Neutral Citation: [2024] UKFTT 00120 (TC)

Case Number: TC09062

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2019/04693/04694/04695/09062/09063/09064

PENSION SCHEMES – conditions and procedure for deregistration by HMRC under section 157 Finance Act 2004 – whether the registration of three pension schemes ought to have been withdrawn – section 159 FA 2004 – in two cases no and in one case yes – three appeals against information notices under Schedule 36 Finance Act 2008 dismissed

Heard on: 10-11 October 2023
(written submissions on 20 October 2023)
Judgment date: 2 February 2024

Before

TRIBUNAL JUDGE MARK BALDWIN
DR CAROLINE SMALL

Between

NBC (ADMINISTRATION SERVICES) LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Firth, of counsel, instructed by The Independent Tax & Forensic Services LLP

For the Respondents: Paul Marks, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The Appellant ("NBC") is the scheme administrator of three pension schemes ("the Schemes"). These are the Halkin Pension Scheme ("Halkin"), the Headforte Pension Scheme ("Headforte") and The Isles and Storer Pension Plan ("Isles and Storer"). The Respondents ("HMRC") have served an information notice on NBC under paragraph 1 of Schedule 36 to the Finance Act 2008 ("FA 2008") in relation to each of the Schemes, and NBC appeals against each of those information notices; we refer to these appeals as the "Schedule 36 Appeals". HMRC has also withdrawn the registration of each of the Schemes pursuant to section 157 of the Finance Act 2004 ("FA 2004"). NBC appeals against each of those decisions; we refer to these appeals as the "De-registration Appeals".

2. On 18 December 2018 HMRC wrote to NBC (as administrator of Halkin) indicating that HMRC "is of the view that the registration of this scheme should be withdrawn in accordance with S157 Finance Act 2004" referring to grounds (za) and (zb) in section 157(1) FA 2004 (see below for a discussion of these grounds). On the same date HMRC served an information notice on NBC (as administrator of Halkin). One of the pieces of information it asked for was "A schedule showing the value and type of each investment held by the scheme as at each tax year end date from 5 April 2012 to 5 April 2018." On 17 January 2019 NBC's representative appealed the information notice on its behalf and wrote to HMRC asking for the evidence for its assertions that grounds for deregistration existed, indicating that they considered HMRC's assertions to be wrong and asking for HMRC's views urgently and confirmation that the de-registration would be stayed until the matter was resolved. On 7 June 2019 HMRC wrote to NBC (as administrator of Halkin) to inform them that the registration of Halkin had been withdrawn with effect from 7 June 2019, referring to grounds (za), (zb), (c) and (g).

3. On 18 December 2018 HMRC wrote to NBC (as administrator of Headforte) indicating that HMRC "is of the view that the registration of this scheme should be withdrawn in accordance with S157 Finance Act 2004" referring to grounds (za) and (zb). On the same date HMRC served an information notice on NBC (as administrator of Headforte). It too asked for information about investments held since 5 April 2012. On 17 January 2019 NBC's representative appealed the information notice on its behalf and wrote to HMRC asking for the evidence for its assertions that grounds for deregistration existed, indicating that they considered HMRC's assertions to be wrong and asking for HMRC's views urgently and confirmation that the de-registration would be stayed until the matter was resolved. On 7 June 2019 HMRC wrote to NBC (as administrator of Headforte) to inform them that the registration of Headforte had been withdrawn with effect from 7 June 2019, referring to grounds (za), (zb), (c) and (g).

4. On 19 January 2019 HMRC wrote to NBC (as administrator of Isles & Storer) indicating that HMRC "is of the view that the registration of this scheme should be withdrawn in accordance with S157 Finance Act 2004", but this time only referring to ground (zb). On the same date HMRC served an information notice on NBC (as administrator of Isles & Storer). It too asked for information about investments held since 5 April 2012. On 11 February 2019 NBC's representative appealed the information notice on its behalf and wrote to HMRC asking for the evidence for its assertions that grounds for deregistration existed, indicating that they considered HMRC's assertions to be wrong and asking for HMRC's views urgently and confirmation that the de-registration would be stayed until the matter was resolved. On 7 June 2019 HMRC wrote to NBC (as administrator of Isles & Storer) to inform them that the registration of Isles & Storer had been withdrawn with effect from 7 June 2019, referring to grounds (zb), (c) and (db).

THE DE-REGISTRATION APPEALS

The Registration and De-registration of Pension Schemes

5. Section 153 FA 2004 allows an application to be made to HMRC to register a pension scheme. Section 153(5) requires HMRC to register a pension scheme unless "it appears that" one of conditions to refuse the application is met. So far as relevant, these are:

> "(f) the pension scheme has not been established, or is not being maintained, wholly or mainly for the purpose of making payments falling within section 164(1)(a) or (b) (authorised payments of pensions and lump sums), or
>
> (g) the person who is, or any of the persons who are, the scheme administrator is not a fit and proper person to be, as the case may be—
>
> (i) the scheme administrator, or
>
> (ii) one of the persons who are the scheme administrator, or
>
> (h) the pension scheme is an occupational pension scheme, and a sponsoring employer in relation to the scheme is a body corporate that has been dormant during a continuous period of one month that falls within the period of one year ending with the day on which the decision is made, …"

6. Section 157(1) FA 2004 provides that HMRC "may withdraw the registration of a pension scheme". Section 158 provides that the registration of a pension scheme may only be withdrawn under section 157 "if it appears [to HMRC]" that one or more of several conditions is met. So far as relevant, these are:

> "(za) that the pension scheme has not been established, or is not being maintained, wholly or mainly for the purpose of making payments falling within section 164(1)(a) or (b) (authorised payments of pensions and lump sums),
>
> (zb) that the person who is, or any of the persons who are, the scheme administrator is not a fit and proper person to be, as the case may be—
>
> (i) the scheme administrator, or
>
> (ii) one of the persons who are the scheme administrator,
>
> (c) that the scheme administrator fails to provide information required to be provided to the Inland Revenue by virtue of this Part or Part 1 of Schedule 36 to the Finance Act 2008 and the failure is significant,
>
> (db) that any document produced to an officer of Revenue and Customs by the scheme administrator contains a material inaccuracy in relation to which at least one of conditions A to C in subsections (7) to (10) is met,
>
> (g) that the pension scheme is an occupational pension scheme, and a sponsoring employer in relation to the scheme is a body corporate that has been dormant during a continuous period of one month that falls within the period of one year ending with the day on which the decision to withdraw registration is made"

7. Section 157(5) provides:

> "(5) A failure by a scheme administrator to provide information required to be provided to the Inland Revenue by or under this Part or Part 1 of Schedule 36 to the Finance Act 2008 is significant if—
>
> (a) the amount of information which the scheme administrator fails to provide is substantial, or

> (b) the failure to provide the information is likely to result in serious prejudice to the assessment or collection of tax."

8. For the purposes of section 157(1)(db), subsections (7) to (10) provide as follows:

> "(7) Condition A is that the inaccuracy is careless or deliberate.
>
> (8) An inaccuracy is careless if it is due to a failure by the scheme administrator to take reasonable care.
>
> (9) Condition B is that the scheme administrator knows of the inaccuracy at the time the document is produced to an officer of Revenue and Customs but does not inform such an officer at that time.
>
> (10) Condition C is that the scheme administrator—
>
> (a) discovers the inaccuracy some time later, and
>
> (b) fails to take reasonable steps to inform an officer of Revenue and Customs."

9. If it withdraws the registration of a pension scheme, HMRC is required to notify the scheme administrator, and the notification must state the date on and after which the scheme will no longer be registered; section 157(2)-(4) FA 2004.

10. Section 159 FA 2004 entitles the scheme administrator to appeal against a decision by HMRC to withdraw the registration of a pension scheme under section 157 and goes on to make the following provisions in relation to such an appeal:

> "(6) On an appeal that is notified to the tribunal, the tribunal must consider whether the registration of the pension scheme ought to have been withdrawn.
>
> (7) If the tribunal decides that the registration of the pension scheme ought to have been withdrawn, the tribunal must dismiss the appeal.
>
> (8) If the tribunal decides that the registration of the pension scheme ought not to have been withdrawn, the pension scheme is to be treated as having remained a registered pension scheme (but subject to any further appeal)."

11. There was some debate between Mr Marks and Mr Firth about where the burden of proof lies in an appeal under section 159, as this is not a case where statute puts the burden on a particular party. We have not needed to decide this case on the burden of proof, but we agree with Mr Firth that, as HMRC are asserting the positive in the terms of the statutory test (that the registration of the scheme ought to have been withdrawn) and also that it appeared to them that one or more gating conditions was present and that they had correctly decided to withdraw the scheme's registration, the burden rests on them.

12. We considered two linked questions of law in relation to the deregistration of the Schemes. The first is, the criteria which must be met before HMRC can deregister a pension scheme. The second relates to the factors the Tribunal can consider when deciding an appeal against a deregistration decision.

What criteria must be met before HMRC can deregister a pension scheme?

13. For NBC, Mr Firth submits that, whilst the grounds in section 157(1) are a necessary precondition to deregistration, the fact that a ground is satisfied does not mean that the pension scheme must or should be deregistered. HMRC must still consider whether deregistration is necessary and proportionate in the circumstances. That is particularly so given the draconian effect of deregistration, which leads to a 40% charge on the value of the pension scheme assets immediately before it ceased to be registered (section 242 FA 2004). Section 242 imposes the deregistration tax charge on the scheme administrator, but it was not suggested that the liability would not ultimately be borne by the pension scheme. Because the consequences of

deregistration are so serious, it should be a last resort and should only be used following a compliance process which gives the scheme administrator an opportunity to cure the facts giving rise to the ground for deregistration.

14. In this context Mr Firth referred us to the approach taken by HMRC to revoking the approval of a fulfilment business. Section 49 of the Finance (No 2) Act 2017 provides that a person may not carry on an imported goods fulfilment business otherwise than in accordance with an approval by HMRC and subsection (4) allows HMRC "at any time for reasonable cause [to] vary the terms of, or revoke, an approval under this section". HMRC set out their approach to revocation in the Manual (at FHDDS33200), as follows:

> "Revocation of approval should be a last resort, where the application of penalties and other sanctions have not ensured compliance. If an officer is considering revoking a fulfilment business's approval, it must first issue a 'Minded to Revoke' letter and follow the compliance process."

15. For HMRC, Mr Marks submits that HMRC can deregister a pension scheme if it "appears" to them that one of the section 158 grounds is satisfied. All that is required is that there is an 'appearance' that a ground is present. Whilst he argued that HMRC only need to prove that it appeared to them that a ground was present, Mr Marks developed an ingenious argument based on the Explanatory Notes to the provisions in FA 2004, which draw a distinction between a breach of the registration requirements and other grounds in section 158. Note (9) says that "Schemes will only be de-registered where there is a case of serious abuse or a breach of the registration requirements.". This is reflected in the note to what became section 159, which reads "Under current legislation withdrawal of approval in most cases is at the discretion of the Inland Revenue and this will be retained. The Revenue may consider withdrawing the registration of a pension scheme if it appears that the scheme no longer fulfils the requirements for registration or where there has been a serious failure on the part of the scheme to provide information required by it under the legislation or pay any tax due."

16. Where this gets Mr Marks to is that, in order to use the power to de-register, HMRC must:

(1) Identify a ground of de-registration in section 158

(2) Establish whether that failure is a case of abuse (a breach of a ground which is not a registration requirement), or a failure to meet the registration requirements

(3) If it is a case of abuse the abuse must be serious.

(4) If it is a failure to comply with the registration requirements, there is no requirement for the failure to be serious.

(5) If there is a failure to provide information, the failure must be significant as defined in FA 2004.

17. Mr Marks' position on the level of discretion given to HMRC, and this Tribunal's power to review it, appeared to shift during the hearing. At one point we thought that his clever formulation discussed in [15]-[16] above was meant to work as a filter that did away with any real discretion on HMRC's part, in other words, it was automatic (and not challengeable) that a serious case of abuse or a failure to continue to comply with a registration requirement would lead to deregistration. Later he seemed to accept that there is still a discretion here. We consider that he was right to do so; the words "may withdraw" make that clear, and this reflects the policy position adopted by HMRC. At paragraph PTM033100 of the Pensions Tax Manual, they say:

> "Where a registered pension scheme has given HMRC grounds to de-register the scheme, for example where there is no scheme administrator, de-registration is not automatic. HMRC will consider the facts and circumstances of each case and decide whether or not to de-register the scheme."

18. More generally, we do not accept that there is any justification for using the Explanatory Notes to justify distinguishing between the various grounds in section 158(1) in this way. In *O (a minor), R (on the application of) v Secretary of State for the Home Department* [2022] UKSC 3, at [29], Lord Hodge DPSC emphasised that the words which Parliament has chosen to enact as an expression of the purpose of a piece of legislation are the primary source by which the meaning of the legislation is to be ascertained. The role of external aids is secondary, as he explained, at [30]:

> "External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity."

19. We can see that there is nothing special or different in the de-registration grounds, which reflect the grounds for refusing registration, if we consider section 158(1)(g). This tells us that one of the grounds for deregistration is "that the pension scheme is an occupational pension scheme, and a sponsoring employer in relation to the scheme is a body corporate that has been dormant during a continuous period of one month that falls within the period of one year ending with the day on which the decision to withdraw registration is made" and it mirrors ground (h) for refusing to register a pension scheme. We asked Mr Marks what the position would be with an occupational pension scheme which had significant assets and members but where the original sponsoring employer had ceased trading and was dormant. Would that scheme have to be deregistered? Would the position be different if the original sponsoring employer had been liquidated? Mr Marks said that HMRC would clearly not exercise its deregistration power in such a case and, if it did, judicial review might be an appropriate remedy. With respect, we do not consider that to be a good answer to the question how sections 157 and 158 operate.

20. All of this supports our analysis that section 158(1) simply lists the grounds which constitute gating items to the possible application of the deregistration power in section 157. There is no justification in the words of section 158 for reading in a different approach to the grounds, depending on whether they mirror a ground for refusing registration or not. Once one of these gating requirements is satisfied, HMRC "may" withdraw the registration of a scheme.

21. HMRC can only withdraw the registration of a pension scheme "if it appears to [them] that" one or more of the situations described in section 158(1) is the case. For HMRC, Mr Marks stresses that phrase and submits that all that is required for one of the gating conditions to be met is that there is an 'appearance' that a ground is present. We agree that the test is clearly not that one or more of those grounds actually is present. If it were, Parliament would not have included the words just quoted.

22. We also agree that the test is subjective. It asks whether something "appears to [HMRC]" to be the case. The words just quoted can usefully be contrasted with phrases such as "it is reasonable to suppose that", which are becoming increasingly common in fiscal legislation.

23. The requirement is also that something appears to HMRC to be the case. The test is not that HMRC suspect that something might be the case. The importance of this is that, in our opinion, for something to appear to a person to be the case, they must believe it to be so; if they harbour real doubts as to whether it is the case, then it will not look to them like it is (as opposed to might be) the case.

24. We discuss the extent of the Tribunal's ability to review HMRC's conclusion that a gating condition is satisfied below.

The nature of HMRC's discretion in section 157

25. On the question of discretion, Mr Marks referred us to *JP Whitter (Water Well Engineers) Limited v HMRC*, [2018] UKSC 31, a decision of the Supreme Court relating to de-registration of a business under the Construction Industry Scheme ("CIS"). The appellant was registered for gross payment under the CIS. It failed to comply with the requirements of the scheme without reasonable excuse. In consequence, HMRC exercised their power to revoke its registration. In doing so, they took no account of the likely effect of their action on the company's business. Section 66 FA 2004 provided that:

> "(1) The Board of Inland Revenue may at any time make a determination cancelling a person's registration for gross payment if it appears to them that –
>
> (a) if an application to register the person for gross payment were to be made at that time, the Board would refuse so to register him,
>
> (b) he has made an incorrect return or provided incorrect information (whether as a contractor or as a sub-contractor) under any provision of this Chapter or of regulations made under it, or
>
> (c) he has failed to comply (whether as a contractor or as a sub-contractor) with any such provision …"

26. It was common ground that the use of the word "may" in section 66(1) imported an element of discretion, but the dispute was as to its scope. The FTT held that HMRC had been wrong not to take account of the likely impact on the company's business. The tribunal described section 66 as giving a "general unfettered discretion" to take account of the impact on a business of cancellation. The Upper Tribunal and the Court of Appeal decided that Parliament had not intended HMRC to have the power, still less a duty, to take into account matters extraneous to the CIS regime (matters which do not relate, directly or indirectly, to the requirements for registration for gross payment, and to the objective of securing compliance with those requirements) when deciding whether or not to exercise the power of cancellation in section 66(1). So, consideration of the financial impact on the taxpayer of cancellation would fall well outside the intended scope of the power. Lord Carnwath (with whom all the other justices agreed) endorsed the Court of Appeal's approach. At [22] he said:

> "Like Henderson LJ, I cannot read the power as extending to matters "which do not relate, directly or indirectly, to the requirements for registration for gross payment, and to the objective of securing compliance with those requirements" (para 60). He rightly emphasised the highly prescriptive nature of the scheme. This starts with the narrowly defined conditions for registration in the first place, among which the record of compliance with the tax and other statutory requirements is a mandatory element, allowing no element of discretion. The same conditions are brought into the cancellation procedure

> by section 66. The mere fact that the cancellation power is not itself mandatory is unsurprising. Some element of flexibility may be desirable in any enforcement regime to allow for cases where the failure is limited and temporary (even if not within the prescribed classes) and poses no practical threat to the objectives of the scheme. It is wholly inconsistent with that tightly drawn scheme for there to be implied a general dispensing power such as implied by the company's submissions."

27. The company in that case was arguing that the effect of cancellation of CIS approval on its business should have been considered. It said that the effect on counterparties of discovering that it had been deregistered (rather than never having been registered to start with) would be calamitous and take it many years to recover from. The Supreme Court held that this was not something HMRC should consider. They should restrict the factors they considered to matters related to the scheme itself.

28. We discuss this issue more fully below, but this decision does not support Mr Marks' position that the Tribunal cannot review HMRC's exercise of its discretion. The whole premise of the case was that the Tribunal could review HMRC's exercise of its discretion. What was wrong was not that the Tribunal did this, but rather its decision that HMRC should have taken the commercial effect of deregistration into account.

29. Just as is the case with the discretion to cancel a CIS registration discussed in *Whitter*, the discretion in section 157 is "desirable … to allow for cases where the failure is limited and temporary (even if not within the prescribed classes) and poses no practical threat to the objectives of the scheme". There is no reason why that consideration should be any different depending on the ground that engages section 157. Before they can exercise their discretion, therefore, HMRC need to decide whether the ground justifies de-registration or whether it can be addressed in some other, less drastic way without threatening the objectives of the regime. The focus in all cases should be on the way the pension fund tax regime is designed to operate and preserving the integrity of that regime; as in *Whitter*, other extraneous factors must be ignored.

30. We agree with Mr Firth that the key feature of the pension fund regime is that it is designed to help and encourage people to make long-term savings for their retirement with certain tax reliefs/benefits. Deregistration, and the tax charge it triggers, runs counter to that objective. That is a very relevant consideration, but, self-evidently, it will not always prevail; if it did, section 157 would be functus officio.

How should the Tribunal approach deciding an appeal against a deregistration decision?

31. As far as section 159 is concerned, Mr Firth submits that the Tribunal has full appellate jurisdiction to decide for itself whether the registration of the pension scheme ought to have been withdrawn – the Tribunal is not exercising a supervisory jurisdiction. Even if one of the grounds in section 158 is satisfied, that only gives rise to the discretion to deregister. The Tribunal must still consider whether it is necessary and proportionate, in the circumstances, to deregister the scheme.

32. Mr Marks says that HMRC do not need to prove that a ground is present, nor do they need to show that de-registration is a necessary or proportionate response, or that the grounds established are sufficiently serious to justify deregistration. Whilst there is an element of discretion in section 157, which allows HMRC flexibility to consider the circumstances of the breaches, this does not give the Tribunal public law supervisory jurisdiction over the use of that flexibility; it is not entitled to consider whether the breach is serious enough to merit de-registration, or whether it is necessary or proportionate to do so.

33. We agree with Mr Marks that we do not have a general public law jurisdiction so far as HMRC's exercise of its discretion in this case (or anything else for that matter) is concerned. The jurisdiction of this tribunal is limited by statute; we can only consider the matters that Parliament has placed within our jurisdiction. However, it does not follow from this that we cannot ever consider public law issues. The question whether we can consider public law arguments was considered, and the position summarised, recently by the Upper Tribunal in *Caerdav Ltd v HMRC*, [2023] UKUT 00179 (TCC), as follows:

> "152. The starting point is therefore that appeal grounds which concern public law arguments should be pursued in judicial review proceedings rather than before the FTT. However, we, like the FTT, accept that the FTT may have jurisdiction to consider appeal grounds based on public law arguments (such as legitimate expectation) depending on the statutory provisions under consideration.
>
> 153. Thus, the statutory context is key, as the UT in Henryk explains.
>
> 154. In this appeal, the taxpayer appeals under s.83(1)(b) VATA, which permits appeals to the FTT with respect to *"the VAT chargeable… on the importation of goods from a place outside the member States."* Like the right of appeal under s.83(1)(c) VATA, the VAT chargeable on the importation of goods is not a matter of discretion but is mandatory and in an appeal the FTT is concerned with whether the conditions prescribed for a charge to arise under the legislation are present and the amount of the charge.
>
> 155. This is in contrast to the manner in which s.83(1)(p) VATA provides a right of appeal against the discretion of HMRC whether to make an assessment under section 73(1). Hence there is a distinction drawn between subsections 83(1)(c) and (p) VATA set in the authority on which the Appellant relies – *Henryk*:
>
> > "We note one point immediately, which is that on the face of it, the scope of section 83(1)(p) is broader than the scope of section 83(1)(c) (the provision in issue both in Oxfam and Noor), because an appeal lies only with respect to the amount of an assessment but instead with respect to "an assessment… under section 73(1)." And the wording of section 73(1), on the face of it, is permissive not mandatory – 'the Commissioners may assess the amount of VAT due to the best of their judgment and notify it."
>
> There is a discretion inherent in s.83(1)(p) VATA read together with section 73, which were the statutory provisions considered in *Henryk* which led it to decide public law arguments could be pursued in the FTT appeal. However, there is no discretion conveyed by subsections 83(1)(b) or (c) VATA which are the mandatory provisions concerning the appeals applicable in this case and in *Noor* respectively."

34. There are many cases where it has been held that the Tribunal can review the exercise of a discretion by HMRC. They include *GB Housley Limited v HMRC*, [2016] EWCA Civ 1299. This concerned HMRC's discretion to allow credit for input tax even though the taxable person does not hold a valid tax invoice – the relevant provision read "[W]here the Commissioners so direct … a claimant shall hold or provide such other evidence of the charge to VAT as the Commissioners may direct." The Court of Appeal held that a similar approach should be adopted to that taken in *John Dee Limited v CCE*, [1995] EWCA Civ 62, and that an appeal against a flawed decision (in *Housley* HMRC's failure to consider the exercise of their discretion) should be allowed unless the evidence showed that HMRC's decision, if taken properly, would inevitably have been the same. They also held that, if the decision was flawed,

the appeal should be allowed and HMRC should not have been given an opportunity to support it by reference to subsequent factual material (see paragraph [81]).

35. *John Dee* concerned an appeal against a decision that a taxpayer be required to provide security for the payment of VAT. The power to require security was in these terms:

> 'Where it appears to the Commissioners requisite to do so for the protection of the revenue they may require a taxable person, as a condition of his supplying goods or services under a taxable supply, to give security, or further security, of such amount and in such manner as they may determine, for the payment of any tax which is or may become due from him.'

36. The Court of Appeal held that in deciding whether the statutory condition (that it appeared to HMRC requisite to provide security) was met "the tribunal will… consider whether the commissioners had acted in a way in which no reasonable panel of commissioners could have acted or whether they had taken into account some irrelevant matter or had dis-regarded something to which they should have given weight. The tribunal may also have to consider whether the commissioners have erred on a point of law."

37. The question Parliament has asked us to answer is "whether the registration of the pension scheme <u>ought to have been withdrawn</u>"; section 159(6). The words we have underlined make it clear that we are not being asked whether we would withdraw the registration if we were addressing the issue today. The registrations were withdrawn by HMRC at a point in the past and the question for us, therefore, is whether HMRC "ought to have withdrawn" the registrations at the time they did.

38. In order for the registration to be withdrawn two things need to happen. First, it needs to appear to HMRC that one of the section 158(1) gating conditions is satisfied. So, the first question we need to answer is whether, at the time they exercised their section 157 power, HMRC believed that at least one of the grounds was satisfied. If they did not, they ought not to have withdrawn the registration of the scheme.

39. Further, although the statutory condition is that it appears to HMRC that one of the section 158(1) gating conditions is satisfied, that question is not (as Mr Marks submitted) to be determined solely by reference to what HMRC believed to be the case. The statute in *John Dee* gave HMRC power to require security "where it appears to the Commissioners requisite" to do so. A decision that something "appears to the Commissioners" to be the case was held to be reviewable by reference to the process HMRC went through to reach their decision. In that case what needed to appear to HMRC was the need to do something. Here what needs to appear to HMRC is that a particular situation obtains (that one of the gating conditions is satisfied). We do not consider that this difference in what needs to appear to HMRC to be the case justifies a different approach to how HMRC should reach their conclusion or the scope of the Tribunal's jurisdiction when it comes to reviewing that decision. So here, we are required to review whether HMRC's conclusion, that it appeared to be the case that a section 158(1) gating condition was satisfied, was flawed. The question for us, therefore, is whether HMRC concluded that a section 158(1) ground was present and, if so, whether the process leading to that conclusion was flawed. By "flawed" we mean that the conclusion was one which HMRC acting reasonably could not have reached or one which was reached after considering an irrelevant matter or taking into account something they should have disregarded. No one has suggested here that HMRC did not consider that one of the section 158(1) gating conditions had been satisfied.

40. Secondly, HMRC must decide to use their section 157 power to deregister the scheme. That is a discretionary power, and so it must be exercised properly and in a way which addresses the reason why Parliament gave HMRC the discretion. So, the second question we

need to answer is whether HMRC exercised their discretion in that way; if not, they ought not to have withdrawn the registration of the scheme.

41. In deciding whether HMRC have exercised their discretion properly, we will, as the Court of Appeal indicated in *John Dee*, need to consider matters such as whether HMRC have acted in a way in which no reasonable panel of Commissioners could have acted (which would include not considering the exercise of their discretion) or whether they had considered some irrelevant matter or had disregarded something to which they should have given weight. We may also have to consider whether HMRC have erred on a point of law. Process may also be important. Although obiter and dealing with a different matter altogether (revocation of registration as "registered owners" of duty-suspended excise goods), Underhill LJ said this in *CC&C Limited v HMRC*, [2014] EWCA Civ 1653 at [47]:

> "The view that I have taken of the law means that HMRC's power of revocation is indeed capable of operating harshly, essentially for the reasons advanced by Mr Jones: if they make an unreasonable decision, the trader affected by their mistake will almost certainly suffer serious uncompensatable loss, which may sometimes be fatal to his business, before it can be corrected through the review or appeal mechanisms. It is all the more important, therefore, that they take all possible care to ensure that any such decision is well-founded. The risk of error is obviously increased if the trader has not been given an opportunity to draw to HMRC's attention, before the decision is taken, factual or other matters which they may have overlooked or mis-appreciated in their assessment of the grounds for revocation. I do not see why it should not be normal practice for a trader whose registration HMRC is contemplating revoking to be given prior notice of the intended decision, and the grounds for it, in the form of a "show cause" or "minded to" letter, with a limited time for response, before a final decision is taken. (Or the decision could be notified, but on the basis that it would not take effect for a limited period during which representations could be made.) Mr Brennan was asked in the course of oral submissions whether there was any reason why such a procedure could not be followed, but he was unable to suggest any. I could understand a concern about over-complicating the process of revocation; but in fact such a procedure would be substantially the same as the process of informal review which is already offered – with the crucial difference that it would occur before, rather than after, the decision had taken effect. I can also understand that there may be particular cases where HMRC reasonably take the view that the public interest requires the registration to be revoked without prior notice and with immediate effect; but in the light of the time taken to reach a decision in the present case it would be hard for them to maintain that that will always be so. None of this is directly pertinent to the present case because, as I have said, no case of procedural unfairness was advanced; and I need not therefore consider whether a failure to give prior notice of an intention to revoke might in an appropriate case constitute a sufficient unfairness to justify the intervention of the Court. But I would encourage HMRC to give further thought to their procedures in this regard."

42. One point made at the end of Neill LJ's judgment in *John Dee* is that, if it can be shown that, notwithstanding any procedural error HMRC made (in that case it was failing to take certain material into account), the decision would <u>inevitably</u> have been the same, it may still be open to us to hold (in the language of section 159(7)) that the registration should have been withdrawn and dismiss the appeal.

43. We do not agree with Mr Firth that the need to answer the question whether the registration "ought to have been withdrawn" (section 159(6)) requires or entitles us to decide whether we would have reached the same decision ourselves on the information now available

to us. Parliament has given HMRC the discretion here. We do not accept that the (admittedly curious) way Parliament has framed the question to be addressed by this Tribunal on an appeal and the consequences of our answer (in section 159(6)-(9)) take that discretion away. Putting the position in the language of the statute, a pension scheme's approval ought to have been withdrawn if HMRC properly considered that one of the gating conditions was present and then properly exercised their discretion to withdraw the scheme's registration. Whether we would have reached the same conclusion, based on what was known then or is known now, is beside the point

The Evidence Before Us

44. We heard evidence from Mr Isles and Mr Burns, who both submitted witness statements and were cross-examined.

Mr Ian Burns

45. Mr Burns is employed as a Pensions Compliance Officer with HMRC and has been working as a Pensions Compliance Officer for 13 years.

46. He became involved in this matter when he was asked to check on the validity of a pensions relief claim submitted by Needham Business Centre Ltd ("NBCL").

47. On August 2016 he began a records inspection of a registered pensions scheme, the Needham Business Centre Ltd Pension Scheme ("NBCLPS"). The scheme administrator was NBCL, which at the time had two directors, Andrew Isles and Anthony Storer. Mr Storer resigned as director during Mr Burns' enquiries. Mr Burns says that, throughout the inspection process and subsequent correspondence, the only director that he had contact with was Mr Isles.

48. Both before and during the inspection Mr Isles presented Mr Burns with a document that Mr Burns says was not executed on the date (9 July 2013) stated on it, although Mr Isles said it had been. This was NBCLPS's establishing trust deed and it was intended to demonstrate that the scheme had been correctly established before it was registered with HMRC. Mr Isles also supplied copies of the pension scheme's bank statements, which (Mr Burns says) had been altered by him by deleting from the statements certain payments that had gone through the scheme's bank account.

49. Mr Burns says that, when questioned during the records inspection about the provenance of the trust deed, both Mr Isles and one of his employees, Michelle Alana Phillips-Naylor (now known as Michelle Alana ("MA")) asserted that the date on which the deed had been created, signed and witnessed was the date on the deed. Mr Burns says he knew that this deed could not have been correctly dated because the document also contained the pension scheme's Pensions Regulator ("TPR") registration number, which was only notified to the scheme on 24 February 2015. Also, one of the parties to the deed, The Needham Business Centre Pension Scheme Trustees Ltd, was not incorporated until 17 December 2013, and even then, it was called VSIH (2014) Ltd, only changing to its current name on 29 December 2014.

50. Further evidence that the deed could not have been executed on 9 July 2013 was a witness signature by Michelle Naylor-Phillips (MA by a different name). On this deed, MA included her address. Mr Burns found that, at the time this deed was alleged to have been executed, MA lived at a different address, and in fact did not move to the address shown on the deed until 27 August 2014.

51. When given the opportunity to clarify when exactly the NBCLPS scheme deed had been signed by the various parties Mr Isles told Mr Burns verbally that it was "around the date of the deed", suggesting on or around 9 July 2013. As MA was not an employee of Mr Isles on 9 July 2013, he asked her where she was when she witnessed the deed. MA said that this had

been at a "meeting" in London that she had attended with Mr Isles. She said that she witnessed the signatures of Mr Isles and Mr Graham Miller. The signature of a third individual (Mr Stephen Bold) was witnessed by someone who lived in Wigan.

52. Following several attempts to ascertain when the deed had been drawn up and signed Mr Isles finally disclosed in correspondence in September 2018 that the deed had been drawn up and executed some 19 months after the scheme had been registered. Mr Burns says that Mr Isles explained this by saying that there had been an earlier, initial trust deed, but it could not be located.

53. Mr Burns says that the execution of the Isles & Storer trust deed is called into question by this, as that document is stated to have been executed on 18 April 2013 too and MA gave the same address on that document as she had on the NBCLPS deed.

54. In the course of this meeting MA said that she had not worked in pensions before. On the trust deed she gave her job title as "administrator", which she said was the generic job title of her employment and she did not mean that she was the scheme administrator.

55. During the records inspection and subsequently, Mr Isles disclosed emails to prospective NBCLPS scheme members. In those emails he was clearly recommending to prospective members a particular scheme investment, a loan to what appeared to be a property finance company. In this correspondence Mr Isles told the prospective member/investor that this particular investment guaranteed a rolled-up interest return, and that the individual member's investment would be secured by the scheme against freehold property in London. Mr Burns says this was not true. Despite several attempts to obtain evidence of this from Mr Isles, none was forthcoming, until in correspondence Mr Isles admitted that there was no such security held by the scheme. Mr Isles did give Mr Burns a letter from Marks & Co (see [78] below), which discussed the security arrangements.

56. Despite several claims from Mr Isles during subsequent correspondence that he had given full and unfettered access to scheme records during his records inspection, Mr Burns says that this could not be further from the truth. In his opinion Mr Isles sought to limit access to the scheme records to what he believed HMRC should see. The immediate result of this was that Mr Burns and his colleague had to cut short the initial inspection because of Mr Isles' non-cooperation.

57. Whilst Mr Isles agreed a further visit in May 2017, Mr Burns says that access to records was still strictly controlled by Mr Isles to the point that Mr Burns was not able to adequately complete his records inspection in-situ. When Mr Burns asked for access to computer records at the start of the second visit, Mr Stephen Bold, the trustee of the NBCLPS, said HMRC would not be allowed access without a production order.

58. Mr Burns says that Mr Isles presented him with a pension scheme bank statement that he had altered so that payments of significant sums into and out of the scheme bank account had been erased from that statement. When challenged about this and being asked to provide the genuine statement showing the previously erased transactions, Mr Isles said that he didn't think HMRC needed to know about what he asserted to be a mistake.

59. Mr Burns asked Mr Isles who had accessed HMRC's online systems to obtain the necessary Government Gateway access code to enable NBCL to register as a registered pension scheme administrator. Mr Isles eventually admitted that the person who had applied for the NBCL Scheme Administrator registration, and who had then actually registered NBCLPS with HMRC, was Alan Fowler ("AF"). AF was not an employee or officer of NBCL, which meant that the registration of the scheme, and the application for NBCL to be registered as a scheme administrator were wrong, because both applications require certain declarations to be made

by the named administrator. As AF was not an employee or officer of NBCL, he was not entitled to carry out either registration, or indeed to apply for a Government Gateway access code for NBCL. Mr Isles had said he did this because he felt ill-equipped to navigate the registration process, but Mr Burns says this is at odds with what he later said in relation to Isles & Storer, that he had registered that scheme.

60. In view of all these points, Mr Burns concluded towards the end of 2018 that NBCLPS's registration with HMRC was invalid and that Mr Isles, as the then sole director of NBCL, was not a fit and proper person to administer a registered pension scheme. He made a submission to HMRC's De-registration Panel that NBCLPS's registration should be withdrawn and this was agreed on 18 October 2018.

61. He then had to consider a number of other pension schemes where Mr Isles was connected to the scheme administrator. One such administrator was NBC. At the time NBC had one director, Mr Isles, and was the scheme administrator for the three Schemes.

62. Mr Burns says that he first gave an indication to NBCL that he did not believe that Mr Isles was a fit and proper person and that any schemes associated with him were likely to be deregistered in a letter dated 31 October 2018 in respect of NBCLPS.

63. Mr Burns says that changes to the directors of NBC were made to try and frustrate any attempt to de-register Isles & Storer, Headforte and Halkin. He points to changes made around that time to the directors of NBC, as notified to Companies House ("CH"). Between 20 and 22 November 2018 three notifications were filed at CH by NBC. These were in order of submission the cessation of Mr Isles as the person with significant control of NBC, purportedly from 1 October 2018, then the appointment of MA as a director and the termination of appointment of Mr Isles, again both purportedly effective from 1 October 2018.

64. Mr Burns says that Mr Isles has connections to another UK registered pension scheme, Northland, which was used as a conduit scheme to another UK registered scheme that HMRC contend was a vehicle for pension liberation. At the time, the scheme in question had become known to the wider UK pensions industry as being a pension liberation scheme, and as such schemes had been refusing to allow transfers from their schemes to it.

65. Mr Burns says that there is an "exponential" risk of any registered pension schemes to which Mr Isles and associates of his have access being used for purposes that HMRC would define as abusive of the prevailing tax legislation.

66. There was some discussion between Mr Firth and Mr Burns about the process Mr Burns had followed in relation to the de-registrations. Mr Burns agreed that each of the three "minded to de-register" letters he had written to the Schemes had been his first letters to them. By then a decision had been taken to de-register them. He agreed that he had not put his evidence and conclusions to the Schemes. He said he had not needed to do this because he was sure that Mr Isles was not a fit and proper person to be a scheme administrator and he was sure that Halkin had been set up as a liberation scheme (to move money from Ireland to New Zealand in a way that is not allowed under Irish pensions law).

67. Mr Firth asked whether he needed to ask questions or establish facts. Mr Burns said he had enough to take his concerns to the De-registration Panel. He would not routinely put concerns to pension schemes before moving to de-registration. There is no flexibility in the process to allow Mr Burns to put his concerns to pension schemes. The correct course of action, where Mr Isles has involved, was simply to go directly to the De-registration Panel.

68. Mr Firth asked whether this meant that further fact finding was irrelevant, Mr Burns said no; if someone provided further information, then he might reconsider his decision. He agreed

that if he had known at the time what he knows now about Headforte, that it has members and investments, he might have made a different decision.

69. Mr Burns says that the information notices issued in respect of Isles & Storer, Headforte and Halkin are necessary to enable HMRC to establish if such abuses have occurred and thus to establish if there is a tax position to address in respect of the scheme administrator (scheme sanction charges and de-registration charges). It is therefore perfectly reasonable to request the information asked for. The information he requested is routine information that HMRC request on a regular basis from numerous pension scheme administrators. As to particular requests:

(1) The pension scheme bank statements will show what payments the pension scheme has received and how those funds have been disbursed, including if payments have been made by the scheme back to its members. They will also show any payments made by the scheme in respect of investments and any other payments made from scheme funds for whatever reason.

(2) The schedule of names etc. of scheme members will demonstrate to HMRC that the individuals enrolled into the scheme supplied the scheme administrator with all of the statutory information required to enable them to become members of a UK registered pension scheme.

(3) The schedule of investments will demonstrate to HMRC that the investments made by the scheme are "allowable" investments under the current legislation. Investments that would not be considered allowable would give rise to tax charges on the scheme administrator.

(4) Evidence of ownership of assets held by the scheme will demonstrate that funds paid out by the scheme were used to purchase genuine scheme investments.

(5) The member applications to join the scheme will demonstrate that statutory information required to be given to the scheme administrator on enrolment was given contemporaneously.

(6) Correspondence with scheme members regarding transfer-out payments from the scheme will demonstrate that the transferring member was aware of the transfer and in fact had requested it.

(7) The other information requested is needed to establish whether the scheme has made payments from scheme funds to its members, its trustees or its scheme administrator. If such payments have been made it is necessary to ascertain that those payments were "authorised" payments that a registered pension scheme is permitted to make, e.g. fees due to the scheme administrator for administering the pension scheme.

Mr Andrew Isles

70. From January 1990 until March 2018 Mr Isles was a practicing accountant and a founding partner of his own accountancy practice. He told us that at no time was any adverse finding made against him by the Institute of Chartered Accountants in England & Wales ("ICAEW") regarding his fitness to practice. Indeed, the most recent compliance visit by the ICAEW was in December 2017, with the ICAEW assessor confirming that there were no matters of concern. He says this is relevant to the Tribunal's assessment of his fit and proper status.

71. Mr Isles has dealt with Mr Burns since the summer of 2016. He says that he "found Mr Burns a difficult person to deal with, in contrast to almost every other HMRC officer I have dealt with over my 30 years of practice".

72. Mr Isles explained that Mr Burns did not formally de-register NBCLPS. He says this is because Mr Burns effectively achieved that unconventionally by corresponding directly with

scheme members, making assertions such as that NBCLPS was a pensions liberation scheme from which few assets would be left to pay benefits and its assets were not as explained to members. Mr Isles says that the allegations made by Mr Burns to members were shown to be without foundation. Each member received the full amount of their accrued entitlement under NBCLPS together with the stated investment return, thus demonstrating that there was no liberation, that all assets remained fully accounted for and that the investments were as indicated to members and delivered the promised rate of return. In cross-examination, Mr Burns agreed that he had spoken to members of NBCLPS about why they joined the scheme and the benefits they obtained.

73. Mr Isles says he and MA did not mislead Mr Burns about when the NBCLPS trust deed was executed. Mr Burns has failed to mention the detailed explanation regarding the establishment of NBCLPS, including matters relating to the scheme documentation, set out in NBCL's letter of 26 July 2018, as follows:

> "One party to that document, Needham, Business Centre, Pensions Scheme, Trustees Limited (for convenience, the "Trustee") was not established at that date. As is common with the establishment of pension schemes, they are initially established by a short, initial (or interim) document, with the full deed and rules following later. It is accepted that the Trustee being shown as a signatory to the deed dated 9 July 2013 could be confusing, but this was an administrative oversight on the part of both NBC and the Trustee. The oversight arose because they were both under the impression (mistakenly as it happens) that, because the Scheme was registered on 9 July 2013, and because the terms of the interim document provided – again as is common – that the provisions of the full trust deed and rules would replace those of the interim document, then the date shown on the trust deed and rules should correspond with that of registration of the Scheme. Despite this, significantly, no assets, (whether by way of contributions or transfers) were received into the Scheme until some considerable time after the establishment of the Trustee. Accordingly, the tax reliefs granted as a result of Scheme registration were not operable until the commencement of contributions to the Scheme. When contributions to the Scheme were commenced, the contributions were paid to the account of the Trustee."

74. In cross-examination he categorically denied that the trust deed had been backdated. He explained the address against MA's signature. Although MA did not become the registered owner of the property until April 2013, she moved in in December 2012.

75. Mr Marks took Mr Isles to three screenshots from HMRC's register of pension scheme administrators. They show NBC taking over from NBCL as scheme administrator of Isles & Storer on 26 November 2018, as administrator of Halkin (from Dorrixo Alliance (UK) Ltd ("Dorrixo")) on 26 September 2018 and as administrator of Headforte (again from Dorrixo) on 6 September 2018. Mr Marks then took Mr Isles to a determination by The Pensions Regulator ("TPR") on 20 December 2017 that Mr Stephen Ward should be prohibited from acting as trustee of pension schemes. Mr Isles said he only knew Mr Ward as an introducer to Ark (another pension scheme). As Mr Marks observed, Mr Burns could see a link here between Mr Isles and Mr Ward.

76. Mr Marks took Mr Isles to notes of a conversation and a subsequent email between Mr Graham Scandrett-Smith (a HMRC officer) and Mr Ward about Halkin and Headforte in 2012. Mr Ward told Mr Scandrett-Smith that the schemes were not being used for pension liberation. "Incoming receipts to each scheme are of non UK tax relieved funds. And in respect of non UK relevant individuals. … Transfers out are to schemes in overseas jurisdictions (which satisfy the requirements of UK law). You asked me why the transfer did not go direct from the

Irish scheme to its ultimate destination. This arises where the receiving pension scheme desired by the member is outside of the EU." Mr Isles said he had no knowledge of this.

77. Mr Isles also says that he did not give HMRC altered bank statements. He says that a single individual copy bank statement had been prepared and was intended solely for internal administrative use. The changes made on that internal administrative copy statement were to remove certain transactions that had occurred in error and that had subsequently been rectified; essentially, £145,000 being transferred into NBCLPS and then out to "Grosvenor Bridging", when the investment was being made directly by a private client rather than NBCLPS. Mr Isles also says that the copy statement inadvertently provided to HMRC at the inspection visit was so obviously a copy that Mr Burns' colleague immediately drew the matter to his attention at the time. Recognising this inadvertent mistake, the original bank statement was produced to Mr Burns at that inspection visit, together with the documentation that confirmed the transaction did not relate in any way to NBCLPS.

78. As far as the security of investments of NBCLPS is concerned, Mr Isles says that an ICAEW regulated firm, wholly independent from NBCL and NBCLPS, provided written confirmation that security for the investments existed in the way presented to members. Each of the members of NBCLPS was a sophisticated investor and each fully understood the nature of the investment offered. Mr Isles says that the investment opportunity has been lost to members due to Mr Burns' actions. Mr Burns was wrong then, and he is wrong in what he says to the Tribunal now.

79. Mr Isles says that there was no opportunity to challenge what Mr Burns said about NBCLPS because he did not issue a formal de-registration notice in respect of NBCLPS, so his assertions could not be tested before the Tribunal.

80. So far as the Northland Pension Scheme is concerned, Mr Isles says he helped the then trustee of this scheme during a period of serious illness; the individual subsequently died. He says his assistance resulted in the efficient compliance with enquiries being made at that time by Mr Burns. The enquiries to which Mr Burns refers occurred in 2015, following which Mr Isles says he had no further contact with Mr Burns about this until it was raised in his witness statement. Mr Isles asked us to note that Mr Burns makes no mention of any activity on Mr Isles' part in respect of the Northland Pension Scheme that gave rise to any concern on Mr Burns' or HMRC's part. He says he had no role whatsoever with any of the operational aspects of the Northland Scheme. Mr Burns made no mention of any concerns regarding the Northland Pension Scheme when he conducted his records inspection with NBCL. We should just pause to note that there was no evidence before the Tribunal about Northland, certainly nothing to suggest it was a pensions liberation vehicle.

81. Mr Marks referred Mr Isles to a decision of this Tribunal, *Dalraida Trustees Limited v HMRC*, [2023] UKFTT 00314. There was some discussion at the beginning of the hearing about the use that could be made of this case, in particular it was agreed that we should not take findings based on an examination of documents or where there had been a "judgment call" about Mr Isles into account for our purposes, but we were taken to some passages in the decision where the Tribunal sets out its views on certain evidence given by Mr Isles:

> "95. Mr Isles was keen to distance himself from the PRP. For example, we were somewhat perplexed by his refusal to accept that he had acted as an introducer of members to the Ark Schemes even though: (1) he was forced to concede that he had received commissions from the Ark LLPs in return for doing just that; (2) Ms Oades confirmed that he was the person who had made her aware of the PRP; and (3) the Final Redacted Spreadsheet listed him as the introducer in relation to around fifteen members of the Ark Schemes. He was also not very forthcoming on the link between the Ark Schemes and one

> of his major clients, the benefits which he had received for setting up and running the sponsoring employer companies for the Portman Scheme and the Lancaster Scheme (of each of which he was the sole director) and the role which he had played in the proposed amendments to the powers of the two schemes to which we have referred in paragraph 92 above.
>
> 96. In the light of his approach, we were not entirely convinced by his protestations to the effect that that he had subsequently divested himself of all of the commissions which he had obtained from the Ark LLPs for introducing members to the Ark Schemes, either to the member in question or to charity and, in any event, his assertion that he had not benefitted financially from the PRP in any way sat somewhat uncomfortably with his admission that the arrangement had produced benefits for the major client referred to in paragraph 95 above and that this had led to more work from that client and some new clients for I&S Limited."

82. The Ark Schemes operated what was described as a "Pensions Reciprocation Plan" (or "PRP"), which was conceived as a way of allowing members access to the value of their pension capital prior to retirement, but without triggering an unauthorised payment which would lead to tax charges, in other words what Mr Burns referred to as a "liberation scheme". Mr Isles says that the commission was paid back to members and used to pay fees to fight the Tribunal case. Mr Marks challenged Mr Isles about his involvement with Ark. He said that he had not acted as trustee or administrator or as an introducer.

83. Mr Isles said that Halkin had always been dormant, with no members or bank account. Headforte had members and held a portfolio of bonds that HMRC had no information about.

The De-registration process

84. The process leading to the deregistration of all three Schemes is essentially the same and is set out at [2]-[4] above. We set out the process in relation to Halkin in more detail below, but there is no material difference between it and the process adopted for Headforte and Isles & Storer.

85. On 18 December 2018 HMRC wrote to Halkin indicating that "HMRC is of the view that the registration of this scheme should be withdrawn", citing grounds (za) and (zb). The letter did not invite a reply.

86. On 17 January 2019 Halkin's advisers wrote to HMRC. They told HMRC that, in view of the "extreme prejudice" deregistration would engender, they expected HMRC to have clear grounds for their assertions. They asked HMRC for the evidence for its assertions that grounds for deregistration existed, indicating that they considered HMRC's assertions to be wrong, and asked for HMRC's views urgently and confirmation that the de-registration would be stayed until the matter was resolved.

87. On 7 June 2019 HMRC notified Halkin that its registration had been withdrawn with effect from that date. The letter notified Halkin of its right of appeal. The grounds for deregistration were:

- The person who is, or any of the persons who are, the scheme administrator is not a fit and proper person to be the scheme administrator (ground zb).
- The pension scheme has not been established or is not being maintained wholly or mainly for the purposes of making payments falling within section 164(1)(a) or (b) (ground (za)).
- The pension scheme is an occupational pension scheme and a sponsoring employer in relation to the scheme is a body corporate that has been dormant during a continuous period of one month that falls within the period of one year ending with the day on which the decision to withdraw registration is made (ground (g)).

- The scheme administrator has failed to provide information required to be provided to HMRC by virtue of section 158 FA 2004 or Part 1 of Schedule 36 of FA 2008 and the failure is significant (ground (da)).

88. On 5 July 2019 Halkin's advisers notified an appeal against the deregistration to HMRC.

89. On 5 September 2019 Mr Burns wrote to Halkin to explain his thinking behind these four grounds, as follows:

(1) As far as the "fit and proper" ground was concerned, he referred to MA as sole director and shareholder of Needham. He believed that she had not used her proper name (Michelle Phillips-Naylor) when registering as scheme administrator contact and elsewhere (eg at Companies House). He also referred to her having "in the past put her signature (as a witness) to a legal document which has since been demonstrated to have been false, and which at the time she would have known to be so". Finally, she ("acting as scheme administrator") was not complying with a valid information notice.

(2) As far as the second ground was concerned, Mr Burns said that HMRC "has evidence that this scheme was not established for the reasons stated by you, but was instead created as a conduit scheme to enable individuals in the Republic of Ireland (RoI) to transfer pension savings held under that country's pensions legislations to other arrangements outside of the European Union, something that was not permitted by RoI legislation."

(3) The dormant sponsoring employer ground was a matter of public record. Although "it appears that someone has altered the status on Companies House records. This doesn't alter the fact that the company accounts for Halkin Resources Ltd have consistently noted since 2014 that this is a dormant company."

(4) Finally, Mr Burns believed the failure to provide the information required by the information notice represented a significant failure to provide information that was reasonably required.

90. On 1 November 2019 HMRC concluded its review of Mr Burns' decision, which was upheld. The review letter does not reveal any new evidence or analysis.

91. In their statement of case (dated 30 June 2020) HMRC referred to MA's alleged dishonesty and asserted that she does not have the requisite experience or knowledge to act as a scheme administrator. At the meeting on 22 September 2016, MA had confirmed that she had not worked in pensions before. Alternatively, even if MA were a fit and proper person, HMRC say that NBC is not a fit and proper person "because it was previously owned and operated by Mr Isles and he continues to be involved" and they refer to Mr Isles' alleged history of being involved with two liberation schemes. HMRC having decided that Mr Isles was not a fit and proper person in relation to NBCLPS (a decision Mr Isles did not appeal), the administration of Halkin passed to NBC around the same time as HMRC deregistered Halkin's previous administrator and Mr Isles works for NBC and the company operates from premises leased from him.

NBC's Submissions

92. Dealing with the question of process first, Mr Firth's criticisms of HMRC's approach to the deregistration decision is that Mr Burns failed to consider any element of discretion. His evidence is that he was following a process, which required him to deregister if any of the preconditions for deregistration were satisfied. That was why he thought that, if he considered a precondition was satisfied, he did not need to provide any opportunity to comment on that.

93. Secondly, Mr Firth asserts that Mr Burns failed to take proper steps to ensure that his decision was well founded. The first letter received by each of the pension schemes was a letter notifying them that they would be deregistered. No reasons were given in that letter and no opportunity to comment on the basis for the decision or to address concerns was given.

94. There was some discussion between Mr Firth and Mr Burns as to whether he had any freedom to send a letter to a scheme administrator outlining his concerns and inviting comment, but the fact is (whether HMRC processes allowed him to do that or not) he did not invite any comment on the proposed deregistration.

95. Thirdly, Mr Firth says that Mr Burns took an irrelevant consideration into account and accorded it significant weight. That irrelevance, in Mr Firth's submission, was Mr Isles' continuing involvement with the schemes. Mr Burns' view was that Mr Isles continued to be involved with the scheme administrator and that Mr Isles was not a fit and proper person.

96. Mr Firth's first point here is that, despite Mr Isles giving evidence in person and being cross-examined, HMRC did not suggest to Mr Isles that he had continued to be involved in the running of any of the schemes. On that basis, says Mr Firth, whether Mr Isles is a fit and proper person to be involved in a scheme administrator is neither here nor there.

97. In any event, Mr Firth says that there is no evidence before us which would enable us to conclude that Mr Isles is not a fit and proper person.

98. Before dealing with that evidence, we deal with HMRC's suggestion that MA is herself not a fit and proper person. HMRC said that she does not have the requisite experience or knowledge to act as a scheme administrator. That suggestion was not given in the deregistration letter or in the first letter that Mr Burns wrote giving his reasons, but it was pleaded in HMRC's statement of case and, because it was a circumstance which existed at the time of the deregistration decision, is something we should consider. The role of a scheme administrator of a pension scheme involves the discharge of certain tasks given to a scheme administrator by the pensions legislation; it is far more than just being a bookkeeper. Mr Firth says that it is quite clear that MA is a perfectly competent person to be a scheme administrator and gives as an example of this the fact that, as soon as the Schemes received Mr Burns' letters in December 2018, appropriate professionals were instructed to deal with them. MA made her comments to Mr Burns (that she had no real experience in the pensions industry) in 2016, but Mr Burns did not seek to deregister the schemes until the end of 2018. There was no suggestion before us that NBC (and therefore MA) had failed to discharge the duties of a scheme administrator properly in the ensuing two years.

99. As far as the allegations of dishonesty against MA go, Mr Isles' position is that he had a perfectly straightforward explanation as to why the trust deed had been dated when it was. Whether that is the case or not, MA's only role was to witness two signatures. Secondly, it is suggested that she used a false name in filings at Companies House and elsewhere. The explanation for this, according to Mr Isles, is simply that MA had changed her name by deed poll. Again, there is insufficient evidence before us to justify a conclusion that MA was (for reasons unexplained) adopting a false persona.

100. The next question (assuming for present purposes that Mr Isles was involved with Needham) is whether Mr Isles himself is a fit and proper person to be a scheme administrator. The first allegation here is that he executed a pension scheme trust deed which was, to his knowledge, backdated. Mr Isles has an explanation (that the trust deed was executed and dated as it was as a result of the (allegedly) common practice of executing an initial document followed by a full trust deed), and says that there was nothing particularly sinister or dishonest about the way the deed was executed. It was, in his view, simply an innocent misunderstanding. In any event, no tax benefit was received from this, as no assets were transferred into a scheme

until later. As Mr Firth put it, why on earth would someone commit a fraud for no purpose and to no advantage?

101. Mr Burns alleged in his witness statement that Mr Isles (and MA) misled him about the execution of the trust deed in the meeting of September 2016. These allegations were not put to Mr Isles. He was not asked any questions at all about what he had said in his meeting with Mr Burns. More importantly, the allegation in Mr Burns' witness statement that Mr Isles and others misled him in relation to the pension scheme trust deed do not appear in Mr Burns' handwritten or typed notes of the meeting. Those notes do not record any questioning or misleading regarding the date on which the deed had been created, signed and witnessed. Even though Mr Burns said that he was fully aware of this issue prior to that meeting and that he was intent on raising this issue with Mr Isles, he made no mention of it in his handwritten or typed notes. Mr Firth submits that Mr Burns' recollection of that meeting is unreliable.

102. Turning to the altered bank statements, Mr Burns and his colleagues were handed a collection of between 50 and 60 bank statements. One of them appeared to have been obviously altered (by the removal of certain balancing entries). Mr Burns and his colleague asked Mr Isles about this, and he went off and produced an unaltered version of the statement explaining that the transactions had been removed because, although they had been made through the pension scheme's bank account, they were nothing to do with it. Mr Burns accepts that nothing turned on this, because the entries were indeed irrelevant to the pension scheme. As Mr Firth submits, if Mr Isles were trying to hide these entries from HMRC, one would have expected him to produce a document which was not obviously altered and not to go away and immediately produce the original.

103. Mr Burns suggests that Mr Isles had suggested to investors in the pension scheme that their investments were secured when they were not. However, Mr Isles has a letter from a firm of accountants, which Mr Burns was aware of, in which they confirm that Grosvenor Bridging Loans Limited ("GBLL"), the entity in which NBCLPS had invested, had charges securing the loans it had made. The value of the properties charged was more than £10M, securing loans of just over £6M. The accountants confirmed that they had been advised that NBCLPS "benefits from the security conferred by the charges in accordance with the signed agreements".

104. Whilst the accountants' letter makes it clear that the properties were not directly charged to NBCLPS, it is equally the case that they confirmed that there was real estate security backing up the loans made by GBLL in which NBCLPS had invested.

105. The final, and potentially most serious, allegation against Mr Isles is that he was involved in pensions liberation. Whilst Mr Burns may have suspected this, no evidence was produced to the tribunal to suggest that the Northland Pension Scheme had been involved with pensions liberation. Similarly, HMRC have not pleaded any case or provided any evidence as to what happened in relation to the "Ark" scheme. Clearly, we have an earlier decision of this Tribunal making some adverse comments about Mr Isles as a witness, but there is nothing in the passages quoted earlier which suggests that Mr Isles was heavily involved in pensions liberation.

106. In cross-examination, HMRC did not suggest to Mr Isles that he had been heavily involved (or indeed involved at all) in pensions liberation.

107. Clearly, Mr Isles had connections with individuals who had been involved in pensions liberation projects, but there is no direct evidence before us which would enable us to conclude that Mr Isles had personally been involved in this activity.

HMRC's Submissions

108. In reply, Mr Marks started by stressing the point we have discussed above, that the process by which HMRC reached their deregistration decision is not a matter for the Tribunal. For the reasons discussed above, we do not agree, and we consider that, as HMRC are exercising their discretion, they are required to do so properly and their exercise of that discretion is relevant to our consideration of whether the registration of the pension schemes ought to have been withdrawn.

109. So far as the process is concerned, Mr Marks stresses that an officer such as Mr Burns does not on their own simply determine that the ground for deregistration is met and then deregister the scheme. They must make a submission to a panel, which will approve or reject that submission. Mr Burns made a submission to the panel setting out what he had learned about Halkin, including its connections with Mr Iles and some of what had been learned in 2012.

110. HMRC's case does involve further grounds and material beyond those about which Mr Burns wrote on 5 September 2019. Mr Marks says that, whilst Officer Burns did not go back to the panel, he has simply used his discretion to add addition material either between the panel submission and the formal deregistration decision or subsequently in preparation for this hearing. Pausing here, we observe that, consistent with the approach in *Housley*, a flawed decision cannot be supported by subsequent materials.

111. As far as ground (za) is concerned, Mr Marks says that HMRC would have made their decision on this point at a time when they still thought that Mr Iles was heavily involved with NBC. In that context, he referred us to an answer given by Mr Iles in cross-examination where he said that "we" instructed Independent Tax in January 2019 before correcting himself to say that the company had instructed them. That slip might indicate that Mr Isles remains involved with NBC and the Schemes.

112. In any event, Mr Marks says that, albeit in an informal way, Mr Burns' letter of 18 December 2018 makes it quite clear that HMRC is contemplating deregistration and indicating the grounds it was then considering. Although that letter did not formally invite a reply, it gave the recipient an opportunity to engage with HMRC if it wanted to. Mr Marks submits that, whilst perhaps imperfect, the process Mr Burns followed was far from unfair.

113. In evidence Mr Iles accepted that Halkin was effectively dormant. It had no members or assets. Mr Marks submits that this rather suggests that there is no additional material for Halkin to provide. In any event, it makes it very clear the ground (za) was present and there was no compelling reason not to deregister the scheme.

114. As far as Headforte is concerned, the position is different. In evidence Mr Iles said that Headforte has between 30 and 35 members and investments in a trust bond. That is different from the position that HMRC understood (and Mr Iles accepted that HMRC had not been provided with any information about this) and Officer Burns admitted that, had he known this, then HMRC might not have carried through the deregistration.

115. So far as Halkin and Headforte are concerned, there is no dispute about whether ground (g) is satisfied. Both sponsoring employers have been dormant since 2014. Mr Marks says that is sufficient to justify deregistration.

116. All three schemes have failed to respond to the information notices served on them and that means that ground (da) is present, and again Mr Marks says that this is sufficient to justify deregistration of all three schemes.

117. So far as ground (za) is concerned, it would appear, from the answers given in 2012, that both Halkin and Headforte (but not Iles & Storer) were not originally set up with a view to

providing benefits of the type referred to in the legislation. They were set up to facilitate transfers from Irish pension schemes, nothing to do with the UK. Ground (za) it was introduced into section 158 by Schedule 7 to the Finance Act 2014 ("FA 2014"). This amendment has effect in relation to pension schemes whenever registered; see paragraph 8, Schedule 7, FA 2014. Mr Firth says that HMRC cannot rely on the fact that a scheme was established otherwise than for the purpose of providing these benefits before the law changed in 2014 as a ground for deregistration. It seems to us that paragraph 8 is against him on this point. It provides that the amendments made by FA2014 apply to all schemes, whenever registered, and provides no savings for anything that happened before the law changed. In any event, as Mr Marks submits, it is sufficient if it has not been established or is not being maintained wholly or mainly for the purpose of making authorised payments of pensions and lump sums. As far as HMRC were concerned, nothing had changed so far as Halkin and Headforte were concerned and therefore, even if their establishment could not be considered, they were still being maintained for purposes other than making approved pension and lump sum payments.

118. So far as ground (da) is concerned, there had been complete failure by all three schemes to comply with the Schedule 36 information notice.

119. So far as ground (zb) is concerned, Mr Marks submits that MA has not provided any evidence demonstrating her qualifications, skills or awareness of responsibilities for acting as a scheme administrator. She may well have engaged Independent Tax to advise (although that may have been at the instigation of Mr Iles) but they were dealing with specific tax issues, not advising MA on how to run a pension scheme.

120. He also repeats his submissions, which we have discussed above, about MA's alleged dishonesty in filing documents at Companies House with a different name and in relation to the execution of the NBCLPS pension scheme trust deed. We have dealt with these already.

121. It is also clear from Mr Burns' evidence that he considered that Mr Iles was still involved with the schemes and that there was a significant risk of schemes with which Mr Iles was involved being used for improper purposes. It is unfortunate that this was not recorded in Mr Burns' letter. However, although Mr Burns might suspect that Mr Iles continued to be involved with the schemes, and there is certainly some evidence to suggest that he was (MA was a colleague of Mr Iles, NBC continued to operate from the same premises as before and Iles & Storer was Mr Iles' own pension scheme), there was no clear evidence before the Tribunal as to exactly what Mr Iles' role was.

122. As far as Mr Iles' suitability is concerned, Mr Marks points to the allegedly incorrect execution of the two trust deeds. Mr Iles has an explanation for that the NBCLPS deed, which in turn would "cure" any concerns about the Isles & Storer deed.

123. As far as the bank statements are concerned, Mr Marks says that Mr Iles produced an incomplete document, not an obviously redacted one. That was an attempt to hide things from HMRC.

124. As far as the security of investments is concerned, Mr Burns was not convinced by Mr Iles' suggestion that this was a misunderstanding. The accountant's letter does not explain how they were able to conclude that the pension scheme benefited from the security arrangements.

125. As far as involvement in liberation schemes is concerned, Ark was found to be a liberation scheme by the Pensions Regulator. It does seem to be accepted that Mr Iles was involved in some way with these schemes, although he did say that that depended on how one interpreted the term "involved".

126. So, Mr Marks submits, we have four reasons why HMRC considered Mr Iles not to be a fit and proper person to administer a pension scheme. That is why Officer Burns made his submission to the deregistration panel. If Mr Iles was not involved with the schemes, then we should focus only on MA.

Discussion

127. We will divide our discussion into three parts. Firstly, we will consider whether the overall process HMRC followed leading up to the deregistration decisions was flawed. Next, we will consider whether HMRC's conclusions that the section 158 gating conditions were satisfied were flawed. Finally, we will review HMRC's overall conclusion that the Schemes should be deregistered.

The De-registration Process

128. HMRC did not engage in any dialogue with NBC. This applies to the fact-finding exercise (which was the foundation of their decision that the gating conditions were satisfied). At no point did HMRC summarise the evidence they had gathered or their analysis of it and invite NBC to comment on it. Similarly, in relation to the overall exercise of their discretion, they never wrote to NBC and invited it to draw their attention to any factors which might militate against deregistration, even if one of the gating conditions was satisfied.

129. We agree entirely with Mr Firth that it would be wholly inappropriate to deregister a pension scheme "out of the blue" with no warning other than in the most extreme circumstances. The obvious reason, as Mr Firth explained to us and NBC's advisers wrote to HMRC, is the prejudice to individual pension savers in the relevant pension scheme. That consideration is founded in the core of the pensions tax regime and is not an external factor of the sort considered in *Whitter*.

130. Although HMRC never wrote to NBC in relation to the Schemes and invited them to make representations, Mr Burns did write to NBC separately in relation to each of the Schemes in December 2018 and explained that "HMRC is of the view that the registration of this scheme should be withdrawn", warning of the deregistration charge and setting out the gating conditions which HMRC considered were satisfied. Mr Burns' letter did not invite a reply, but nevertheless it obtained one. In each case, NBC's advisers wrote to Mr Burns in January 2019 to the effect that, given the prejudice deregistration could give rise to, they would expect HMRC to have good grounds for their assertions. They also asked HMRC to provide the evidence for their assertions. HMRC never provided even a summary of the evidential basis for their assertions that gating conditions were met before they made and notified their deregistration decisions.

131. The effect of all of this is that there was no flow of information or argument between NBC or its advisers and HMRC. If there had been, Mr Burns might have learned (for example) that Headforte had assets and members. When cross-examined by Mr Firth, he admitted that, if he had known this, it would have been something he would have taken into account, and it might well have led him to reaching a different decision.

132. Mr Burns was clear in cross-examination that, although he did not consider that he was required to raise his concerns with pension schemes (as he put it there was no flexibility in the process to allow him to do this), if anyone had produced further information then he would have been open to reconsidering his decision. However, Mr Burns clearly did not consider (or considered and then discounted) the effect of ignoring NBC's advisers' request for an explanation of why HMRC considered that the gating conditions had been met here.

133. In the circumstances, the process which led to the deregistration of the Schemes was flawed, as HMRC's failure to engage with NBC (despite NBC's reply to the "minded to

deregister" letter asking for details of HMRC's assertions and underlying evidence) meant that NBC were unable to address HMRC's concerns. They did not know why HMRC thought they were not a fit and proper person and so could not produce evidence which might disprove HMRC's assertions or suggest other ways (less drastic than deregistration) of addressing any residual concerns. Whether NBC could have addressed HMRC's assertions is neither here nor there; the point is that, despite asking, they were given no opportunity to do this.

HMRC's decisions on the gating conditions.

Ground (c)

134. Clearly, none of the Schemes had provided the information required by the Schedule 36 information notices. Mr Marks says that this failure is significant, as defined in section 158 FA 2004 (see [7] above), and we agree with him.

Ground (za)

135. In relation to Halkin and Headforte, one of the grounds referred to in Mr Burns' December letter was ground (za). HMRC had evidence from their enquiries in 2012 that the pension schemes had been established otherwise than for the purposes of making authorised pension and lump sum payments.

136. They had been told by Mr Stephen Ward that the schemes had been set up for the purposes of facilitating transfers from schemes registered in the Republic of Ireland. We do not agree with Mr Firth that the fact that these schemes were setup before the rules changed in 2014 is at all relevant. The FA 2014 changes applied to schemes whenever established and these schemes were clearly established otherwise than for the purposes of making authorised payments.

137. On the basis of the information they held (which would appear to be what Mr Ward told HMRC in 2012), we can see why HMRC might have concluded that ground (za) was satisfied by reference to the reasons why these schemes were set up. They were not aware of any reason to think things had changed.

Ground (zb)

138. The main gating condition, relevant to all three schemes, is ground (zb), that the scheme administrator is not a fit and proper person.

139. In his "view of the matter" letter, Mr Burns referred only to his concerns around MA's honesty. The grounds in that letter are quite flimsy. He referred to MA not using her proper name, but clearly does not seem to have considered that she might have changed her name. As far as we can tell, this was only revealed by Mr Isles in his witness statement, but there are lots of innocuous reasons why someone might change their name and Mr Burns does not seem to have investigated or considered this

140. Mr Burns referred to MA as having signed as a witness a document which "has since been demonstrated to have been false and which at the time she would have known to be so". We are not prepared to accept that a person who signs a document as a witness necessarily knows a great deal more about it than that it has been signed by the person whose signature they have witnessed. We do not think that it can be extrapolated from one person witnessing another's signature to a document that the first person understands the contents of the document. Nor will they necessarily know the date written on a document as its date of execution, as that is commonly not written in until everyone has signed it. Whether or not the pension scheme document is itself dishonest we do not consider that MA's involvement with it betrays any dishonesty on her part. Certainly, no evidence was led before us to suggest that MA was dishonest and Mr Burns does not appear to have investigated the position.

141. Mr Burns referred to MA not complying with the information notice. We do not consider that her failure to secure compliance with information notices which have been appealed can be held against her.

142. Although these are the grounds set out in Mr Burns' view of the matter letter, it is abundantly clear that his real concerns were with Mr Isles and his continued involvement (as Mr Burns saw it) with the Schemes. That became apparent from his witness statement and in evidence before us. We accept his evidence that he was concerned by the role of Mr Isles in the Autumn of 2018 and took this into account, although it is unhelpful and misleading that this was not explored in the view of the matter letter.

143. Mr Burns' previous dealings with Mr Isles since 2016 had made him question Mr Isles' co-operation and honesty. One concern related to the execution of the NBCLPS scheme deed, but that had been explained to him in NBCL's letter of July 2018, as had the position with the "secured" investments taken out by NBCLPS.

144. His other, perhaps more substantial, concern was that Mr Isles was involved in pension liberation arrangements and any pension scheme he was involved with was, therefore, likely to be a liberation vehicle. Mr Isles referred to the Northland scheme, although there is no evidence before us that that was a conduit to a pension liberation arrangement. Mr Isles has been criticised by this tribunal in *Dalraida Trustees* (see [81] above), but we do not consider that that is something Mr Burns could have considered, as that decision was not reported until 2023. What would have been available to Mr Burns is TPR's findings about Mr Stephen Ward, which were published at the end of 2017. Similarly, he could not rely on NBCLPS scheme having been de-registered and this not being appealed as this only took place in 2022. There is, of course, a link between Mr Ward and Halkin and Headforte, as NBC took over the administration of those schemes. So far as pensions liberation or similar activities are concerned, the only evidence we have (and that we have been told that Mr Burns had at the relevant time) is that of some kind of link between Mr Isles and Mr Ward.

145. Although Mr Burns did not disclose his conclusions about MA's qualifications to be a scheme administrator until HMRC's statement of case was served, it is clear from the comment she made to him in September 2016, that he would have been aware that she was a general administrator, not someone familiar with pension scheme administration or pension schemes generally. By the time he wrote his "minded to deregister" letter, MA was the only director of NBC and Mr Burns knew, from MA's own admission in 2016, that she had no skills and experience in this area. Again, although this issue was not addressed in Mr Burns' view of the matter letter, we accept his evidence that it was a point he considered.

146. It seems to us to be perfectly open to HMRC to conclude from MA's comments, and without any need for further investigation, that MA was not properly qualified to act as a scheme administrator. We do not accept that simply turning to qualified professional advisers on receiving a formal communication from HMRC is enough to show that a person has the required qualifications to be a scheme administrator.

147. Our conclusion on this ground is that there was material (relating to MA's qualifications and experience) considered by HMRC at the time which would justify its concluding that NBC was not a fit and proper person to be a scheme administrator. For the reasons set out above, we do not consider that HMRC's conclusion that MA was not a fit and proper person for the reasons (focusing on personal dishonesty) set out in Mr Burns' view of the matter letter was one open to them.

148. Turning to Mr Burns' concerns about Mr Isles, the only evidence produced to the Tribunal, which was extant in late 2018, relating to Mr Isles' links to pensions liberation arrangements is the evidence of a link between Mr Isles/NBC and Mr Ward. There is no

evidence of Mr Burns exploring the nature and extent of that link; certainly, any conclusions he reached were not explained to us. The issues around Mr Isles' supposed dishonesty (the execution of the trust deeds, the marketing of "secured" investments and the production of an allegedly "doctored" bank statement) have all been explained by Mr Isles and those explanations were already known to Mr Burns.

149. Assuming for a moment that there was evidence sufficient to suggest that Mr Isles was not a fit and proper person to be involved with a pension scheme, Mr Burns did not explore the extent to which Mr Isles remained involved with the Schemes. He knew that steps had been taken to distance Mr Isles from NBC, but there is no evidence of Mr Burns having investigated whether this was just "window dressing" or whether Mr Isles had ceased to be involved with the Schemes.

Ground (zg)

150. Mr Burns also gave as a ground for his eventual deregistration decision that the sponsoring employers for Halkin and Headforte had been dormant, so that ground (g) was satisfied. The fact that the sponsoring employer for these schemes was dormant is a matter of public record and was not challenged before us.

Ground (db)

151. In relation to Isles & Storer only, HMRC referred also to ground (db). It is not clear exactly what this is meant to refer to. In Mr Burns' view of the matter letter he separately itemises the suggestion that MA put her signature to a document she knew was false at the time, but this is generally used to support the suggestion that she was not a fit and proper person. By the time of HMRC's statement of case, ground (db) had disappeared and it did not play any part in Mr Marks' submissions.

HMRC's exercise of its discretion

152. Drawing the threads of the previous section together, we are satisfied that at the time Mr Burns concluded his evaluation of the evidence he held material which, without further enquiry, would justify HMRC concluding that the following gating conditions had been met on their face:

(a) Ground (zg) for Halkin and Headforte;

(b) Ground (zb) for all three Schemes, but only by reference to MA's qualifications and experience;

(c) Ground (za) for Halkin and Headforte

(d) Ground (c) for all three Schemes.

153. That, however, is not the end of the matter. The presence of a gating item gives HMRC a discretion as to whether a pension scheme should be deregistered. Their exercise (or not) of that discretion is something which this Tribunal is entitled to review.

154. Mr Firth criticises Mr Burns for operating on the basis that all he needed to do to deregister the Schemes was to find that a gating condition had been met and so he did not consider the exercise of any discretion here. That is a fair criticism of Mr Burns, but the deregistration decision was made by the De-registration Panel and we have no evidence as to whether they paused, after agreeing with Mr Burns that gating conditions had been met on their face, to decide what to do next. Mr Firth did not make any submissions about the role of the De-registration Panel and so we are unable to conclude that HMRC failed to exercise their discretion at all.

155. In exercising their discretion, HMRC would need to evaluate the gating conditions that had been met to decide what weight to put on them. We know that Mr Burns did not carry out this exercise and we do not know whether the De-registration Panel did or not, but we can consider the weight HMRC acting reasonably should have put on those gating items and we turn to that now.

156. As far as ground (zb) is concerned, a question mark clearly hung over the suitability of NBC as a scheme administrator given MA's own admissions as to her shortcomings. However, there is no evidence that HMRC explored with NBC whether this concern could be addressed by NBC hiring in a higher quality replacement of or support for MA or retiring as scheme administrator in favour of a better resourced entity. We do not consider that HMRC would have been acting reasonably in deciding to deregister the Schemes as a way of remedying MA's shortcomings without exploring these options first. This could have been done in a much less drastic way, and it would have been unreasonable of HMRC to move to deregister the Schemes without discussing other options with NBC.

157. As far as ground (c) is concerned, the most important point here is that the information notices had been appealed by NBC. On that basis, it would have been wholly unreasonable of HMRC to hold NBC's failure to provide the required information against them and take it into account in deciding whether the Schemes should be deregistered. A person in NBC's position cannot be criticised for exercising rights of appeal afforded to it by Parliament. If HMRC had wanted to "close off" NBC's ability to appeal against the information notices, it would have been perfectly easy for them to have obtained prior approval to the notices from this Tribunal.

158. As far as ground (za) is concerned, Mr Burns did not enquire whether the two schemes were still established for their original purpose or were now established for the purposes of making approved pension and lump sum payments. Mr Isles said that Headforte now had assets and members. Depending on the nature of the pension arrangements Headforte is now running, that may have established that Headforte is no longer being maintained for purposes caught by ground (za). Halkin, Mr Isles told us, is now completely dormant. Mr Isles did not say in evidence that Headforte was now operated for the purposes of making approved pension and lump sum payments, but clearly Mr Burns regarded what Mr Isles said about Headforte as something which could be important and should be considered. If Halkin and Headforte were now being operated for the purposes of making approved pension and lump sum payments, HMRC would not have been acting reasonably if they deregistered these two schemes simply because of a historic failure. This point was not addressed.

159. As far as ground (zg) is concerned, we have seen that a sponsoring employer may become dormant (or be wound up) in perfectly benign circumstances. HMRC would not have been acting reasonably if they deregistered these two schemes simply on the basis that the sponsoring employer was dormant without further enquiry as to the implications of this for the scheme. This point was not addressed.

160. Pausing here, there is no evidence of HMRC having considered how serious any particular gating item was and how much weight to attach to any particular failure and whether that failure, if potentially serious, could be addressed in a way that fell short of deregistration.

161. After having evaluated the gating conditions individually, HMRC would need to stand back and decide whether it would be appropriate to deregister the Schemes. We agree with Mr Firth that the consequences for a pension scheme and its members of being deregistered are so serious that deregistration should be an act of last resort. We have seen that Mr Burns fairly acknowledged that, if he had known that Headforte had assets and members, he might have come to a different conclusion. That is a very fair concession on his part and, to our mind, it is also a very powerful endorsement of why a thorough process of evidence gathering followed

by a thorough review of that evidence and a reflective approach to the exercise of HMRC's discretion is so important. We can readily understand how, if a scheme administrator is operating a pension scheme for pension liberation or other purposes contrary to the purpose of the pensions legislation and scheme members have consciously "bought into" such arrangements, de-registration of the scheme might be an appropriate remedy, but as a starting point we cannot accept that the failings of a scheme administrator should automatically be visited on a scheme and its members. There is no evidence of HMRC having considered whether, in the light of their conclusions on the gating conditions, de-registration was appropriate given the consequences for the Schemes and their members. This is exactly the sort of consideration that the Supreme Court thought was important in *Whitter*. HMRC should have considered whether any of the identified grounds were serious enough to potentially warrant deregistration on their own and, if they were, whether those failings could be addressed in another way which did not impact on the integrity of the pensions tax regime. There is no evidence of any engagement with NBC or exploration of any of these points at all.

Conclusions on the De-registration Appeals

162. For the reasons discussed above, we have concluded that:

(1) The overall process which led to the de-registration decisions was flawed, because (a) (despite NBC asking for this) no explanation was given by HMRC of why it proposed to deregister the Schemes or of the evidence on which it had based its assertions and (b) NBC was not given an opportunity to draw to HMRC's attention, before the decision was taken, factual or other matters which they may have overlooked or mis-appreciated in their assessment of the grounds for de-registration.

(2) There was material which would justify HMRC concluding that certain of the gating conditions had been met.

(3) However, HMRC did not evaluate the gating conditions which had been met and decide what weight to give them when deciding whether they justified the Schemes being deregistered.

(4) HMRC either did not consider the exercise of their discretion, or, if they did, they reached their conclusions without taking all relevant considerations into account and arrived at a position which, acting reasonably, they could not adopt.

163. On Mr Isles' evidence, Halkin is a dormant scheme with no assets or members. On that basis, there would be no prejudice to its being deregistered. That, in the light of ground (za) being established, means that we consider that, if they had followed a proper process, properly considered only relevant factors and exercised their discretion properly, HMRC would inevitably have decided to deregister Halkin.

DISPOSITION OF THE DE-REGISTRATION APPEALS

164. So far as the De-registration Appeals are concerned:

(1) the registrations of Headforte and Isles & Storer should not have been withdrawn, and they are each to be treated as having remained a registered pension scheme (subject to any further appeal); and

(2) Halkin's registration ought to have been withdrawn and its appeal against HMRC's withdrawal of its registration is dismissed.

165. Although we have decided that the registrations of Headforte and Isles & Storer should not have been withdrawn by HMRC when they were, we should stress that we have not decided that none of the deregistration grounds were (or are) present, nor have we decided that not deregistering those schemes was (or is) the only avenue conceivably open to HMRC, who

remain perfectly at liberty to revisit the question of deregistration as far as these two schemes is concerned. Our decisions are concerned with how HMRC reached their decisions, not the decisions they reached. As we have already explained, those decisions are for HMRC (and HMRC alone) to make.

SCHEDULE 36 APPEALS

166. Schedule 36 ("Schedule 36") to the Finance Act 2008 gives HMRC various powers to gather information for the purposes of checking a person's tax position.

167. Paragraph 1 of Schedule 36 provides HMRC with power, by notice in writing, to require a taxpayer to provide information or documentation that is reasonably required for checking the tax position of the taxpayer.

168. In the schedule to this decision notice we have set out the information requested from Halkin. The requests made of Headforte and Isles & Storer were the same except that the notice issued to Isles & Storer was also asked for a copy of the scheme's establishing trust deed and rules.

169. "Tax" is defined in paragraph 63 of schedule 36 and, particularly relevant in this case, includes income tax. Both the pension scheme deregistration charge and the scheme sanction charge operate as charges to income tax.

170. Paragraph 64 of Schedule 36 defines a person's "tax position" as being: "the person's position as regards any tax, including the person's position as regards – (a) past, present and future liability to pay any tax,…". It is clear therefore that an information notice can be used to obtain information not only to determine whether a tax liability has already arisen but also whether a tax liability may arise in the future.

171. Paragraph 7 of Schedule 36 provides that, where a person is required by such a notice to provide information or documentation, the person must do so within such period (and by such means and in such form) as is reasonably specified in the notice.

172. Paragraph 20 provides that:

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

173. Paragraph 29 of Schedule 36 provides a right of appeal to this tribunal "against the notice or any requirement in the notice". However, sub-paragraph (2) provides that there is no right of appeal against a requirement "to provide any information, or produce any document, that forms part of the taxpayer's statutory records".

174. Paragraph 62 makes provision in relation to statutory records, as follows:

> "(1) For the purposes of this Schedule, information or a document forms part of a person's statutory records if it is information or a document which the person is required to keep and preserve under or by virtue of—
>
> (a) the Taxes Acts, or
>
> (b) any other enactment relating to a tax, subject to the following provisions of this paragraph.
>
> (2) To the extent that any information or document that is required to be kept and preserved under or by virtue of the Taxes Acts—
>
> (a) does not relate to the carrying on of a business, and

(b) is not also required to be kept or preserved under or by virtue of any other enactment relating to a tax,

it only forms part of a person's statutory records to the extent that the chargeable period or periods to which it relates has or have ended.

(3) Information and documents cease to form part of a person's statutory records when the period for which they are required to be preserved by the enactments mentioned in sub-paragraph (1) has expired."

175. So far as appeals are concerned, paragraph 32 of Schedule 36 provides:

"(3) On an appeal that is notified to the tribunal, the tribunal may-

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

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

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

(4) Where the tribunal confirms or varies the information notice or a requirement, the person to whom the information notice was given must comply with the notice or requirement-

(a) within such period as is specified by the tribunal, or

(b) if the tribunal does not specify a period, within such period as is reasonably specified in writing by an Mr of Revenue and Customs following the tribunal's decision.

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

176. Mr Firth says that Mr Burns is not permitted to go on a "fishing expedition". Support for that position is to be found in the regularly quoted passage (paragraph [20]) from the judgment of Simler J (as she then was) in *Derrin* (supra), where she observed:

"Finally, HMRC may not use their Sch 36 powers for a fishing expedition—whether for their own or the purposes of another revenue authority. A broadly drafted request will not be valid if in reality HMRC are saying 'can we have all available documents because they form so large a class of documents that we are bound to find something useful'. What is required is that the request is genuinely directed to the purpose for which the notice may be given, namely to secure the production of documents reasonably required for carrying out an investigation or enquiry of any kind into another taxpayer's tax position. It is no objection however, to the issue of a third party notice that it seeks disclosure of 'conjectural' documents; in other words documents that might not exist."

177. That is, of course, entirely correct. A request such as Simler J described is unlikely to be reasonable or proportionate. She described a "fishing expedition" in terms redolent of indiscriminate bottom trawling ('can we have all available documents because they form so large a class of documents that we are bound to find something useful') rather than an angler sitting patiently by the riverbank with a single carefully positioned rod. The notices prepared by Mr Burns do not ask indiscriminately for everything available but each is a carefully drawn-up list of material which Mr Burns, after careful thought which he explained when he gave evidence, sees as necessary to check the Schemes' tax position.

178. Schedule 36 allows HMRC to request information reasonably required for the purposes of checking the taxpayer's tax position. As Simler J explained in *Kotton v First-tier Tribunal*

(Tax Chamber), [2019] EWHC 1327 (Admin) at [60], this requires that "there is a genuine and legitimate enquiry or investigation of any kind into the tax position of a taxpayer that is neither irrational nor in bad faith". Mr Burns' evidence is that he wanted to enquire into the past and potential future tax liabilities of the Schemes. Further, as this Tribunal has explained, whilst HMRC cannot go on a trawling expedition of the type described by Simler J, they are entitled to check a taxpayer's tax position (and ask for the information to do that) without first needing to suspect that a tax return is incorrect; see *Spring Capital Ltd v HMRC*, [2015] UKFTT 0008 (TC), where the Tribunal said (at [34]):

> "Paragraph 1 of Sch 36 provides that an HMRC officer can issue an information notice 'if the 20 information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position' (see §2 above). There is nothing in this section that requires HMRC to suspect that the return is incorrect before issuing an information notice. HMRC are entitled to check taxpayer's tax position and they are entitled to any documents or information reasonably required for the purpose of doing so. In other words, HMRC are entitled to undertake 'fishing expeditions' when checking returns: they do not need suspicion in order to check a tax return."

179. As far Schedule 36 appeals are concerned, Mr Firth submits that the information notices were not issued for the legitimate purpose of checking the Schemes' tax position. He says that they were wholly speculative fishing expeditions, designed to find information to justify the decision (already taken) to deregister the Schemes. He says that the information notices are consequential on the decision to deregister and, if that fails, they should too. He describes the information sought as being wide and unfocussed and, he says, this clearly shows that the information notices have not been issued for a legitimate purpose. When asked in cross examination, Mr Burns accepted that he knew about the six-year time limit in paragraph 20 but he still overreached it in at least one of his requests. Again, Mr Firth says this is further evidence, if it were needed, that the information notices are not being issued for proper purposes.

180. In his evidence, Mr Burns was very clear that he was issuing the information notices to find information relevant to a possible deregistration charge and to find out whether scheme administrator was subject to a scheme sanction charge. In broad terms, a scheme sanction charge arises on an unauthorised payment (which would include lump sum payments to cash in or access pension funds before the age of 55 and so would embrace most "pension liberation" payments), unauthorised borrowings and investments in "taxable property". So far as the scheme sanction charge on unauthorised payments is concerned, credit is given against this charge where members have been liable to (and paid) an unauthorised payments charge.

181. An awfully long period of time (over 5 years) has passed since the information notices were issued. As a result, a lot of the information sought will, when produced, relate to periods outside the ordinary time limits for assessment of income tax, and scheme sanction and deregistration charges are charges to income tax. It was not suggested before us that it followed from this time delay that a lot of the information sought was no longer reasonably required for the purposes of HMRC's enquiries into the Schemes' tax positions and that this should colour our approach to the requests HMRC made. We have proceeded on the basis that, if the information requested was reasonably required for the purposes of checking the Schemes' tax position when the notices were issued, it still is.

182. In order to check the tax position of the Schemes so far as the scheme sanction charges are concerned, Mr Burns needs to know details of movements into and out of the Schemes, their investments and their members, so that, if a scheme sanction charge is due, he can look

to see whether members have paid an unauthorised payments charge. He described the information he asked for as standard in the context of pension schemes.

183. It is clear that HMRC do not need any particular suspicion (for example of pensions liberation activity) in order to enquire into someone's tax position and issue an information notice to obtain information and documents they need to do that. Provided HMRC are genuinely investigating a tax issue they have identified, using their powers in Schedule 36 to obtain the information and documents they need to carry out that investigation is perfectly proper.

184. We accept Mr Burns' evidence that, given his suspicions about pension schemes associated with Mr Isles and their possible use for pensions liberation purposes, he wanted to make sure that the Schemes had been properly established and funded and, most importantly, that they had not borrowed or made investments or payments in a way which would give rise to a scheme sanction charge. Clearly, given the breadth of issues which the scheme sanction charge engages, that would need a significant amount of information to be collected. Mr Burns will need to know about cash movements into and out of each of the Schemes, its investments and other activities. Understanding why members have applied to join the scheme (and whether amounts have been transferred in from other schemes) as well as details of payments out will be important to work out whether the Schemes have been involved in pensions liberation arrangements which could give rise to a scheme sanction charge.

185. Whilst the information sought is broad, it is a targeted list focussing on identifying members, transactions with members and investments, any or all of which could provide evidence of a liability to a scheme sanction charge.

186. Paragraph 20 of Schedule 36 provides that an information notice may not require a person to produce a document if the whole of the document originates more than six years before the date of the notice, unless the notice is given by or with the agreement of an authorised officer. Mr Firth objected to the request in the information notice for details of investments held more than six years before the issue of the notice. He suggested that Mr Burns consciously overreaching this time limit invalidated the whole of the notice. Mr Firth accepts that, that if the notice was given in ignorance of the limitation on HMRC's powers, the correct course may well be to amend the requirements of the notice. However, he says the position is different where the officer was aware of the limitation (as Mr Burns admitted he was) but chose to request 'everything', contrary to the limitation. Mr Firth submits that that is such a fundamental flaw in the decision-making process to issue the information notice, that it invalidates the decision. Mr Firth relied on the decision of this Tribunal in *The Barty Party Company Limited v HMRC*, [2017] UKFTT 697 (TC), as authority for this proposition. We do not consider that this case supports the view that asking for more information than the statute allows HMRC to require invalidates the whole of the notice. The question in that case was whether asking for information that investigated a period beyond that for which HMRC could issue an assessment suggested that the notice went beyond what was reasonably required to check the taxpayer's tax position, and so the information notice was not validly issued. The Tribunal held that this was indeed the case and quashed the notice accordingly. That is not the position here. Mr Burns issued the information notices to check the tax position of the Schemes and he was in a position to take action if he found a liability. That was not the position in *Barty Party*. In *Khalid Mahmood v HMRC*, [2018] UKFTT 297 (TC), this Tribunal held that asking for documents outside the paragraph 20 time limit did not invalidate the notice as a whole.

187. The information notice issued to Isles & Storer asks for details of investments held at the end of each tax year starting with 5 April 2012, whereas that scheme was only established on 18 April 2013.

188. All the information sought in these notices seems to us to be relevant to working out whether the scheme administrator was liable to a deregistration or scheme sanction charge. So far as Headforte and Isles & Storer are concerned, we have allowed their appeals against HMRC's decision to withdraw their approval, but the information remains relevant to checking whether either of these schemes is liable to a scheme sanction charge.

189. The only piece of information which is not strictly relevant for this purpose is the request for confirmation of the scheme's trustees.

190. Paragraph 20 of Schedule 36 refers to the production of documents, not information. As such, it does not prevent HMRC asking, so far as Halkin and Headforte are concerned, NBC to produce year-end schedules of investments starting from 5 April 2012. We can understand why HMRC might want to know the investments held by those schemes at the beginning of the 2012/13 tax year as well as at the end, so schedules of investments as at those dates seem to us to be reasonably required for the purposes of checking NBC's tax position as far as those schemes was concerned.

191. Paragraph 20 of Schedule 36 operates automatically and overrides any request made by HMRC. Accordingly, it does not need to be reflected in the information notices, simply borne in mind by HMRC and NBC.

192. We have concluded that:

(1) Each of the information notices was validly given for the purposes of enabling HMRC to obtain information required for the purposes of checking the scheme administrator's tax position so far as the relevant scheme was concerned; and

(2) With the exception of the final request (for details of the trustees of the relevant scheme) the information sought was, and still is, reasonably required for that purpose.

DISPOSITION OF THE SCHEDULE 36 APPEALS

193. Accordingly, we confirm each of the information notices, subject to the following variations:

(1) The final request (for details of the scheme trustees) is to be deleted.

(2) The tax year end from which investment schedules are be prepared is to be changed from 5 April 2012 to 5 April 2014 in the case of Isles & Storer.

DE-REGISTRATION APPEALS: RIGHT TO APPLY FOR PERMISSION TO APPEAL

194. This document contains full findings of fact and reasons for our decision as regards the De-registration Appeals. Any party dissatisfied with our decision on the De-registration Appeals 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.

SCHEDULE 36 APPEALS: NO RIGHT TO APPLY FOR PERMISSION TO APPEAL

195. Paragraph 32(5) of Schedule 36 provides that the decision of the Tribunal regarding an appeal made by a taxpayer under Part 5 of Schedule 36 is final and so there is no right to appeal against our decision as regards the Schedule 36 Appeals.

MARK BALDWIN
TRIBUNAL JUDGE

Release date: 02nd FEBRUARY 2024

Schedule: Halkin Schedule 36 information request

Statutory records or information that we need. Statutory records are the records that tax law says a person must keep.

1. Up to date copies of the pension schemes bank account(s) statements from commencement to date.
2. A schedule containing the details of all members of the pension scheme,.i.e. Name, address, National Insurance Number.
3. A schedule showing the value and type of each investment held by the scheme as at each tax year end date from 5 April 2012 to 5 April 2018.
4. Copies of documents evidencing the ownership of all assets/investments held on behalf of the scheme members.
5. Copies of all member applications to join this scheme, and copies of all correspondence with members and any other parties with reference to any transfer-out payments from this scheme to other arrangements.

Other documents or information that we need

In this context 'document' means anything in which information of any description is recorded. This includes any records held on computer, magnetic tape, optical disk (CD-ROM/DVD), hard disk, memory stick, flash drive, floppy disk or other recording media.

1. Excluding investment returns, details of any payments made to any scheme members, scheme administrators past or present or to any of the scheme trustees as a result of pension scheme funds being transferred into this scheme or subsequently transferred out to any other arrangement.

Such payments include sums paid as a loan, compensation, commission, incentive or one off payment and which may also have come from an introducer, financial advisor or company involved in the scheme's investments. Provide any documentation you hold in this respect.

2. Confirmation of the current trustees of the Halkin Pension Scheme, along with a contact address and telephone number for each