions on the related law, in particular that in *Beadle* and *Sheiling.*

Beadle* and *Sheiling

200. Exclusive's case was that Mr Jones had an objectively reasonable belief that the JR would succeed because of HMRC's failure to consider the Designated Officer points in the representations.

201. Mr Hall submitted that it was clear from *Beadle* that a person's belief in the merits of his legal challenge to an APN did not provide a reasonable excuse. Mr Beadle had appealed against two FTT judgments, one concerning jurisdiction and one concerning reasonable excuse; we considered the Court of Appeal's judgment on the first of those issues earlier in this decision, see §186ff. In relation to the second, the Court of Appeal at [59] upheld Judge Rupert Jones's analysis in *Beadle v HMRC* [2017] UKFTT 0829 (TC):

> "202. …Even if the appellant had a reasonable belief, subjectively, objectively or both, and based upon professional advice, that he was not liable to pay the understated partner tax liability, this could not form a reasonable excuse for the failure to pay the PPN within the payment period.
>
> 203. Applying the test in the *Clean Car Company*, a reasonable taxpayer in the appellant's position would make payment of the sum under the PPN within the payment period and make whatever challenges (whether statutory or extra statutory) to the underlying liability he or she chose to do in the mean-time. This would be the case, whatever his or her reasonable belief as to the merits of his substantive challenge. If such a challenge were successful then the appellant would receive a refund or repayment but this cannot reasonably excuse [not] making a payment [of] the sum due under the PPN that Parliament has required should be made in the interim.
>
> …
>
> 209. The appellant's reasoning, if accepted, would permit any taxpayer to circumvent the evident intention of Parliament as to who should hold the tax pending the final determination of the tax liability by allowing taxpayers to institute multiple proceedings in different fora. It would also result in the Tribunal entertaining collateral challenges to the underlying tax liability in penalty proceedings which cannot have been the Parliamentary intention. The statute requires that the taxpayer [pay the tax] in the interim while the underlying liability, if challenged, can be resolved. If the taxpayer is

successful in their challenge to the liability they will receive the appropriate rebate from HMRC."

202. The Court of Appeal concluded at [57] that:

> "…the FTT was correct to hold that the invalidity or alleged invalidity of PPNs are not matters that could properly be considered in the context of a reasonable excuse defence to penalties for non-compliance."

203. Mr Hall invited the Tribunal to conclude that Issue Two should therefore be decided in HMRC's favour. Mr McDonnell responded by relying on *Sheiling*, in which the UT had distinguished "procedural" invalidity from "substantive invalidity", saying at [69]:

> "It must be noted at the outset that (real or perceived) 'invalidity' can arise in two situations. The first is where the taxpayer believes that the tax payment accelerated by the notice is not owed by him, either because he does not owe it at all or because it has been wrongly calculated. We call that 'substantive invalidity'. The second is where the taxpayer believes that, regardless of whether he owes the tax, the APN has not been issued in compliance with one or more of the statutory conditions imposed by FA 2014. We call that 'procedural invalidity'."

204. The UT then held at [78] that:

> "…it would be unduly restrictive to determine that a belief as to procedural invalidity could never be a reasonable excuse in respect of a penalty for non-payment of the APN. In our opinion, there is a difference between substantive invalidity and procedural invalidity, because in relation to procedural invalidity the policy considerations considered in *Beadle* and in other cases cannot simply be assumed to apply in undiluted form. Where the taxpayer's belief is essentially that what purports to be on its face an APN is not an APN at all, because it does not satisfy the statutory conditions, the policy considerations driving the APN code are necessarily less persuasive in determining the objective reasonableness of that belief."

205. The UT went on to give the following guidance at [81]:

> "…in assessing the objective reasonableness of a belief which a taxpayer had been found to hold that the APN issued to him is procedurally invalid, the FTT's assessment should take into account the following points:
>
> (1) In line with *Perrin*, it should consider all the surrounding facts and circumstances, including the foundation for the taxpayer's belief, any advice on which he has relied, and whether that advice is specific to his APN.
>
> (2) It should identify precisely what the taxpayer does believe; is it that the APN is obviously procedurally invalid, or merely that it is arguable (however strongly) that it is?
>
> (3) It should take into account the reason for the alleged procedural invalidity. We observe that in *Chapman*, to which the FTT referred in this case in forming its view, the FTT referred at [72] to 'an obvious or gross error' in the notice, such as where the decimal point had slipped in the statement of the amount to be paid. One can postulate other similar errors. One would hope that in practice such errors would be corrected through the process of representations. In any event, the assessment of objective reasonableness in such a situation will be much more straightforward than one where the determination of validity turns on detailed legal arguments and the outcome of a judicial review.

> (4) In view of the concerns we have set out above, it would not be desirable or appropriate for the FTT to conduct a 'mini-trial' of the arguments which a taxpayer asserts mean that his judicial review into procedural invalidity will or is likely to be successful.
>
> (5) It must be borne in mind that substantive invalidity cannot form the basis for a reasonable excuse. While the dividing line between substantive and procedural invalidity is clear in principle, there may be instances where the taxpayer's excuse is really the former dressed up as the latter."

206. The UT added at [84] that:

> "if the alleged ground of procedural invalidity requires detailed submissions by the parties on competing legal arguments, it is by definition not a gross or obvious error, and, as such, is considerably less likely to be objectively reasonable in this context."

207. Mr McDonnell drew attention to the UT's definition of a "procedural error" at [69], namely one where an APN has not been issued in compliance with one or more of the statutory conditions imposed by FA 2014. He submitted that HMRC's failure to consider the Designated Officer representations was a "procedural error" and so could provide the basis for a reasonable excuse defence.

208. Mr Hall expressed some unease about the *Sheiling* distinction between a procedural and a substantive error, saying that in *Beadle* the Court of Appeal had made no such distinction. However, he accepted that when *Sheiling* was itself appealed, HMRC did not file a respondent's notice, so the *dicta* in *Sheiling* have not been considered by a higher court. On the basis that *Sheiling* was right to distinguish between the procedural and a substantive errors, he said:

(1) at [81(3)] the UT had referred to "an obvious or gross error" in the APN, such as where the amount to be paid was plainly incorrect because the decimal point was in the wrong place. In his submission, the Designated Officer points were not "obvious or gross" errors; and

(2) at [84] the UT had contrasted "obvious or gross" procedural errors with those where the determination of the APN's validity "turns on detailed legal arguments and the outcome of a judicial review", and the Designated Officer points fell into the latter category.

The Tribunal's view

209. Before deciding whether or not Exclusive (acting through Mr Jones) believed that the JR would succeed because of HMRC's failure to consider the Designated Officer points in the representations, we first considered the case law. We note as follows:

(1) there is no suggestion in *Beadle* that belief in a procedural error could provide the basis for a reasonable excuse when appealing a penalty;

(2) in *Sheiling* there is a contrast between:

(a) the wide definition of procedural error at [69] as being one which occurs where the APN has not been issued in compliance with one or more of the statutory conditions imposed by FA 2014; and

(b) the UT's later statements that it is more likely to be objectively reasonable for a person to rely on a procedural error if it is "obvious or gross" and does not turn "on detailed legal arguments";

(3) the parts of the judgment in *Sheiling* on which Mr McDonnell relied were *obiter*, because the UT went on to confirm the judgment below that:

(a) the taxpayer's belief at the relevant time "was not that the APNs were without doubt invalid, as he would likely have believed in the case of an obvious or gross error…Rather, it was that there was a 'good prospect' that the judicial review proceedings would show the APNs to have been issued unlawfully, although he was not certain that they were unlawful…In relation to such a belief, in principle it is reasonable to conclude that a reasonable and responsible taxpayer would be likely to pay the APNs and argue his case in the judicial review"; and

(b) the predominant reason for his non-payment of the APN was the financial consequences, not his belief.

210. We accept that *Sheiling* provides support for the view that a gross or obvious procedural error in an APN can provide the basis for a reasonable excuse defence. However, we agree with Mr Hall that a genuine belief in the success of a JR based on the failure by the Designated Officer to form a view on the effectiveness of the scheme is not "gross or obvious" error, but instead one which requires "detailed legal submissions": this is evident from the *Rowe* litigation as well as from the length and complexity of the relevant parts of this Decision.

211. It therefore follows that a person's belief that a JR would succeed because of the failure by the Designated Officer to form a view on the effectiveness of the scheme cannot form an objectively reasonable excuse for the purposes of an appeal against an APN penalty. That is sufficient to decide Issue Two in HMRC's favour, but in case we are wrong in our analysis we have also considered *Perrin.*

Perrin and Mr Jones's belief

212. The first and second steps in *Perrin*, further informed by the guidance in *Sheiling* at [81], require us to establish "precisely what" Mr Jones believed.

213. It is clear from our findings of fact that, although Mr Jones genuinely believed that the JR would succeed, his belief was based on trust in the expertise of his advisers, and not on any understanding of the merits of the claim, see §109ff. It follows that Mr Jones had no knowledge of the Designated Officer ground, and did not rely on it.

214. The third stage of *Perrin* is to consider whether this uninformed faith in his advisers was reasonable for a person in Mr Jones's position, and we find that it was not. He is an intelligent and experienced businessman, who regularly makes contracts with his suppliers. He was capable of understanding the PPS Scheme sufficiently to explain it to Menzies.

215. The fourth stage of *Perrin* is thus academic, but even if we were to be wrong in our analysis and our factual findings, this stage would block any reliance on this excuse in relation to the third penalties. These were issued on 20 April 2018, more than four months after the *Rowe* judgment became final on 12 December 2017. From that point it was clear that reliance on the Designated Officer point would be insufficient for the JR to succeed, at least where (a) the taxpayer knew from other information the reasons for the calculation of the "amount" in question, as in the *Rowe* appeals. and/or (b) where the scheme fell within a published Spotlight

(as in *Vital Nut* appeals), and as set out at §192(1) and (2) above, both (a) and (b) applied to Exclusive.

216. Thus, even if (contrary to our findings above) Exclusive had a reasonable excuse until 12 December 2017, it failed to remedy the position "without unreasonable delay" after that date. It was not until 21 January 2019, some two years later, that Exclusive came to a TTP agreement with HMRC,

Conclusion on Issue 2

217. For the reasons set out above, we find that Exclusive's reliance on its legal advice does not provide it with a reasonable excuse. We consider Mr Fox's position at §326.

ISSUE THREE (Exclusive): INTERIM RELIEF AND REASONABLE EXCUSE

218. Issue Three was whether Exclusive had a reasonable excuse because interim relief had been granted for its JR claim. We first set out the legal background to Exclusive's interim relief application, then make findings of fact, and finally decide whether interim relief provides Exclusive with a reasonable excuse for not paying the APNs by the due date.

The legal background

219. In JR cases, the Court can be asked for "interim relief" to prevent the enforcement of a decision pending the determination of the JR claim. The principles which apply when the other party is a public body are summarised in *Patterson & Karim on Judicial Review* at Part 1 Chapter 3.10:

> "In essence it is an approach of a modified 'balance of convenience'. It is modified to take into account the wider public interest that arises in public law cases. What is required is, firstly, an arguable case for the grant of judicial review and, secondly, the avoidance of the greater risk of injustice. The court will consider the overall case, taking into account the strength of the claim, the importance of maintaining the status quo, the wider public interest and, if relevant, which will be rare in public law cases, the prospect of any monetary order providing an adequate ultimate remedy. Where a public authority is involved 'the balance of convenience has to be looked at more widely and take into account the interests of the public in general to whom these duties are owed [*Smith v ILEA* [1978] 1 All ER 411]."

220. The public interest where a public authority is involved was explained by Lord Goff in *R v Secretary of State for Transport, ex parte Factortame Ltd. (No. 2)* [1991] 1 AC 603 ("*Factortame*") at page 673 as follows:

> "It is necessary in cases in which a party is a public authority performing duties to the public that one must look at the balance of convenience more widely and take into account the interests of the public in general to whom these duties are owed. In this context particular stress should be placed upon the importance of upholding the law of the land in the public interest, bearing in mind the need for stability in our society and the duty placed upon certain authorities to enforce the law in the public interest. This is of itself an important factor to be weighed in the balance when assessing the balance of convenience. So if a public authority seeks to enforce what is on its face the law of the land and a person against whom action is taken challenges the validity of that law, matters of considerable weight are to be put into the balance to outweigh the desirability of enforcing in the public interest what is on its face the law and so to justify the refusal of interim injunction in favour

> of the authority or to render it just or convenient to restrain the authority for the time being for enforcing the law."

Rowe Interim Relief

221. As noted earlier in this decision, the appellants in the *Rowe* JR applied for interim relief. This was originally granted on the papers by Haydn J on an *ex parte* basis, ie without HMRC having been given notice of the application. Haydn J's order was that:

> "The Defendants [HMRC] will refrain from enforcing the partner payment notices in this case until the Claimants' applications have been determined by the court."

222. There was then a dispute between HMRC and the claimants as to what Haydn J's order meant, and a hearing took place before Simler J on 26 March 2015, see *R(oao Rowe) v HMRC* [2015] EWHC 1511 (Admin) ("*Rowe Interim Relief*"). Mr Southern QC, on behalf of the claimants, asked Simler J to confirm that, until the determination of the JR:

(1) HMRC would consider representations, but would not determine the PPNs; and

(2) HMRC were inhibited from issuing penalty notices if a JR claimant failed to comply with a PPN.

223. Having considered *Factortame* and the parties' submissions, Simler J disagreed with Mr Southern, saying at [35] that "what Mr Southern seeks to do is to obtain a positive advantage rather than simply preserving the status quo and holding the ring", and continuing:

> "[36] In my judgment, for the reasons I shall come to in a moment, the balance of injustice here strongly favours allowing the statutory scheme to operate up to the point of enforcement of payment. It is in the public interest that until set aside, HMRC's decision in relation to the operation of this legislation should be respected and should be permitted to take effect. To prevent HMRC from continuing to consider and ultimately from publicly promulgating decisions on written representations received in relation to PPNs will mean that no sum will become payable because only after such representations have been determined by HMRC does any sum become due under paragraph 6, subparagraph 5 of Schedule 32. Moreover, no penalty for late payment can become due until the requisite time after the sum becomes payable has expired.
>
> [37] This goes well beyond holding the ring. If the Claimants' claims for judicial review are successful the relevant PPNs will fall to be quashed and there would be no sum payable under the PPNs, and to the extent that a penalty notice has also been issued, this too would fall away. Provided that the Claimants do not have to pay anything under the PPNs or the penalty notices in the interim, the status quo is preserved and the injunction has effect and substance.
>
> [38] If the Claimants' claims for judicial review are unsuccessful ultimately that will mean that they should all along have paid the sums under the PPNs as and when they fell due under the primary legislation. In that scenario there would have been no justification for delaying the date when such payment fell due or preventing HMRC from confirming the PPNs following consideration of the written representations. Similarly, there would have been no justification for preventing the other consequences of failure to pay or late payment, in application of the penalties regime.

> [39] The balance of injustice accordingly strongly favours allowing the statutory scheme to operate up to the point of enforcement in those circumstances."

224. One of the reasons given by Simler J for those conclusions was that:

> "there is a statutory scheme for challenging any penalty notice that is issued. That scheme operates by reference to paragraph 16 of Schedule 56 of the Finance Act 2009 and enables a tax payer who is issued with a penalty for late payment of sums otherwise due, to appeal to the First Tier Tribunal on the basis that there is a reasonable excuse preventing liability from arising in the first place. That affords an avenue for addressing the question of penalties and no compelling reason has been advanced by Mr Southern for effectively inviting this court to determine the question in favour of the Claimants in a manner that would prevent the FTT from exercising this jurisdiction."

225. Simler J concluded at [67] by saying that in relation to existing claimants she was qualifying Haydn J's order by adding that the order "does not inhibit either the issuing of further PPNs or the continuing reconsideration and conclusion of further representations or the issuing of penalty notices". In relation to new claimants, she made an order in similar terms in accordance with a draft provided by HMRC.

226. It is thus clear from *Rowe Interim Relief* that:

(1) the claimants asked for interim relief on the basis that HMRC would be inhibited from issuing penalty notices;

(2) Simler J refused the application in those terms; instead she decided that HMRC were free to issue penalties but could not enforce them pending determination of the JR; and

(3) if the claimants' JR succeeded, the penalties would fall away because the PPNs would be set aside, but if the JR failed, any penalties issued would be enforceable.

Sword Services

227. On 7 December 2015, after Simler J had decided *Rowe Interim Relief*, and also after she had subsequently decided the *Rowe* JR claim in HMRC's favour, another group of claimants made various applications to the High Court, one of which concerned interim relief.

228. Those applications were heard and determined by Picken J, see *R (oao Sword Services) v HMRC* [2015] EWHC 3544 (Admin) ("*Sword Services*"). As regards interim relief, he recorded at [34] that the claimants had previously agreed a consent order drafted by HMRC in the following terms:

> "Insofar as any Claimant in this case has filed and served a witness statement providing evidence of hardship in paying any sum due under a Partnership Payment Notice, HMRC shall not (without first applying to the court in relation to the cogency of such evidence) take steps against that Claimant to enforce any sum due and payable under the PPN or any associated penalty until the current Claimant's judicial review claim is determined by this court or otherwise disposed of."

229. Picken J decided that the existing order was to be maintained until after the final determination of the *Rowe* litigation. It seemed to us likely that the wording of the consent order set out above was the same as, or substantially similar to that issued by Simler J after *Rowe Interim Relief*. In any event, it is clear from its wording that HMRC were not prevented

from issuing penalty notices, but only from enforcing them, pending the conclusion of the *Rowe* JR.

The interim relief granted to Exclusive: findings of fact

230. When Exclusive's JR claim was filed on 23 September 2016, RPC referred the Court to *Sword Services* and said they understood HMRC was "not currently resisting interim relief being afforded to the claimants in APN judicial review challenges". Attached to the claim was a draft order for interim relief in identical terms to that set out above in relation to *Sword Services*, other than that "PPN" was replaced by "APN".

231. The Exclusive JR claim attached a witness statement dated 19 September 2016 from Mr Jones on the basis of hardship, which concluded by stating that if Exclusive had to pay the APNs, it "would have to stop trading and be wound up".

232. As we have already found, on 23 November 2016, C3 sent a letter of representation to HMRC in relation to Exclusive's APNs. HMRC's Response to those representations was issued on 22 February 2017, and ended by noting that Exclusive had applied to the High Court for interim relief, adding:

> "Until we inform your legal representatives otherwise, HMRC will not enforce payment of the accelerated payment or of any associated penalties until the Court has dealt with your application for an interim relief order. However, the accelerated payment remains due by 30 March 2017 and you will be liable to penalties if you do not pay in full and on time. This is consistent with the terms of the interim relief order for which you and other claimants have applied."

233. On 28 November 2017, HMRC wrote to RPC, stating that they accepted that Exclusive and certain other claimants met the hardship requirements, and that they would consent to interim relief made in accordance with the draft consent order attached, which read:

> "1. The Defendants [HMRC] shall not take steps to enforce any sum due and payable by the Claimant under its APNs or associated penalties until the High Court has refused permission to proceed or, if permission to proceed is given, has given judgment on the claim.
>
> 2. Nothing in paragraph 1 shall affect the Defendants' entitlement to:
>
> 2.1 issue further APNs to the Claimant
>
> 2.2 determine any written representations by the Claimant in respect of any APN it has received (including any further APN)
>
> 2.3 issue any notice of penalty to the Claimant in respect of its failure to pay the accelerated payment required of it by any APN (including any further APN)."

The parties' submissions

234. Mr Hall said that it was quite clear from the facts that (a) HMRC had retained the right to issue penalties, and (b) the effect of the interim relief order was only to defer enforcement of the APN and any related penalties. It followed in his submission that it could not be objectively reasonable for a person such as Mr Jones, who had been granted interim relief, to believe that it removed the obligation to pay the APN on time, or that it prevented penalties either from being charged, of from subsequently being enforced if the JR failed.

235. Mr McDonnell said that:

(1) the whole point of granting interim relief was that the taxpayer did not have to pay the APN by the due date;

(2) Mr Jones had given a witness statement setting out the hardship that would be suffered if Exclusive had to pay the APNs by the due date;

(3) when Exclusive filed its JR claim, HMRC was "not currently resisting interim relief being afforded to the claimants in APN judicial review challenges";

(4) although the interim relief order was not sent to RPC until 28 November 2017, from the date on which the JR claim was filed Exclusive reasonably believed that interim relief would be granted; and

(5) Exclusive did not pay the APNs because Mr Jones had been told interim relief would be granted.

236. Mr McDonnell relied in particular on two submissions. The first was that the purpose of interim relief would be undermined if taxpayers such as Exclusive, who did not pay the APN in reliance on the grant of interim relief, were now liable for penalties. He said it would be "utterly extraordinary" if a taxpayer complying with a court order did not have a reasonable excuse for not paying the APNs by the due date.

237. His second submission was based on *Factortame,* in which Lord Goff had stated that where "a public authority seeks to enforce what is on its face the law of the land and a person against whom action is taken challenges the validity of that law" interim relief is only granted if "matters of considerable weight…outweigh the desirability of enforcing in the public interest". He pointed out that in *Rowe Interim Relief,* Simler J had considered the high threshold set by *Factortame* and found that it was satisfied. In Mr McDonnell's submission, it must therefore follow that reasons of "considerable weight" were contained within Exclusive's JR claim, and as a result a taxpayer who has received (or been told he would receive) interim relief would also have an objectively reasonable basis for believing that the JR claim would succeed. In his submission, HMRC should only enforce penalties where taxpayers failed to pay their APN *after* the end of the JR proceedings, and this would represent "alignment of the penalty regime" with the interim relief order.

The Tribunal's view

238. Having considered the legal background and the parties' submissions, we apply the guidance in *Perrin.*

The first stage: taxpayer's assertions as to reasonable excuse

239. We understand Exclusive's case to be that it had an objectively reasonable excuse for not paying the APNs by the due date because Mr Jones:

(1) had been told that Exclusive would be granted interim relief:

(2) knew interim relief was only granted where the other party is the Crown, where the JR raised matters of "considerable weight", and the granting of interim relief therefore showed that the JR had a good chance of succeeding; and

(3) also understood that as a result no penalties would be chargeable for failure to pay by 30 days after being notified of MRC's Response.

The second stage: which of those facts are proven

240. Mr Jones's witness statement says that Exclusive did not pay the APNs in part "because of the interim relief obtained from HMRC". Mr Hall took Mr Jones to the draft interim relief order, but Mr Jones said he could not understand it.

241. We have already identified conflicts between his witness statement and his oral evidence, and have made findings of fact that Mr Jones's belief the JR would succeed was based on the expertise of his advisers, and not on any understanding of the merits of the JR claim, and also that he had no understanding of the progress of the JR, see §94 and §109. Even had Mr Jones been told that Exclusive would be granted interim relief, we find as a fact that he did not understand the meaning of the term, let alone that interim relief is only granted where the JR raised matters of "considerable weight", or that as a result there would be no penalties chargeable if he failed to pay the APNs by the due date. We therefore find that §239(2) and (3) above are not proven.

The third stage: objectively reasonable?

242. Exclusive's case on Issue Three therefore fails because there are no findings of fact that Mr Jones believed that the effect of the interim relief order meant that the JR would succeed, or that he was no longer liable to pay by the due date, or that he would escape penalties were he to fail to pay but subsequently lost the JR.

243. Even if Mr Jones *did* believe that the interim relief order meant he did not have to pay the APN, we would have found that his belief was not objectively reasonable. That is because:

(1) Although we were not supplied with copies of RPC's legal advice to Mr Jones, it is absolutely plain from the terms of the draft interim order and from the final order that its effect was merely to stay enforcement. It did not change the date on which APNs were due for payment or prevent HMRC from issuing penalties for failure to pay by the due dates.

(2) RPC would have known the effect of the order, and would also have know that this outcome was consistent with Simler J's rejection of the claimants' application in *Rowe Interim Relief* that "no penalty for late payment can become due until the requisite time after the sum becomes payable has expired". RPC would also have seen the same terms reflected in HMRC's Response.

(3) We therefore find that RPC id not advise Mr Jones that the interim order had changed the date by which the APN was legally due to be paid, or that the order prevented penalties being payable.

Conclusion on Issue Three:

244. For the reasons set out above, we refuse Exclusive's third ground of appeal. We move on to consider Mr Fox's case.

MR FOX: FINDINGS OF FACT

245. This part of the Decision sets out our findings of fact in relation to Mr Fox, on the basis of the documents, his witness statement and the oral evidence given during the first day of the hearing. There are further findings of fact about interim relief at §331.

Mr Fox's use of the Schemes

246. Mr Fox works in foreign exchange as a contractor rather than as a permanent employee. Around 2008 he began to use a contractor loan scheme known as "Penfolds". During the 2010

tax year he moved to a different contractor loan scheme known as "Hamilton", and used that Scheme during 2011. Both Schemes had DoTAS numbers.

247. Under the Schemes, there was no contract directly between Mr Fox and his engager. Instead, the engager made payments to an intermediary for Mr Fox's services. Part of that money was then paid to Mr Fox as salary, and the balance was paid as a loan from an Employee Benefit Trust ("EBT"). The detailed structure of the Schemes was set out in *Hoey v HMRC* [2019] UKFTT 0489 (TC).

248. Mr Fox used the Schemes because they were more convenient than operating via a personal service company, and they also avoided the risk of his services being found to be within the personal service legislation at ITEPA Part 2, Chapter 8 ("IR35"). He understood that tax counsel had confirmed the Schemes to be effective, and he believed those assurances.

249. On 19 November 2012, HMRC opened an enquiry into Mr Fox's self-assessment ("SA") return for the 2010-11 tax year**.** At the time of this hearing, the enquiry remained open.

250. On 14 January 2014, HMRC issued an assessment under TMA s 29 ("a discovery assessment") in relation to the 2009-10 tax year, assessing Mr Fox to £119,110.20 on the basis that the money received from the EBTs was earnings and not a loan. Mr Fox appealed the assessment to HMRC on 20 January 2014.

Matt Hall and the assessments

251. Meanwhile Matt Hall had been instructed by the trustees of the Penfold and Hamilton EBTs to act on their behalf in dealing with HMRC's enquiries into users of the Schemes. The users were formed into "litigation associations" for each Scheme, and Matt Hall liaised with HMRC with the aim of resolving the enquiries, either by settlement or by litigation. He established a website on which he updated users on what was happening, known as the "Contractor Update" site. Mr Fox regularly viewed the website.

252. As noted above, HMRC was issuing assessments to users of the Schemes on the basis that sums said to be loans were in fact salary. The loans had been disclosed on the contractors' P11Ds, but HMRC did not base their assessments on the P11D figures, but instead estimated the loan by multiplying the salary on the P35s by four or by five. Matt Hall said that this methodology:

> "appears to have been an arbitrary process carried out on a bulk basis for administrative ease. The figure shown on the discovery assessment as additional tax due was almost always incorrect where this process was used."

253. On 15 May 2015, HMRC confirmed to Matt Hall that they were using the process described above, saying:

> "If the loan values were on the forms P11D, they were not copied over to individual records, so when we realised we would need to protect our position by issuing several thousand assessments for various years, we did not have the time or resource to review each form individually. We used a salary multiplier as advised by the scheme promoter and we would have expected that to produce the right result, but in any cases where it did not, customers were not disadvantaged as they had the right to appeal."

254. Mr Fox appealed the discovery assessment issued to him on the basis that it was "wrong in law and excessive", but did not say that HMRC had ignored the P11D figure and had instead used an estimated sum calculated based on the salary paid to him.

The APNs

255. HMRC sent Mr Fox three APNs, as follows:

(1) On 11 June 2015, HMRC issued an APN for £67,171 in relation to Mr Fox's use of the Penfolds Scheme in 2009-10 ("the First APN"). The APN states that the conditions in FA 2014, s 219 were met because Mr Fox had made a tax appeal on the basis that a tax advantage resulted from the Penfolds Scheme, and the arrangements were within DoTAS.

(2) On 19 June 2015, HMRC issued an APN for £51,939.20 in relation to Mr Fox's use of the Hamilton Scheme in 2009-10 ("the Second APN"). It states that the conditions in FA 2014, s 219 were met, because Mr Fox had made a tax appeal on the basis that a tax advantage resulted from the Hamilton Scheme, and the arrangements were within DoTAS.

(3) On 27 July 2015, HMRC issued an APN for £1,985.60 in relation to Mr Fox's use of the Hamilton Scheme in 2010-11 ("the Third APN"). It states that the conditions in FA 2014, s 219 were met because there was an open enquiry into a tax return which had been made on the basis that a tax advantage resulted from the Hamilton Scheme, and the arrangements were within DoTAS.

256. The First and Second APNs were thus for 2009-10, the year for which HMRC had already issued a discovery assessment and against which he had appealed, so they were Appeal Cases. The Third APN was for 2010-11, a year which still under enquiry, so this was an Enquiry Case. The total sum HMRC sought to collect by the APNs was £121,095.80.

The JR

257. When Matt Hall became aware that HMRC were beginning to issue APNs to users of the Schemes, he contacted RPC to obtain legal advice on their legality. They discussed possible grounds for a JR claim, one of which was the lack of evidence that the Designated Officers had carried out their statutory responsibilities.

258. On 13 March 2015, Matt Hall posted an update on his website informing users of the Schemes that HMRC were about to start issuing APNs, and that the executive members of the litigation associations were liaising with RPC with a view to filing JR claims.

259. During 2015 a number of webinars and a conference were organised by one or more of RPC, Matt Hall and another firm called Peak Performance. Mr Fox listened to the webinars and attended the conference. RPC advised attendees that whilst there could be no guarantee, the JR claim should succeed.

260. In June 2015, Mr Fox instructed RPC to represent him in a JR claim challenging the First APN. On 12 June 2015, RPC filed a JR claim in which Ms Hilary Duggan was the lead claimant; Mr Fox and over 1,000 other claimants were joined in the same claim. Mr Fox subsequently added his Second and Third APN to the claim.

261. The grounds of the JR were that in issuing the APNs HMRC had breached natural justice, legitimate expectations and human rights and had also acted unreasonably. One of the points made under the "unreasonableness" ground was that:

> "no evidence has been provided to show that the payments demanded by the Defendants have ben determined 'to the best of the officer's information and belief'."

262. Matt Hall also filed a witness statement at the High Court to support the "unreasonableness" ground. He stated that HMRC were using arbitrary multipliers to assess taxpayers, and that the same erroneous figures had been carried across into the APNs**.**

The *Rowe* JR and the revised grounds

263. As noted earlier in this decision, on 31 July 2015, the *Rowe* JR was decided in HMRC's favour by Simler J at the High Court. On 9 October 2015, RPC filed amended grounds in the Duggan JR, which took into account the *Rowe* judgment. The first ground was now HMRC's failure to comply with the Designated Officer requirements, and reads:

> "The APNs have been issued in breach of the strict requirements of the legislation, namely the designated officer issuing the notices is required to determine the amount which is correctly payable 'to the best of that officer's information and belief', and in the circumstances the officer cannot have reached such a determination in the case of the Claimants."

264. The amended grounds also set out the same points (a)-(f) as were included in Exclusive's representations, see §98(1). The document continues by saying that all the claimants are "Enquiry Cases" (although this is incorrect, as Mr Fox's First and Second APNs were Appeal Cases) and that as a result:

> "…it is difficult to identify how any designated officer has been able to reach the determination required of that officer…in order for a designated officer to reach the quantification of the amount identified in section 220(2)(b)/220(3) it is clear that the discretion must be carefully exercised, and therefore that the designated officer must fully and properly consider the Arrangements to identify whether it achieves its tax saving purpose. There is no evidence from the Defendants or on the face of the APNs that the Defendants have met this obligation."

265. Under a newly separate ground of "unreasonableness", the document says:

> "…there is nothing in the APNs to indicate that any individual has undertaken any individual consideration to the sums expressed in the APNs. Quite the contrary, in the absence of any information to the contrary, on the face of the APNs or otherwise, it appears evident that HMRC is producing APNs mechanically and on an industrial scale. In so doing HMRC is neglecting the individual consideration which forms a critical requirement of the machinery of the statute."

Interim relief

266. On 17 June 2015, so five days after the JR claim was filed, Matt Hall posted an update on his website which included information about witness statements and hardship. It also contained a section on penalties, with the following text set out twice, once in the main body and once highlighted in bold at the end:

> "Should the judicial review be unsuccessful, HMRC will seek to recover any penalties they have issued for non-payment of the sums demanded in the APNs."

267. On the same date, Mr Fox signed a witness statement in support of his application for interim relief; this was later filed by RPC at the High Court. On 30 July 2015, the Court granted interim relief; the wording of the Order was identical to that set out at §228, in relation to *Sword Services,* and thus stated that HMRC could not recover the APN amount or any associated penalty until the JR claim was "finally determined or otherwise disposed of."

Mr Fox's letters to HMRC

268. Matt Hall's website included template letters which contractors could use after they had received APNs, together with the following instructions:

> "You should use this suggested form of wording in order to make written representations to HMRC. This is something you must do yourself. Neither we, nor RPC, will be making these representations on your behalf."

269. In response to the First APN, Mr Fox downloaded the template from Matt Hall's website. amended it to reflect his own position and sent it to HMRC. The letter was undated, but a chronology provided by HMRC for the hearing records the date as 29 July 2015, and we have taken that to be correct.

270. Mr Fox's letter:

(1) sets out the address of the recipient HMRC office as being Glasgow, although the First APN was in fact issued from HMRC's office in Newcastle;

(2) included the HMRC reference number used on the First APN; was marked "By Recorded Delivery";

(3) was headed "Representations regarding the accelerated payments notice ('APN') issued to me in relation to scheme reference number 71676485", being the DoTAS number for the Penfolds Scheme;

(4) was signed by Mr Fox; and

(5) includes the following text:

> "I refer to the APN dated 11 June 2015 which you have issued to me ('the APN') a copy of which I attach for ease of reference.
>
> This letter should be treated as containing representations in respect of the APN for the purpose of section 222(2), Finance Act 2014…
>
> I assume that the amount referred to in the APN has been calculated by the designated HMRC officer pursuant to the provisions of section 220, Finance Act 2014. Please let me know if that is not the case.
>
> I, together with others participants to the above referenced arrangements, have instructed solicitors to commence judicial review proceedings to challenge the legality of the APNs which you have issued against me and others. The basis of my challenge to the APN is set out at length in the Grounds for Judicial Review which accompany the judicial review claim form and have been provided to HMRC through the Solicitor's Office (South West Bush House, Strand, London). For the purposes of these representations, and specifically section 222(2) Finance Act 2014, you are to take it that those submissions are repeated here in their entirety…"

271. On 12 August 2015, HMRC replied; the letter was sent from HMRC's Newcastle office and reads as follows:

> "Thank you for your recent letter.

> I have notified Solicitors Office of your intention to commence Judicial Review proceedings and they will inform me of any action I need to take in relation to this. You have also requested that your letter be treated as containing representations. HMRC must consider any representations made in accordance with Section 222(2) of the Finance Act 2014.
>
> To be in accordance with that subsection, a representation is required to be made in writing within 90 days of the date the APN was given and must object on the grounds that one or more of Conditions A, B or C has not been met and/or to the amount specified in the notice. As the contents of your letter do not meet those requirements, I am unable to treat your letter as containing a valid representation.
>
> The APN charge remains due by 14 September 2015 unless you make a valid representation.
>
> Please note that our new address is HM Revenue & Customs, Counter Avoidance AP Teams, S0694, NEWCASTLE, NE98 1ZZ. If you write to us but do not use this address then we may not get your post."

272. It is clear from the wording of this letter, and we so find, that (a) HMRC refused to accept that Mr Fox's letter contained valid representations, and (b) for that reason said that the APN payment date continued to be set by reference to that on the APN, rather than by reference to the date on which HMRC's determination of the representations was received.

273. HMRC accepted that this was the purpose and effect of their letter: the detailed chronology provided for the hearing said that:

> "As the Appellant had not made representations in accordance with s. 222 (2) FA14 by 14 September 2015, the due date for payment remained 14 September 2015 (being 90 days after the date the Appellant was notified of the APN)."

274. Mr Fox wrote a similar letter in response to the Second APN. This too was signed but undated, addressed to HMRC's Glasgow office, and marked "Recorded delivery". It has the HMRC reference number from the Second APN (which is different to that on the First APN) and the DoTAS number for the Hamilton Scheme. The text is identical to the earlier letter, other than that it refers to an APN dated 19 June 2015, the date of the Second APN.

275. On 13 August 2015, HMRC replied. Their letter begins by recording that Mr Fox's letter was received on 29 July 2015, but the text is otherwise a mirror image of that sent in relation to the First APN. In other words, HMRC again refused to accept that Mr Fox had made representations and the payment date continued to be calculated by reference to the date on the APN. HMRC's chronology prepared for the hearing similarly confirmed that this was the purpose and effect of their letter.

276. There was a dispute between the parties as to whether Mr Fox had sent HMRC a letter relating to the Third APN, and we return to this at §293. The parties also disagreed on whether the letters were "representations" within the meaning of FA 2014, s 222 and we consider this at §291 and §293ff.

Mr Fox's understanding

277. The evidence in Mr Fox's witness statement was that he had "limited" understanding of the grounds on which the JR had been brought. He said:

> "I do recall, however, that it was mentioned to me that the claims were being brought on human rights grounds and that the retrospectivity of the APNs was an important consideration. There were also questions about whether HMRC had followed correct processes."

278. Under cross-examination, he said RPC had advised him there was a "reasonable chance" of the JR succeeding, and that the percentage chance of success was "somewhere in the middle". In relation to interim relief, he said he had filed a witness statement to evidence that paying the APN would cause hardship, but he had not seen the interim relief order until the first day of the hearing. When asked by Mr Hall if he had been updated by his advisers in relation to the interim relief order, he replied "not to that particular point, to my recollection, no".

The surcharges, the penalties and the IVA

279. Mr Fox did not pay the amounts shown on any of the APNs by the date set out on those Notices, and he was issued with surcharges and penalties as follows:

(1) On 18 November 2015, HMRC issued Mr Fox with a penalty of £99.28 under FA 2014, s 226, being 5% of the Third APN. The penalty stated that the APN had been due for payment on 29 October 2015; this was 90 days after the Third APN had been notified.

(2) On 19 November 2015, HMRC issued him with a surcharge of £3,358.55 under TMA s 59C(2), being 5% of the amount on the First APN. The surcharge stated that the APN had been due for payment on 14 September 2015, being 90 days after the APN had been notified.

(3) On 18 May 2016, HMRC issued Mr Fox with a second 5% penalty in relation to the Third APN, and on 25 May 2016 they issued him with a second 5% surcharge in relation to the First APN.

(4) On 7 September 2016, HMRC issued him with a surcharge of £2,596.96 under TMA s 59C(2), being 5% of the amount on the Second APN. It is clear from the wording on the face of that document that this is the "second" 5% surcharge, because it states that it has been issued because of a failure to pay the APN six months after the date it was due, see Sch 56, para 3(3). Mr Fox's position was that if HMRC had issued a first surcharge, he had not received it. In any event no other surcharge was before the Tribunal for determination**.** The surcharge stated that the Second APN had been due for payment on 22 September 2015; this was 90 days after it had been notified to Mr Fox.

280. Mr Fox appealed all the above surcharges and the penalties to HMRC, and notified the appeals to the Tribunal.

281. In April 2019, he entered into an individual voluntary arrangement ("IVA") with his creditors, including HMRC.

The Duggan JR and the Tribunal's directions

282. The Duggan JR was stayed behind the final determination of the *Rowe* litigation, and Mr Fox's appeals were stayed behind the final determination of the Duggan JR, along with penalty/surcharge appeals made by other claimants in the same JR.

283. On 4 December 2019, RPC applied for the stay to be lifted and HMRC agreed. Correspondence with the Tribunal followed in relation to whether a Rule 18 direction was appropriate, with the lead cases being Exclusive and another appellant, Mr Underwood.

284. On 19 February 2020, Judge Poole decided a Rule 18 direction was inappropriate, but that instead Exclusive's case and that of Mr Underwood should proceed to a hearing, with the other appellants stayed behind, as we explained at §31. On 20 March 2020, RPC notified the Tribunal that HMRC were withdrawing three of the penalties issued to Mr Underwood which related to the Hamilton Scheme. RPC suggested Mr Fox replace Mr Underwood as an informal lead case, and on 3 September 2020, Judge Poole agreed:

285. The Duggan JR remained undetermined at the date of this hearing. Mr Fox said in his witness statement (dated April 2021) that HMRC was considering whether to withdrawn the APNs, and a letter dated 9 March 2021 from RPC to that effect was exhibited to his witness statement. However, neither party updated the Tribunal on the current position, possibly because of what happened in relation to the First and Second APNs, and its effect on Mr Fox's participation in the proceedings, to which we now turn.

The withdrawal of the surcharges for the First and Second APNs

286. At the end of the first day of the hearing, Mr Hall was part way through his cross-examination of Mr Fox. This was expected to continue for around an hour and a half the following day, followed by re-examination by Mr McDonnell. As set out at §146, RPC emailed the *Mrs Archer* case to HMRC after the close of that day's proceedings.

287. Before Mr Fox could be recalled to the witness box the following morning, Mr Hall said he had been instructed to withdrawn the surcharges relating to the First and Second APNs. He was provided with the following statement by HMRC's Solicitor's Office:

> "While we accept that HMRC is one organisation, it is unfortunate that Mr Fox did not notify the specific representations to the appropriate team as the grounds for judicial review were sent to an entirely separate office. We do not consider it would have been difficult for Mr Fox to identify the specific individual circumstances that he may be relying upon to challenge the APNs but we accept that the broad challenges of the judicial review to matters such as condition C (DOTAS notifiability point) would need to be considered in order to confirm his APNs correctly. This broader approach in considering representations under s.222 FA14 comes from *Archer* [2019] EWCA Civ 1021 in the context of a costs claim.
>
> We as an organisation will undertake to review other appellants that may be in the same position to see if the particular facts in the case of Mr Fox exist in other appeals. We will need to review the particular circumstances of each appellant and would invite them to work with us where necessary to identify if they were party to the judicial review at the time they notified us that they wished those points to be considered as representations, that the JR application contained matters relevant to section 222 FA14, and that the notification was received before the end of the 90-day period for making representations."

288. Mr Hall confirmed to the Tribunal that "if there are other identical situations" HMRC would withdraw the surcharges/penalties which are under appeal.

289. The Tribunal's understanding of HMRC's position at this point is as follows:

(1) Having received the First and Second APNs, Mr Fox had sent HMRC a letter which did not detail specific objections, but instead stated that:

(a) the letter should be treated as containing representations;

(b) he had entered into a JR, and

(c) for the purposes of these representations, and specifically s 222(2) HMRC was to take it that the submissions in the JR were repeated in the letter..

(2) HMRC had treated those letters as containing no valid representations. However, *Mrs Archer* had found that HMRC had a duty to construe s 222 broadly.

(3) Having considered that case overnight, HMRC now agreed that Mr Fox's letters *did* contain representations, which should have been considered.

(4) Because HMRC had failed to consider the representations, they now accepted Mr Fox was not liable to surcharges for failure to pay the First and Second APNs.

(5) HMRC also accepted that other taxpayers had used a similar form of words, and their letters had similarly been rejected as not containing representations; they undertook to review other appellants and would apply the same approach if the situation was the same as that of Mr Fox.

290. As a result of HMRC's change of position, and recognising that Mr Fox was in the middle of giving evidence, Mr McDonnell requested permission for him and RPC to ask Mr Fox whether he wished to (a) withdraw his appeal against those surcharges, and (b) also against the penalties relating to the Third APN, which were each only £99. We gave permission on the basis that the only matter to be discussed between Mr Fox and his legal advisers was whether or not to continue with his appeal.

291. After a short break, Mr McDonnell informed the Tribunal that Mr Fox had decided it was not proportionate to continue. Mr McDonnell added that during the break Mr Fox had identified a letter he had previously sent to HMRC responding to the Third APN, which we have called the Third Letter. Mr McDonnell said that once the Third Letter had been provided to HMRC and the Tribunal, it would be clear that it was in the same terms as Mr Fox's first two letters. As a result, in his submission, the penalties for the Third APN should be cancelled as well as the surcharges for the first two APNs

292. At Mr McDonnell's request, Mr Fox was released from the witness box without any further cross-examination. Mr McDonnell later confirmed that Mr Fox was not withdrawing his appeals against the penalties, pending clarification as to whether HMRC would cancel the penalties because of the Third Letter.

The Third Letter

293. Shortly afterwards, the Third Letter was emailed to HMRC and to the Tribunal. Mr McDonnell added some further explanation about its discovery, saying that Mr Fox had done "another search of his files in the light of this morning's events and found a copy of his letter of representations to HMRC in relation to the Third APN".

294. The Third Letter was substantially identical to that sent in response to the Second APN, so that the heading referred to the Hamilton DoTAS number, but the first line of the text referred to "the APN dated 27 July 2015", the date of the Third APN. Like Mr Fox's other two letters, it was undated but signed, and the HMRC address was in Glasgow

295. HMRC's position at the end of the third day of the hearing was that they had searched in vain for a copy of the Third Letter in their records. Mr Hall pointed out that it was undated, and had been provided to HMRC only after Mr Fox's evidence had concluded; he said HMRC were unable to accept that the Third Letter had been sent, unless further supporting evidence was located. The case was then relisted for a fourth day to take place on 22 November 2021.

The email to Emma

296. On 18 October 2021, RPC sent HMRC an email from Mr Fox dated 2 August 2015, which was addressed to "emmaw" at "thehubwales". RPC's covering email said Emma was Mr Fox's "agent".

297. The subject of Mr Fox's email was "APN received" and three attachments were listed: "Hamilton APN – sent 27 July.pdf"; "witness statement 3 pdf" and "HMRC reply 3 pdf". However, none of those documents was attached to the copy served by RPC. Their covering email said that "given the passage of time, no further contemporaneous evidence can be found which evidences delivery".

298. The text of Mr Fox's email to Emma read:

> "As discussed earlier, I have received a third APN from HMRC, this time in relation to Hamilton for tax year 2010/2011. I have enclosed a copy of the APN, as well as the witness statement required for when you have already received a previous APN and a copy of the reply letter to HMRC.
>
> Please confirm that all is in order."

299. In written submissions provided shortly before the hearing resumed on 22 November, Mr Hall submitted that the Tribunal should find that the Third Letter had not been sent to HMRC, and he repeated those submissions orally. Mr McDonnell asked the Tribunal to find that the Third Letter had been both sent and delivered to HMRC. We next consider the evidence together with both parties' submissions.

Whether the Third Letter was sent

300. The Third Letter refers to the Third APN, both in the text and indirectly by use of the DoTAS reference number, and it was signed by Mr Fox. However, we agree with Mr Hall that on the balance of probabilities it was prepared by Mr Fox but not actually posted. That is because:

(1) Mr Fox's witness statement said "I made written representations to HMRC in response to the first two APNs, dated 29 and 31 July 2015", and he exhibited copies of those two letters to his witness statement, along with HMRC's replies. His witness statement thus did not refer to the Third Letter, and it was not exhibited.

(2) Mr Fox gave no oral evidence about the Third Letter. In particular he was not recalled to the witness box (a) after he had located it during the break on the second day of the hearing; (b) when Mr Hall set out HMRC's difficulties with the Third Letter on the third day, or (c) on the final day, after Mr Hall had provided written submissions confirming that HMRC would be asking the Tribunal to find that the Third Letter had not been sent.

(3) Although the Third Letter is marked "recorded delivery", no evidence was provided as to the record of the delivery.

(4) HMRC have no copy of the Third Letter.

(5) HMRC replied to Mr Fox's letters on the First and Second APNs, but did not reply to the Third Letter.

(6) There is no evidence that any follow-up letter was sent either by Mr Fox, or by any of his advisers, as might have been expected if the Third Letter had been sent but not acknowledged.

(7) Mr Fox's email of 12 August 2015 to Emma states that he is attaching a "copy of the reply letter", and Mr McDonnell encouraged us to infer from the use of the word "copy", that the original had been sent to HMRC. However, we agree with Mr Hall that the word "copy" simply means that Mr Fox was attaching an electronic copy of a physical document; there is no necessary inference that the hard copy letter was sent to HMRC. .

(8) The email to Emma does not say the Third Letter was sent to HMRC, or (if sent) when it was sent.

(9) There was no evidence from Emma, and no explanation as to her role, or in what sense she was Mr Fox's "agent", as RPC said was the position.

(10) There was also no evidence as to how the email to Emma had reached RPC, or as to why they had the email but not the attachments.

301. We therefore find as a fact that the Third Letter was not sent to HMRC.

Whether the Third Letter was delivered

302. Even if that finding were to be incorrect, so that the Third Letter had been sent by Mr Fox, we would have found that it was not delivered to HMRC. That is because the Interpretation Act 1978, s 7 provides that a letter is only deemed to have been delivered if the conditions there set out are met.

303. The section applies where "an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used)". It thus encompasses representations made to HMRC about an APN, because FA 2014, s 222(2) provides that a taxpayer has to "send" written representations.

304. The section provides as follows:

> "…unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

305. HMRC's position is that the "contrary intention" is proved, because they have no evidence of receipt. However, it is also clear that the Third Letter was not properly addressed. It was sent to HMRC's office in Glasgow, despite both HMRC's previous letters having informed Mr Fox that the correct address was in Newcastle, and warning him that "If you write to us but do not use this address then we may not get your post". We thus find that, even if the Third Letter was sent, it was not delivered to HMRC.

The final hearing day, and the other appellants

306. As explained above, on the second day of the hearing, HMRC withdrew the surcharges issued to Mr Fox and explained the reasons for the withdrawal in a statement, which is set out at §287. In summary, having considered *Mrs Archer*, HMRC had accepted that they should not have rejected Mr Fox's letters, and in consequence no surcharges were due. The statement also said that HMRC would "undertake to review other appellants that may be in the same position to see if the particular facts in the case of Mr Fox exist in other appeals" and that if so, the related penalties or surcharges would be similarly cancelled.

307. However, when the hearing resumed on 22 November 2021, HMRC's position had changed. Although Mr Fox's surcharges had been withdrawn and would not be reissued, Mr Hall said that HMRC now considered that they had been wrong to conclude that *Mrs Archer*

applied, because Mr Fox's letters were not "representations" within the meaning of s 222. Mr Hall set out HMRC's amended position statement in relation to appellants who had sent similar letters to Mr Fox. It read as follows:

> "We acknowledge that a concession was made on day two of the hearing. At the time of the last hearing, HMRC considered that as a result of Archer (which was not part of the authorities bundle, nor a major part of the skeleton arguments made by the appellants) that HMRC would have to consider Judicial Review grounds, where the taxpayer was party to those JR proceedings, that parts of that JR claim met the statutory conditions for being representations (i.e. covering conditions A-C or quantum), where they were relevant to the individual taxpayers case and where notification was received before the end of the 90 day period for making representations.
>
> Further to the previous hearing HMRC have changed our view on the position and we do not believe that the letter submitted by Mr Fox would constitute representations, as it does not clearly specify the Judicial Review claim to which Mr Fox states he is a party, nor identifies the relevant grounds that apply to him that HMRC should consider. The submissions this morning set out HMRC's revised position.
>
> As stated this morning, HMRC will not resile from the concession we made in Mr Fox's case. In line with HMRC's submissions made to the Tribunal this morning, we no longer consider that those who sent highly similar letters to Mr Fox will have made valid representations. We would be prepared to work with those appellants who believe they have submitted representations in line with HMRC's position as outlined this morning."

308. The references in this statement to "HMRC's revised position" and "HMRC's position as outlined this morning" are to the submissions of Mr Hall which are summarised below. The Tribunal next considers whether that revised position is correct, in other words, whether Mr Fox's letters did constitute representations within the meaning of s 222.

ISSUE ONE (Mr Fox): WHETHER TIME LIMIT HAD STARTED TO RUN

309. As explained at §59, a penalty (or surcharge) is payable where an APN has not been paid by the later of 90 days after it has been given to the taxpayer and 30 days after the date on which "HMRC's determination in respect of those representations is notified" to the taxpayer, see s 223(5) above in relation to Enquiry Cases and TMA s 55(8D) inserted by s 224, in relation to Appeal Cases.

310. Mr McDonnell's position was that Mr Fox's letters contained representations which HMRC had failed to consider; that as a result there had been no "determination", and in consequence the payment date for the APNs had not begun to run, and so no penalties/surcharges were due.

311. However, we have found as a fact that Mr Fox only sent HMRC two letters. HMRC had withdrawn the related surcharges, and Mr Fox had withdrawn his appeals. Therefore the only appeal remaining to be determined by the Tribunal was Mr Fox's appeal against the penalties for the Third APN, and we have found that he did not send a letter to HMRC about that APN.

312. It follows that Issue One is not relevant to Mr Fox's remaining appeal. However, because it will be relevant to other appellants, and because it was fully argued, both parties asked the Tribunal to set out our conclusions.

313. We first considered whether Mr Fox's letters were representations within the meaning of s 222, before going on to decide Issue One.

Whether Mr Fox's letters were "representations"

Mr Hall's submissions

314. Mr Hall accepted that Henderson LJ had held in *Mrs Archer* that s 222 should be given "a broad and non-technical construction", but said Mr Fox's letters were nevertheless not representations within the meaning of that section, because:

(1) it is not clear from the text whether the JR claim has begun: the letters simply states that Mr Fox and others have "instructed solicitors to commence judicial review proceedings to challenge the legality of the APNs which you have issued against me and others" (his emphasis);

(2) if the JR claim had begun, the letter did not identify the claim;

(3) the letter did not refer to any of the Conditions, or to the "amount" of the APN; and

(4) it did not refer to any particular part of the JR claim, so as to identify which parts were arguably relevant to the Conditions or to the "amount" of the APN.

315. In Mr Hall's submission, a person seeking to make representations under s 222 must do more than make general points. It must identify how those points apply to his particular case. Mr Hall said that some taxpayers "have multiple JRs for multiple years"; some think they are a claimant in a JR, but in fact are not, and some JR claims contain nothing of relevance to s 222. In his submission, HMRC should not have to "spend expend time and resources…looking into their vaults in order to ascertain which JR, if any, is appropriate".

Mr McDonnell's submissions

316. Mr McDonnell said that the Duggan JR was filed on 12 June 2015, and Mr Fox's first letter was sent to HMRC over a month later, on 29 July 2015, so the claim had clearly commenced at the date of the letters. HMRC as a body knew which JRs claims had been filed to challenge the APNs, and they knew from the scheme reference number that Mr Fox was a participant in the Penfolds and Hamilton Schemes, so it was not the case that HMRC would have to "search their vaults" to identify the relevant JR.

317. He added that it was normal legal practice to "incorporate by reference" – in other words, to refer to one document as being incorporated in another, and that was what had happened here: Mr Fox had incorporated the grounds of his JR in his letter of representations. One of the grounds in his JR was that HMRC had acted unreasonably because the amounts had been inaccurately calculated, and the JR had also questioned whether the Designated Officer had determined the figures "to the best of the officer's information and belief'. In his submission, HMRC could not simply ignore Mr Fox's letters because they did not include the reference number of the relevant JR.

The Tribunal's view

318. We begin by noting that Mr Fox headed his letters "Representations regarding the accelerated payments notice ('APN') issued to me…" and explicitly stated that it "be treated as containing representations in respect of the APN for the purpose of section 222(2), Finance Act 2014" on the basis that the submissions made in that JR were "repeated here in their entirety". HMRC were thus left in no doubt that the purpose of his letters was to make representations, and that the content of those representations mirrored the submissions made in his JR.

319. HMRC also had the scheme reference number, the APN reference, and a copy of the APN itself, and they therefore knew Mr Fox was a participant in the Penfolds and Hamilton Schemes, and thus a claimant in the related JR. HMRC also knew the ground of appeal which had been filed for that JR. We thus agree with Mr McDonnell that HMRC could identify the grounds which Mr Fox had incorporated in his letters. .

320. We also agreed with Mr McDonnell that "incorporation by reference" is a common legal practice: for example, many contracts incorporate standard conditions or the terms of a master agreement or of an earlier agreement. Of course, as Mr Hall said, it would have been easier for HMRC if Mr Fox had replicated the JR grounds of appeal in the letter. But there is no substantive difference between repeating the JR grounds within the body of the letter of representations, as was the position with Exclusive, and incorporating the grounds by reference, as Mr Fox did.

321. The grounds of the Duggan JR were those originally filed (rather than the amended grounds which followed the *Rowe* JR judgment). Those grounds plainly raised points which fell within the "broad and non-technical construction" which Henderson LJ had said must be used to construe s 222, because they included explicit challenges to the "amount" of the APNs, namely that HMRC were using arbitrary multipliers to arrive at erroneous figures, see §261-§262. Mr Hall rightly did not seek to argue to the contrary.

322. If it was irritating and time-consuming for HMRC to track down the relevant JR, they could simply have asked Mr Fox for the JR reference number. In any event, having to expend extra effort either by asking the Solicitor's Office, or Mr Fox, is not a valid reason for rejecting his letters on the grounds that they were not "representations about a notice" within the meaning of s 222: they plainly were.

Whether the time limit had started to run

323. Given our finding that Mr Fox's letters were representations, it follows that:

(1) HMRC were required by s 222(3) to consider those representations;

(2) HMRC were required by s 222(4) to issue a determination; and

(3) s 223(5)(b) provides that the taxpayer is required to pay the APN by the later of:

(a) 90 days after the date the APN was received; and

(b) 30 days after the determination was received.

324. We therefore agree with Mr McDonnell that in relation to Mr Fox's First and Second APNs the time limit had not started to run, and that as a result no surcharge could be levied. If those surcharges had not been withdrawn by HMRC, we would have allowed his appeals. In other words, HMRC were right when they decided on 6 October 2021 that there was no legal basis for the surcharges, and their revised position on 22 November 2021 was wrong.

325. Our conclusion on Issue One is therefore different from our conclusion in relation to the same issue in Exclusive's case. HMRC's Response to Exclusive's representations was a determination, albeit one which was flawed for failure to take into account certain matters. In Mr Fox's case, as HMRC themselves accept, they did not issue a determination at all.

ISSUE TWO (Mr Fox): WHETHER BELIEF A REASONABLE EXCUSE

326. As explained in relation to Exclusive, a person's belief that his JR would succeed may provide an objectively reasonable excuse if his belief was founded on HMRC having made an "obvious or gross" error.

327. Mr McDonnell submitted that it was clear from Mr Fox's witness statement that he believed that "the APNs were procedurally invalid and accordingly void and of no effect". However, we do not agree. Instead, his witness statement only sets out his belief, having received advice from RPC, that "the chances of a successful challenge were greater than 50% and [he] expected us to win".

328. Our findings of fact as to Mr Fox's understanding are at §277. He referred to the claim being based in part on human rights grounds and also on the retrospective nature of the legislation, and he knew there were "questions about whether HMRC had followed correct processes". This falls well short of a belief that the JR should succeed because there was a "gross or obvious" error in the APNs. Mr Fox has not shown that the penalty should be set aside because his belief gave him a reasonable excuse, and we decide Issue Two in favour of HMRC.

ISSUE THREE (Mr Fox): INTERIM RELIEF AND REASONABLE EXCUSE

329. Issue Three was whether Mr Fox had a reasonable excuse because interim relief had been granted for his JR claim. We have set out the legal background earlier in this Decision in the context of Exclusive.

330. Mr McDonnell submitted that Mr Fox had a reasonable excuse for not paying the APN because he had received interim relief. We have already made the following findings of fact (see §267, §266 and §278):

(1) the interim relief was granted on the basis that HMRC could not recover the APN amount or any associated penalty until the JR claim was "finally determined or otherwise disposed of".

(2) Mr Fox regularly reviewed Matt Hall's website, and this included a warning that if the JR was unsuccessful "HMRC will seek to recover any penalties they have issued for non-payment of the sums demanded in the APNs".

(3) Mr Fox first saw the interim relief order on the first day of the hearing, and when asked by Mr Hall if he had been updated by his advisers in relation the Order, he replied "not to that particular point, to my recollection, no".

331. We find as a further fact that Mr Fox did not believe that the interim relief order would prevent HMRC from enforcing payment of the APNs or from charging penalties based on the payment dates, if they won the Duggan JR.

332. Even had Mr Fox had held such a belief, we would have found that it was not objectively reasonable, because it was patently clear from the advice on Matt Hall's website that this was not the position, and because that advice was consistent with that given by RPC, as we have already found at §243.

The continuing JR?

333. According to the evidence before the Tribunal, the Duggan JR remained live at the time of the hearing. It follows that interim relief continues in force, and the penalty charged to Mr

Fox is not due and payable unless and until the JR is determined in HMRC's favour. If Mr Fox were to succeed in the JR, or the APN were to be withdrawn by HMRC, the penalty would fall away.

OVERALL CONCLUSION AND APPEAL RIGHTS

334. For the reasons set out above, we find that:

(1) Exclusive loses on all three Issues;

(2) Issue One is no longer relevant to Mr Fox, but had HMRC not withdrawn the surcharges for the First and Second APNs, he would have won those appeals; and

(3) Issues Two and Three, being reasonable excuse, are decided against Mr Fox.

335. All the appeals of Exclusive, together with Mr Fox's remaining penalty appeals, are therefore determined in favour of HMRC.

Appeal rights

336. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE REDSTON
TRIBUNAL JUDGE

Release Date: 01 MARCH 2022