[2019] UKUT 0407 (TCC)

Appeal number: UTJR/2019/002

JUDICIAL REVIEW – HMRC and taxpayer agreeing method for determining proportion of taxpayer's supplies that were standard-rated – HMRC exercise power to withdraw method – whether taxpayer had a legitimate expectation that arrangement would continue – permission to bring judicial review refused

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE QUEEN **Claimant**
on the application of
METROPOLITAN INTERNATIONAL SCHOOLS LTD

-and-

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

TRIBUNAL JUDGE JONATHAN RICHARDS

Sitting in public at The Royal Courts of Justice, Strand, London on 5 December 2019

James Ramsden QC and Conrad McDonnell, instructed by Reynolds Porter Chamberlain LLP, for the Claimant

Eleni Mitrophanous, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Defendants

DECISION

1. The claimant (who I will refer to as the "School") applies for permission to bring judicial review proceedings in respect of decisions that the defendants ("HMRC") made in connection with its VAT liabilities.

Relevant factual background

2. Much of the relevant background is uncontroversial. However, the School and HMRC have different perspectives on some points of detail, such as what happened during and following meetings between them in 2006 and 2007. The School is entitled to have its application for permission to bring judicial review determined on the basis of the facts as it alleges them to be. Therefore, in this section, I will set out a summary of the relevant factual background as the School has presented it without determining whether that sets out the correct, or full, picture.

3. At times material to this application, the School supplied home study distance learning materials which included the supply of training manuals. The VAT analysis of the School's business was not straightforward since (i) the supply of the training manuals would (viewed in isolation) be zero-rated for VAT purposes, but (ii) to the extent the School was supplying education or training services those would be standard-rated[1].

4. Over the years the School and HMRC[2] had many meetings to consider the nature of the supplies that the School was making and, on 21 December 1999, they reached a compromise. The agreed compromise was reflected in a letter (the "2000 Letter") from HMRC to the School dated 14 January 2000 which started with the following paragraphs:

> I am writing to confirm the method agreed at our meeting of 21 December 1999 to be used to apportion the course fees between standard and zero rated supplies.
>
> The method is to be used from 1 October 1998, and is based on the costs involved in making both the standard and zero rated supplies. Should there be any changes in your business which prevents this method giving a fair apportionment of the course fees you must notify us immediately. This method may be reviewed, amended or withdrawn by Customs and Excise at any time. You may apply to this office for a change of method if this one no longer produces a fair and reasonable result.

5. It is not necessary to set out in detail how the standard-rated proportion was to be calculated. It suffices to note that, for so long as the agreed method was in operation, it

[1] To the extent that the School was supplying educational or vocational training services, those supplies were not eligible to be treated as exempt under Group 6 of Schedule 9 of the Value Added Tax Act 1994 since the School did not meet the applicable conditions for exemption.

[2] I will refer to HM Customs & Excise and the body into which it merged, HM Revenue & Customs, together as "HMRC".

resulted in a material amount of the Company's turnover being treated as consideration for zero-rated supplies.

6. HMRC did not terminate the arrangement until 26 August 2009. While the arrangement was in place, the School asserts and, for the purposes of this application, I will accept, that it relied on the presence and terms of the arrangement in connection with its business affairs. For example, it determined the price that it would charge its students by assuming that the output VAT due to HMRC was to be determined in accordance with the arrangement. Decisions on staff salaries, working capital and other budgetary matters were made on a similar assumption.

7. Up until 2005, there were no material problems. HMRC inspected the School's VAT position in 2002 and during their visits at this time reaffirmed the approach set out in the 2000 Letter. There were other routine visits during which HMRC also confirmed the continuing application of the principles set out in the 2000 Letter.

8. In 2005, the House of Lords released its decision in *College of Estate Management v Customs & Excise Commissioners* [2005] UKHL 62. That decision concerned an educational establishment (that was not VAT-exempt) which provided residential, taught courses and books to its students. The House of Lords determined that the educational establishment was making wholly standard-rated supplies. Both HMRC and the School considered the implications of that decision.

9. On the 17th and 18th of July 2006, there was a meeting between the School and HMRC whose purpose was specifically to discuss the *College of Estate Management* case. At the end of that meeting, the School asserts and, for the purposes of this application I will accept, that HMRC's Officer Edwards indicated that he considered the supplies the School was making to be different from those made in College of Estate Management. He took some documents with him and said that he would consider matters further and report back to the School if he wanted to suggest any variations to the method outlined in the 2000 Letter. He also confirmed that if he did wish to suggest such changes, he would consult with the School before implementing them. Officer Edwards did not report back to the School and the School formed the view that he was content with the arrangement as it stood.

10. On 12 and 13 November 2007, there was a further meeting with HMRC. Following that meeting, HMRC made an assessment to recover input VAT connected with entertainment that the School had overclaimed. However, no other adjustments were made to the School's VAT computations and the School concluded that this meant that HMRC remained content with the arrangement.

11. On 26 August 2009, HMRC sent the School a letter (the "2009 Letter") that explained HMRC's view that, in the light of the decision in *College of Estate Management*, the School's supplies were all standard-rated. In their skeleton argument, Mr Ramsden QC and Ms McDonnell characterised this letter as "stating that the 14 January 2000 agreement was withdrawn". While, as far as I can see, the 2009 Letter does not refer to the 2000 Letter at all this characterisation is accurate since an assertion

that all of the School's supplies were standard-rated for VAT purposes would be completely inconsistent with the method agreed in the 2000 Letter.

12. The 2009 Letter set in train a sequence of events that can be summarised as follows:

> (1) Initially, HMRC's position was that the 2000 Letter had been withdrawn with retrospective effect and on 26 March 2010, they issued assessments in respect of periods from, and including, 06/06 to, and including, 12/09[3]. They subsequently made further assessments in respect of periods after 12/09.
>
> (2) Following some twists and turns, HMRC came to accept that withdrawing the 2000 Letter retrospectively was unfair. The School asserts, and for the purposes of this application I will accept, that HMRC have formally conceded that the School had a legitimate expectation that the 2000 Letter would not be withdrawn with retrospective effect. HMRC have, therefore "remitted" the assessments made insofar as they related to a period ending on or before 31 August 2009[4].
>
> (3) The School appealed to the First-tier Tribunal (Tax Chamber) (the "FTT") against HMRC's decision that it was making wholly standard-rated supplies. The FTT decided, in the School's favour, that it was making wholly zero-rated supplies of books. However, in *Metropolitan International Schools Ltd v HMRC* [2017] STC 2523, the Upper Tribunal reversed that decision, concluding that the School was making wholly standard-rated supplies. Permission to appeal against that decision was refused. The Court of Appeal did hear an appeal concerned primarily with a question relating to whether the School could argue its points relating to legitimate expectation before the FTT. The Court of Appeal decided that issue in favour of HMRC (see *Metropolitan International Schools Ltd v HMRC* [2019] EWCA Civ 156).
>
> (4) HMRC have served a winding-up petition in respect of unpaid VAT liabilities. The logic of HMRC's position recorded at [(2)] above might suggest that they would feel able to collect VAT due on that basis that the School was making wholly standard-rated supplies with effect from 1 September 2009. However, in their winding-up petition, HMRC sought only to recover such VAT for VAT quarters from, and including 9/12 (i.e. a period beginning on 1 October 2009) to, and including 9/14. Moreover, in that winding up petition, HMRC gave the School a "credit" equal to the

[3] I assume HMRC concluded that they were no longer in time to issue assessments going all the way back to 2000.

[4] The assessments have not been "withdrawn" as HMRC's practice is to withdraw assessments only when they are shown to be wrong in law. Rather, by "remitting" them, HMRC are recording their view that the assessments were correctly made as a matter of law, but should not be enforced. I confess that I do not follow the logic of this. If HMRC accept that the retrospective assessments were made in breach of the School's legitimate expectation and that it would be unfair in the circumstances to collect them, that would appear to amount to an acceptance that the assessments were, as a matter of public law, void *ab initio* and so wrong in law. However, little seems to turn on this for present purposes.

entirety of its underpaid VAT liability for 12/09 so that, economically, HMRC's winding-up petition dealt with additional VAT due for the period from (and including) 3/10 to, and including, 9/14[5]. That winding-up petition was struck out on the basis that it was an abuse of process (no doubt because the School's application for permission to bring these judicial review proceedings meant that the debt was disputed) and HMRC were ordered to pay the School's costs on an indemnity basis.

The School's claim for judicial review

13. The School issued judicial review proceedings on 18 June 2010. That claim was stayed while the proceedings before the FTT and the Upper Tribunal were in progress. On 25 January 2013, Warren J transferred the stayed proceedings to the Upper Tribunal. On 29 March 2019, by which time the Tribunal proceedings had run their course, culminating in a conclusion that the School's supplies were entirely standard-rated, Zacaroli J lifted the stay.

14. In its "Details of Remedy Sought" served in 2010, the School requested various orders that would have prevented HMRC from either making, or enforcing, assessments in respect of periods during which the arrangement set out in the 2000 Letter was in force. That aspect of the claim has now been overtaken by events since HMRC have agreed to "remit" assessments made in respect of periods ended prior to 31 August 2009. The School also sought some measure of relief in respect of periods after HMRC withdrew the arrangement contained in the 2000 Letter and framed the relief sought in the following terms:

> An order that the Commissioners be prohibited from raising further assessments … for the two prescribed accounting periods next beginning after 26th August 2009.

15. In its skeleton argument, the School explains that it is not just seeking relief for the two VAT periods next beginning after 26 August 2009. Rather, it seeks orders precluding HMRC from collecting VAT on a basis different from that set out in the 2000 Letter (i) during a "reasonable" notice or transition period and/or (ii) in respect of supplies made under contracts which the School concluded on or before 26 August 2009 ("run-off contracts").

16. HMRC argue that the extended relief sought has not been adequately pleaded, and, having made no application to amend its pleadings, the School is limited to claiming the relief set out at [14]. However, putting pleading points to one side for the time being, the justification that the School advances for seeking to hold HMRC to the terms of the 2000 Letter beyond 26 August 2009 is the law of "legitimate expectation". In its skeleton argument, the School takes as its starting point what it considers to be HMRC's

[5] It was not clear why HMRC gave this "offsetting credit". The Applicant argues, and for the purpose of this application I will accept that HMRC were not intending to accept that they had no right to the VAT assessed in respect of the 12/09 period, but rather to estimate the tax that was genuinely in dispute (in these judicial review proceedings) and so not to claim for that tax in the winding-up petition. That point has been rendered somewhat academic by the fact that HMRC's winding-up petition was struck out in its entirety.

acceptance that it had a legitimate expectation based on the terms of the 2000 Agreement and frames two key questions it considers need to be determined in the following terms:

> A. Is the [School] entitled to continue to rely on that legitimate expectation in relation to the VAT treatment of its supplies made pursuant to the run-off contracts, even after the promise was withdrawn on 26 August 2009?
>
> B. Was it implicit in the 14 January 2000 agreement, or in any general principles of legitimate expectation in this context, that the promise made on 14 January 2000 could not be withdrawn without reasonable notice or without a reasonable transitional period to allow for representations and/or commercial adjustment?

17. In its skeleton argument, the School also argued that concepts of *Wednesbury* reasonableness, proportionality and good administration compelled HMRC to grant a reasonable transitional period before withdrawing the arrangement set out in the 2000 Letter. However, in his oral submissions, Mr Ramsden QC accepted that the School's claim for judicial review made in 2010 was based solely on the principle of legitimate expectation and that, absent an application to amend those grounds, the School could not be given permission to bring judicial review proceedings on grounds that had not been advanced. Since he viewed the *Wednesbury* arguments as simply being an aspect of the School's case on legitimate expectation, he was content for the School's application to be determined solely by reference to its case on legitimate expectation.

18. Putting to one side their disagreement as to the extent of the School's pleading, the parties were agreed that I should approach the application for permission by asking whether the School has an "arguable case" with "realistic prospects" of success. I will follow the parties' agreed approach and will take into account the following guidance from Underhill LJ in *Wasif v Secretary of the Home Department* [2016] EWCA Civ 82:

> …the conventional criterion for the grant of permission does not always in practice set quite as low a threshold as the language of "arguability" or "realistic prospect of success" might suggest. There are indeed cases in which the judge considering an application for permission to apply for judicial review can see no rational basis on which the claim could succeed: these are in our view the cases referred to in *Grace* as "bound to fail" (or "hopeless"). In such cases permission is of course refused. But there are also cases in which the claimant or applicant (we will henceforth say "claimant" for short) has identified a rational argument in support of his claim but where the judge is confident that, even taking the case at its highest, it is wrong. In such a case also it is in our view right to refuse permission; and in our experience this is the approach that most judges take. On this approach, even though the claim might be said to be "arguable" in one sense of the word, it ceases to be so, and the prospect of it succeeding ceases to be "realistic", if the judge feels able confidently to reject the claimant's arguments.

Legitimate expectation – the law

19. In *Nadarajah and another v Secretary of State for the Home Departmen*t [2005] EWCA Civ 1363, Laws LJ, with whom both other members of the court agreed, set out the principle underpinning the law of legitimate expectation in the following way:

> 68.The search for principle surely starts with the theme that is current through the legitimate expectation cases. It may be expressed thus. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. In my judgment this is a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law. That being so there is every reason to articulate the limits of this requirement – to describe what may count as good reason to depart from it – as we have come to articulate the limits of other constitutional principles overtly found in the European Convention. Accordingly a public body's promise or practice as to future conduct may only be denied, and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.

20. So far as HMRC are concerned, concepts of "fairness" and "good administration" have to be approached in the light of HMRC's duty to collect tax. As Bingham LJ put it in *R v Inland Revenue Commissioners ex parte MFK Underwriting Agencies Ltd* [1989] STC 873:

> Every ordinarily sophisticated taxpayer knows that the Revenue is a tax-collecting agency, not a tax-imposing authority. The taxpayer's only legitimate expectation is, prima facie, that he will be taxed according to statute, not concession or a wrong view of the law (see *R v A-G, ex p Imperial Chemical Industries plc* (1986) 60 TC 1 at 64 per Lord Oliver). … No doubt a statement formally published by the Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them. But where the approach to the Revenue is of a less formal nature a more detailed inquiry is, in my view, necessary. If it is to be successfully said that as a result of such an approach the Revenue has agreed to forego, or has represented that it will forego, tax which might arguably be payable on a proper construction of the relevant legislation it would, in my judgment, be ordinarily necessary

> for the taxpayer to show that certain conditions had been fulfilled. I say 'ordinarily' to allow for the exceptional case where different rules might be appropriate, but the necessity in my view exists here. First, it is necessary that the taxpayer should have put all his cards face upwards on the table….Secondly, it is necessary that the ruling or statement relied on should be clear, unambiguous and devoid of relevant qualification.

21. This is not a case in which HMRC are said to have published a formal statement "to the world". Therefore, if the School's claim for judicial review is to succeed, it will need to establish as a necessary (though not sufficient) condition that HMRC made a statement that was "clear, ambiguous and devoid of relevant qualification" that they would forgo tax arguably payable on a proper construction of the relevant legislation.

22. In deciding if an apparent concession by HMRC is "clear, ambiguous and devoid of relevant qualification", a court or tribunal should not embark on an "arid intellectual exercise" (see *R (oao Davies and others) v HMRC* [2011] UKSC 47). Rather, the matter should be decided in the light of all relevant statements made and the identity of the person to whom those statements were made. Apparent concessions should not be construed as if they were statutes (*R v Greenwich Property Ltd v Customs and Excise Commissioners* [2001] STC 618).

23. I do not need to address in detail the legal controversy as to the extent to which a taxpayer must establish "detrimental reliance" before it can hold HMRC to an apparent concession that they will not collect tax lawfully due, or thought to be due. The School has given witness evidence of what it asserts to be the necessary detrimental reliance. I am prepared to assume at this permission stage that the School can establish that it relied on what it regarded as HMRC's concession to its detriment.

24. More relevant to this application are the circumstances in which HMRC will be held to the terms of a concession even though that concession involves HMRC agreeing not to collect tax lawfully due. In such a case, HMRC's public law duty to collect tax conflicts with its public law duty to "deal straightforwardly and consistently with the public" (to use the words of Laws LJ in *Nadarajah*). In *R (Hely-Hutchinson) v HMRC* [2017] EWCA Civ 1075, Arden LJ said:

> If HMRC finds that they need to resile from guidance, a taxpayer can only rely on the legitimate expectation that the guidance created where, having regard to the legitimate expectation, it would be so unfair as to amount to an abuse of power.

25. More generally, in the extract from the judgment in *Nadarajah* which I have already cited, Laws LJ framed the test as whether resiling from the guidance or concession would be:

> a proportionate response …having regard to a legitimate aim pursued by the public body in the public interest

Discussion

The nature of the representation that HMRC made

26. The School argues that it is at the very least arguable that HMRC made a clear, unambiguous and unqualified representation. It points out that the 2000 Letter set out a comprehensive agreement as to the principles underpinning the calculation of the School's VAT liability that HMRC were content to apply for some 9½ years. During the currency of the parties' agreement, HMRC repeatedly affirmed the continued validity of that agreement. Even after the release of the decision of the House of Lords in *College of Estate Management*, despite their visits in 2006 and 2007, HMRC did not withdraw from the arrangement, waiting until 2009 to do so.

27. However, it is important to bear in mind that the School has to establish that HMRC made a clear, unambiguous and unqualified representation that they would not collect tax that was arguably due as a matter of law (see the decision in *MFK Underwriting Agencies*). It is not, therefore, enough simply to point to the clarity of the 2000 Letter, or HMRC's repeated affirmation of the terms of that letter. The School's claim for judicial review can succeed only if it shows that, in the 2000 Letter, HMRC represented that it would collect tax on the basis of that letter even if the law indicated that the School's tax liability was higher.

28. Although I do not need to decide the point (since HMRC have conceded it), I can quite see how this test is satisfied in relation to periods prior to 26 August 2009, the date on which HMRC brought the arrangement to an end. While the 2000 Letter did not deal with the question of retrospective termination in express terms, people do not generally enter into arrangements on terms that another party could, unilaterally, and with retrospective effect, deprive that arrangement of any effect. It might be thought that there would be little point in having such an arrangement. I therefore see the force of the argument that, in the 2000 Letter, HMRC made a clear, unambiguous and unqualified representation that, unless and until it withdrew from the arrangement, it would apply the 2000 Letter even if that resulted in the School paying less VAT than would have been due if HMRC applied the letter of the law.

29. However, I do not think it is arguable (in the sense articulated in *Wasif*) that HMRC made any clear representation that, after they terminated the 2000 Letter, they would nevertheless continue to apply that letter in periods after termination so as to result in the School paying less tax than HMRC considered the law required. The 2000 Letter certainly contains no express representation to this effect. Nor would it make any sense to imply such a representation. The 2000 Letter gave HMRC the right to review, amend or withdraw the arrangement at any time. As a counterpart, it gave the School the right to ask HMRC to approve a different method at any time. Plainly a paradigm situation in which HMRC might wish to review, withdraw or amend the letter would arise if HMRC no longer considered the 2000 Letter resulted in the School paying VAT that was lawfully due. It is not arguable that the 2000 Letter contained any clear representation that, in that paradigm situation, HMRC would nevertheless agree to collect tax on the basis of the 2000 Letter either for a period or in relation to specific "run-off contracts". In those circumstances, the fact that the 2000 Letter was long-lived and HMRC's reaffirmation of the 2000 Letter (and their initial failure to disaffirm the

2000 Letter following the *College of Estate Management* decision) do not bear the weight for which the School contends. Long-lived though it was, and re-affirmed as it was, the 2000 Letter did not contain any clear representation that HMRC would apply its terms, in a period after it had been terminated, so as to enable the School to pay tax less than the amount HMRC considered due as a matter of law.

30. Another way in which the School seeks to make its case is by arguing that the 2000 Letter contained an implied term or representation to the effect that HMRC would provide some kind of notice or transitional period before termination of the 2000 Letter would take effect. The School justifies this on the basis of principles of "good administration" (including a duty to consult along the lines of that discussed in *Bank Mellat v HM Treasury* [2013] UKSC 39) or, borrowing from the language of contract law, on the basis of "business efficacy". Mr Ramsden QC submitted that, while HMRC had a right to terminate "at any time", that provision was silent as to the period of notice to be given, thus leaving room for an implied representation that "reasonable" notice would be given. However, I do not accept that. The search is for a clear and unambiguous representation. The 2000 Letter permitted HMRC to terminate "at any time". That is inconsistent with a notice period since, if HMRC were required to give notice, there would always be some period during which HMRC could not terminate. It is not an "arid intellectual exercise" to read the 2000 Letter as permitting HMRC to terminate at any time, and without notice. On the contrary, I regard that as the plain effect of the 2000 Letter. Faced with such a clear express term, I see no arguable case (in the *Wasif* sense) that HMRC made a clear and unambiguous (implied) representation that they would give any notice of termination. Given that, during any notice period, HMRC would be "locked into" the 2000 Letter on a prospective basis even in circumstances where that resulted in the School paying less tax than was lawfully due, I consider that the 2000 Letter would need to contain clear words to provide for a notice period.

31. That conclusion is not altered by *Bank Mellat.* At [32] of that decision, Lord Sumption, with whom a majority of their Lordships agreed, decided that the Treasury had a common law duty to consult with a bank before exercising a power (not a duty) to make a direction that would have the serious effect of preventing other financial institutions from entering into business relations with that bank. The circumstances of this case are different. HMRC has a positive duty to collect tax lawfully due. In performing that duty, HMRC entered into the 2000 Letter with the School which, in its express terms, gave HMRC an absolute right to terminate the arrangements at any time and imposed no duty to consult. The fact that other public bodies might have a duty to consult when making different decisions cannot operate to imply any representation that consultation would take place, still less a "clear and unambiguous" representation, when no such representation was contained in the 2000 Letter.

Fairness and proportionality

32. The first aspect of the School's arguments on fairness and proportionality is that a provision for HMRC to terminate the 2000 Letter at any time, and without notice, would be so unfair and disproportionate as to indicate that this cannot have been the true effect of the 2000 Letter. The School points to the fact that it made important long-term

business decisions (such as the pricing of its contracts, its budgeting and its recruitment and remuneration of staff) assuming that its VAT liability would be determined in accordance with the 2000 Letter. In those circumstances, it argues that fairness required the provision of some notice period so that it would have the opportunity to factor the disapplication of the arrangement set out in the 2000 Letter into its ongoing business arrangements. The nature of the representation in the 2000 Letter should, it argues, be determined accordingly.

33. I reject that argument. In issuing the 2000 Letter, HMRC were not seeking only to address the School's commercial concerns. They were seeking to reach a fair arrangement on the determination of the School's tax liabilities in the light of HMRC's duty to collect tax. In the light of that duty, HMRC offered an arrangement that they could terminate at any time without expressly requiring any notice period. The fact that the School would suffer adverse commercial consequences if the arrangement was terminated without notice does not compel a requirement for notice to be given. As I have noted already, given HMRC's duty to collect tax, clear words would have been needed if HMRC were to be required to continue to apply the 2000 Letter in preference to the letter of the law.

34. In any event, the "unfairness" to which the School refers is in reality no different from the commercial consequences that many businesses would face if HMRC decide, for whatever reason and on a prospective basis, that they have a greater VAT liability than was previously thought. Many such businesses will have budgeted, priced contracts, taken on and remunerated staff on the basis of their previous expectations as to their ongoing VAT liability yet there is no general principle of law to the effect that such businesses are entitled to any transitional period.

35. The second aspect of the School's argument was that it was unfair and disproportionate for HMRC in this case to "resile" from the 2000 Letter without providing any notice period. A more proportionate course of action, it argues, would be for HMRC to allow a reasonable notice period. The School seeks to draw an analogy with notice or transitional periods that are either given, or required by EU law, when Parliament introduces new VAT legislation. However, the difficulty with this argument is that HMRC were not "resiling" from the 2000 Letter; they were operating it in accordance with its terms which permitted termination at any time, without notice. It cannot be "so unfair as to amount to an abuse of power" (or at odds with principles of proportionality set out in EU or domestic law) for HMRC to exercise an express power to terminate on a prospective basis given to it by the terms of the 2000 Letter in circumstances where they reached a view (ultimately shown to be correct) that the 2000 Letter resulted in the School paying less tax than was lawfully due. I acknowledge that, when Parliament legislates to change the law, it will frequently provide for a transitional period before the change takes effect but that is a different situation from this. Nor have I derived any assistance from the decision of the House of Lords in *Fleming v HMRC* [2008] UKHL 2. That case dealt with a situation where Parliament was legislating to remove rights that had already crystallised. In this case, HMRC are not seeking to argue that termination of the 2000 Letter had retrospective effect.

36. At points in his oral submissions, Mr Ramsden QC suggested that it was a short step from HMRC's acceptance that the School had a legitimate expectation that the 2000 Letter would not be applied retrospectively to a conclusion that termination of that letter without a notice period was unfair. I do not accept that submission. As I have explained, termination of the 2000 Letter with retrospective effect is of a completely different nature to the application of an express right to terminate with prospective effect.

37. Finally, Mr Ramsden QC pointed to the fact that HMRC appear to be taking no steps to collect additional tax due for the period from 27 August 2009 to 30 September 2009 (see [17(4)] above) arguing that this indicated that HMRC had "crossed the Rubicon" of accepting that some notice period was appropriate. I draw no such inference. HMRC are clearly arguing that the 2000 Letter required no notice period and that it was fair and proportionate to terminate the arrangement on a prospective basis without notice. In those circumstances, I do not need to ask why they are conducting enforcement proceedings in the way they are.

Conclusion and disposition

38. The School has put forward a rational argument in support of its claim for judicial review. This is not a case where the claim is, to use the words of the Court of Appeal in *Wasif*, "hopeless" or "bound to fail". However, rational though the School's argument is, I have reached the clear conclusion that HMRC's express power to terminate the arrangement in the 2000 Letter "at any time" is fatal to the School's claim for judicial review. I consider that such a claim would have no realistic prospect of success. I accordingly refuse the School permission to bring judicial review proceedings.

39. Having reached that conclusion, I do not need to consider, whether the remedies that the School now seeks are adequately pleaded and I will not do so.

JUDGE JONATHAN RICHARDS

RELEASE DATE: 30 December 2019