Neutral Citation Number: [2018] EWCA Civ 2798

Case No: C1/2017/2235

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
Mr Justice Charles
CO/2901/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2018

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE HAMBLEN
and
LORD JUSTICE PETER JACKSON

- -

Between:

JOHN DICKINSON AND OTHERS	**Appellants**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Mr James Ramsden QC (instructed by Reynolds Porter Chamberlain) for the Appellants
Sir James Eadie QC, Ms Gemma White QC and Ms Aparna Nathan (instructed by Solicitor for HM Revenue & Customs) for the Respondents

Hearing date: 28 November 2018

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Approved Judgment

Lord Justice McCombe:

(A) Introduction

1. This is the appeal of Mr John Dickinson and a large number of other claimants (listed by name in Annex 1 to the Appellants' Notice) from the order of Charles J of 7 July 2017 dismissing their application for judicial review of the decision of the respondent Commissioners ("HMRC") to give to the claimants accelerated payment notices (APNs) under section 219 of the Finance Act 2014 (FA 2014) and its associated provisions. Such notices require taxpayers (here the claimants) to pay "up front" sums alleged to be due as tax before the determination of any outstanding appeal as to the underlying liability to pay.

2. In the present cases, the APNs were given after HMRC had previously agreed expressly (pursuant to section 55 of the Taxes Management Act 1970 (TMA) in its unamended form) to postpone any requirement for payment of the particular sums of tax claimed, in each case, until after the resolution of appeals by the claimants to the First-tier Tribunal (Tax Chamber) (FTT). The claimants argued before the judge that it was an unlawful abuse of power for HMRC to resile from the express promises made not to enforce payments pending resolution of the disputes as to the tax in question. However, as the judge briefly put it, at the outset of his judgment,

> "…arguments advanced by the Revenue on this issue outweigh the Claimants' arguments on it and so the claims should be dismissed".

The reference to the judge's judgment is [2017] EWHC 1705 (Admin); the judgment is available on the BAILII website. I return to the judge's salient reasoning and conclusions below. On this appeal, the claimants argue that the judge's decision was wrong.

(B) Assessments to tax and Postponement Agreements

3. The liability of the claimants to pay the tax in dispute arose when HMRC issued "discovery assessments" under TMA s.29. Section 29(1) is in these terms:

> (1) "If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment that (a) any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax have not been assessed, or (b) that an assessment to tax is or has become insufficient or (c) that any relief which has been given is or has become excessive, then the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax."

The judge noted that pursuant to s.29(2) such an assessment cannot be made if a return had been made in accordance with the practice generally prevailing at the time

but, as he said, no reliance was put on this before him; nor was it before us. Upon the issue of the assessments, the amounts claimed by HMRC became due and payable. However, as mentioned, HMRC had agreed expressly with each of the claimants to postpone payment until after determination of the appeals against the assessments. The judge gave one example of such a postponement agreement recorded in a letter of 13 February 2014 to the claimant, Mr John Dickinson, in these terms:

> "I have noted your reasons for appealing and agree that we will postpone collection of the amounts shown in the table below whilst your appeal is considered. Your client's appeal will remain open whilst we continue with our enquiries and you will be provided with an update in due course
>
> [The table shows an income tax liability of £26,077.60].
>
> I understand that the matter of the tax liability is under discussion with AML Tax (IOM) Ltd [to whom this letter was addressed] and Mr. Andy Finch of HMRC Specialist Investigations [who has given evidence].
>
> HMRC will continue to review the arrangements and will contact you further when the review is completed, in the meantime if you would like to provide further documentary evidence in respect of amounts received or the operation of the scheme in your client's particular circumstances then we will be happy to consider it."

4. As the judge recorded, HMRC accepted before him, and they now accept before us, that by the postponement agreements, made to each of the claimants, they made clear and express promises, giving rise to a legitimate expectation, that payment of the disputed tax would not be required pending consideration of the appeals. The appellants contend that to resile from those promises amounted to an unlawful abuse of power.

5. On the appeals to the FTT, apart from issues as to the underlying tax liability, there are also, it seems (in some cases at least), disputes as to whether HMRC were entitled to raise "discovery" assessments at all in the circumstances of those claimants' cases.

(C) **The APN Regime**

6. By the FA 2014 Parliament introduced the regime of APNs. In the present cases, and others, the APNs were directed to recover disputed sums of tax which were claimed by the taxpayers not to be payable as a result of schemes directed specifically to avoid the taxation in question. The schemes had been disclosed to HMRC pursuant to the statutory requirements of "Disclosure of Tax Avoidance Schemes" (DOTAS), introduced by the Finance Act 2004. DOTAS was designed to require notification of schemes that potentially took advantage of perceived "loopholes" in tax legislation. Notification has no direct effect upon liability or otherwise to tax, but it gives to the legislature the distinct possibility of closing such loopholes by legislation, possibly with retrospective effect. However, an arrangement notified under DOTAS may be entirely lawful and effective under current legislation, as contended by the scheme promoters/taxpayers in any particular case, and any dispute about that can be argued out in the usual way before the FTT and further before the Upper Tribunal and/or the courts, if appropriate.

7. The principal provisions of FA 2014, as relevant to this case, are set out in paragraph 42 of the judgment below. In summary, the APNs were served on the basis that the three conditions (A, B and C) set out in s.219 were satisfied because: A) the taxpayers had brought, or had intimated an intention to bring, an appeal in relation to the assessment in question and to the tax claimed which had not yet been determined by the FTT; B) the claim by the taxpayers was made on the basis that an "asserted advantage" resulted from the arrangements made by them; and C) those arrangements were DOTAS arrangements which had been duly notified.

8. By s.221, in an APN, HMRC have to specify the extent to which they say that the "asserted advantage" (in short) does not work as the taxpayer claims and to identify the amount that is required to be paid to counteract the "denied advantage". By s.222, the recipient taxpayer has 90 days to make representations against the notice which HMRC must then consider and, having done so, they must determine whether to confirm or withdraw the notice and/or they must determine whether a different amount should have been specified and then to confirm, vary or withdraw the notice. Payment under the APN has to be made within 90 days of the APN being given or, where representations have been made, within 30 days of the notification of the determination of the representations, if that date is later than the initial 90 day period.

9. By s.224 of the FA 2014, Parliament introduced a "Restriction on powers to postpone tax payments pending initial appeal" in cases where APNs have been given. It did so by an amendment to TMA s.55, introducing new subsections (8B) to (8D) as follows:

> (1)"In section 55 of TMA 1970 (recovery of tax not postponed), after subsection (8A) insert—
>
> (8B) Subsections (8C) and (8D) apply where a person has been given an accelerated payment notice or partner payment notice under Chapter 3 of Part 4 of the Finance Act 2014 and that notice has not been withdrawn.
>
> (8C) Nothing in this section enables the postponement of the payment of (as the case may be)—
>
> (a) the understated tax to which the payment specified in the notice under section 220(2)(b) of that Act relates,
>
> (b) the disputed tax specified in the notice under section 221(2)(b) of that Act, or
>
> (c) the understated partner tax to which the payment specified in the notice under paragraph 4(1)(b) of Schedule 32 to that Act relates.
>
> (8D) Accordingly, if the payment of an amount of tax within subsection (8C)(b) is postponed by virtue of this section immediately before the accelerated payment notice is given, it ceases to be so postponed with effect from the time that notice is given, and the tax is due and payable—

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

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

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

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

Subject to these provisions, s.55(1) to (9) provide for postponement of tax pending the outcome of a tax appeal (either by agreement with HMRC or by order of the FTT) where there are reasonable grounds for believing that the appellant has been overcharged to tax. In short, therefore, subject to the revisions made by the FA 2014, a postponement could usually be obtained if the taxpayer had a good arguable case on the appeal against an assessment. That position still holds good in relation to appeal cases where there has been no APN served.

10. It will be appreciated that, in the present cases, HMRC agreed to the postponement of payment (pending appeal) of assessed tax, which would otherwise have been due, pursuant to the postponement regime, under TMA s.55, as in force prior to the introduction of the APN provisions and the enactment of the revised postponement regime and in particular the introduction of section 55(8D) (quoted above).

11. The judge acknowledged the tension between the resources available to HMRC and the burdens placed upon them by uncooperative taxpayers who use complicated tax avoidance schemes. However, he expressed sympathy with the problems caused by that tension and delays caused by them within the Revenue and in the Tribunal system. He said that those problems are not the fault of responsible and co-operative taxpayers whose arrangements have been freely and properly disclosed under DOTAS and which are not complicated; such taxpayers have an interest in their tax position being resolved without undue delay and in being able to rely upon an acceptance by HMRC of their calculations and their resultant tax liability once the primary periods for raising an enquiry about a particular tax year have passed. In many of the present cases, PAYE codes had been issued by HMRC working on the basis that the avoidance scheme worked in the way that the taxpayers contended. The judge said that it was in the public interest to promote the private interests of co-operative taxpayers, such as he clearly thought these claimants to be.

12. HMRC have emphasised throughout these proceedings, however, that in enacting the APN procedure Parliament intended to remove the cash flow advantage of participating in DOTAS arrangements, even in the case of open and co-operative taxpayers, by changing the presumption of where a disputed amount sits during a pending dispute. Such legislative intention, they submit, outweighs the usual consequences of a postponement agreement made under the old unamended TMA s.55. This Parliamentary intention can be seen to apply also to any antecedent postponement agreement made prior to the introduction of the changes in FA 2014 because of the amendments made to s.55.

(D) **The Underlying Tax Dispute**

13. The underlying tax dispute between the parties to the present cases seems not to be inherently complicated. In short, the claimants, UK residents all, became employees of a company, Aston Management Limited (AML), which was incorporated in the Isle of Man. They were employed in reality to work for "end users" of their services in the UK. In return they would receive salary and other benefits from AML. Such benefits would, in part, take the form of interest free loans made to them by AML. End users would pay AML the amounts that AML paid to the employees, whether formally salary or loan. Thus, the UK resident employees would receive a combination of salary and loan equating to what they would have earned if they had been employed by the end users in the UK.

14. On the face of it, salary would normally be subject to income tax, paid through PAYE, and National Insurance Contributions (NICs). On the other hand, loans would be taxable as benefits in kind under Chapter 7 Part 3 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA). The taxable element of the loan, pursuant to s.175(3) of ITEPA, would be the "difference between (a) the amount of interest that would have been payable on the loan for that year at [HMRC's prescribed rate – "the official rate"] and (b) the amount of interest (if any) actually paid on the loan for that year". The benefit that would be taxable would be the difference between interest at a commercial rate and no interest at all. However, no income tax or NIC would be payable on the amount of the loan capital itself.

15. The arrangements were disclosed pursuant to DOTAS in March 2006 (in the terms set out by the judge at paragraph 89 of his judgment). The judge found that HMRC were in a position to, and did, issue PAYE codes to the claimants based upon the information provided by them in their returns (when filed), and in forms P60 and P11D supplied by the employer, and working upon the efficacy of the claimants' asserted case as to the taxability of the salaries and loans respectively. The judge also found that, by issuing such codes without raising enquiries under TMA s. 9A, HMRC accepted or indicated an acceptance of the claimants' approach and to the tax advantage claimed as a result of the DOTAS arrangement used. However, as the judge records, HMRC now assert that the claimants are liable to income tax on the loans under what are called the "Transfer of Assets Provisions" in Part 13, Chapter 2 of the Income Tax Act 2007 because, it is argued, the employment contracts constitute a transfer of assets abroad, relying upon the decision in *Boyle v HMRC* [2013] UKFTT 723 (TC). Alternatively, it is said the loans are employment income, on the true construction of ITEPA, again relying upon *Boyle's* case, and are subject to income tax and NICs in the normal way. The judge's view was that the facts of that case are potentially easily distinguishable from other cases, including those of the present claimants. However, for the purposes of the present proceedings it is accepted that the true tax position is arguable either way.

16. The judge also said that it seemed to him that any reasonably informed reader of the DOTAS disclosure in this case would have appreciated that the scheme was, or had the potential to be, used as an "income extraction scheme" which was designed to enable UK residents to receive a combination of salary and loans which equated to what they would have earned if they had been employed directly by the end users in the UK. They would also have appreciated that the loans would or might constitute a significant proportion of the sums paid to the UK residents for their services.

17. The judge's view was that, on the one hand, HMRC must have readily appreciated the workings of the DOTAS scheme in question and, on the other hand, the claimants must have known that they were entering into a novel scheme in reliance upon the view that it was both lawful and operated in the manner asserted by the scheme promoters. Part of the claimants' understanding must have been that, unless the loans were a sham, they were repayable and that there was a need to manage their financial affairs accordingly. There seems to have been no evidence whatsoever as to any repayment of the loans or as to the understanding of the parties to them as to the circumstances in which repayment would be sought.

(E) History of these cases from June 2006 onwards

18. In paragraphs 96 to 116 of the judgment, the judge sets out in some detail the history (in the period between June 2006 and June 2011) of the engagements between HMRC, on the one hand, and the scheme promoters and Mr Dickinson (as a sample taxpayer for the purpose of these proceedings) on the other. He also records the setting up of a collective specialist investigation into issues arising in certain cases, not the subject of appeals but which were under formal enquiry under TMA s.9A. The judge noted also that nothing was heard by AML in respect of the enquiry between June 2011 and April 2013 and that after a revised tax calculation in respect of his PAYE code in February 2011, Mr Dickinson heard no more until the raising of the discovery assessments in February and December 2013.

19. The judge's conclusion (paragraph 120) about this was that HMRC had enough information by June 2011 to found the arguments countering the efficacy of the scheme that they ultimately raised, in the discovery assessments and otherwise, only in February/April 2013. He went on to characterise HMRC's explanation of these delays as "lacking in clarity and an appropriate focus on the position of the Claimants within the approach, processes and investigations decided upon and pursued…" by them. He also described some of the evidence adduced by HMRC, seeking to explain these matters, which he said required some "de-coding", as "obfuscation". Before us, HMRC did not seek to go behind the judge's account of this timetable or his characterisation of the explanations given on behalf of HMRC.

20. After April 2013, AML sought to counter HMRC's new position in a letter of 28 June 2013. A meeting was held on 23 July 2014 at which the rival arguments were discussed. In the meantime, assessments had been raised, appeals had been intimated and postponement agreements had been reached with the claimants, but the APN regime had also come into force upon the FA 2014 receiving Royal Assent on 17 July 2014. Decisions to issue APNs in these cases were reached by the relevant Revenue officers at meetings on 4 December 2014 and 6 January 2015. Thereafter, in the sample case of Mr Dickinson, on 11 March 2015 he received a "warning letter" that an APN was to be issued and he received the APN itself on 24 March 2015, requesting payment of £23,284.60 by no later than 26 June 2015.

(F) Proceedings

21. These proceedings were issued on 19 June 2015. In short, the claim was that the giving of the APNs in these cases was an abuse of power because (a) it breached the express and direct promise made to each of the claimants in the postponement agreements which had given rise to a legitimate expectation that the disputed tax

would not be sought to be collected until after their appeals had been decided; and (b) in all the circumstances the giving of the notices was conspicuously unfair as a matter of both procedure and substance.

22. The judge recorded that HMRC accepted that when the conditions for giving an APN were satisfied, they had a power, rather, than a duty, to give the notice and that, in deciding to give the APNs in these cases, they had given no consideration to the existence of the prior postponement agreements made before the change in the legislation. The judge said that he found this to be a surprising approach for a government department to take when it decides to exercise a power in a manner that puts to an end the effect of a clear and express promise previously given by it.

(G) **The Judge's Decision**

23. The judge, who has great experience of public law, reviewed the principles governing claims of "abuse of power" on the part of a government body, as set out in a number of the decided cases. He summarised those principles in ten short sub-paragraphs in paragraph 38 of his judgment. No criticism was levelled against this summary by either counsel before us.

24. Having given the summary, the judge described the law's approach to such claims as "multi-faceted" which he said required an examination of all the circumstances in the present cases, notwithstanding three specific points, namely: (i) Parliament had expressly provided that an APN could be given when HMRC had agreed to postpone payment, or the FTT had so ordered; (ii) HMRC had succeeded in resisting challenges to APNs in three cases (*Rowe & ors. v HMRC* [2015] EWHC 2293 (Admin) (Simler J) (*"Rowe"*); *Walapu v HMRC* [2016] EWHC 658 (Admin) (Green J, as he then was) ("*Walapu*") and his own decision in *Vital Nut v HMRC* [2016] EWHC 1797 (Admin) ("*Vital Nut"*); and (iii) the court should not second guess the FTT in its performance of its statutory role in determining tax appeals. He also held that the relevant circumstances included the history of the disclosure and assessment process, the changing positions of what HMRC knew during their consideration of the DOTAS arrangements used by the claimants over a number of years, and the nature and effect of the underlying arguments before the FTT on the basis that all those matters were arguable.

25. The judge distinguished the present cases from *Rowe*, *Walapu* and *Vital Nut* on the basis that the claimants' case in these proceedings was based upon "a clear and specifically directed promise to postpone the payment of the disputed tax" (paragraph 153). This was not so in the earlier cases. But the promises were not the only foundation of the claims and he identified (in paragraph 155) eight particular points upon which the claimants relied as follows:

    i) a DOTAS arrangement that is not complicated,

    ii) initial reaction of the Revenue that supports a conclusion that the Revenue accepted that the arrangement worked in the way asserted by and on behalf of the Claimants,

    iii) early disclosure of the information that the Revenue relied on several years later to issue the discovery assessments,

iv) positive steps by the Revenue, namely the issues of PAYE codes and their recalculation taken on the basis or the apparent basis that it was accepted that the loans were taxable as benefits in kind,

v) negative steps namely not issuing s. 9A enquiries into tax returns submitted by some of the Claimants, which indicate that the Revenue was then accepting that the loans were taxable as benefits in kind,

vi) no uncovering or finding out a fact or a line of argument by the Revenue as a body over and above what it had been told by and on behalf of the Claimants by at the latest June 2011 that triggered the giving of the discovery assessments,

vii) long delays in the processes and investigations of the Revenue for which the Claimants were not responsible, and

viii) the reality that the discovery assessments were issued after those long delays because it was only then that applying its approach, processes and resources that the Revenue got round to pursuing its present argument that the tax advantages of the DOTAS arrangement asserted by and on behalf of the Claimants do not exist and the loans are taxable as income."

26. The judge agreed that the power to give APNs was just that – namely, a power and not a duty and he regarded as "flawed" the "one size fits all" approach which he considered was taken by HMRC to DOTAS arrangements by reference solely to the underlying purpose of the legislation. He considered it a weakness in the case for HMRC that it sought to defend the claim by an assertion that when the conditions for giving an APN in respect of a DOTAS scheme are met it may always lawfully give one.

27. The judge quoted paragraph 16 of the judgment of Simler J in *Rowe* as follows:

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

However, the judge said that Simler J's statement was made in the context of a challenge based upon irrationality after she had earlier rejected an argument based upon legitimate expectation; she was, he said, referring to a general policy and not one that was determinative of the different issues arising in respect of a challenge to an exercise of power based upon legitimate expectation/abuse of power. His view was that the argument of HMRC before him ignored the principles of good administration and so was conspicuously unfair as a matter of procedure and substance. He added (paragraph 166), of particular relevance to one of the arguments presented by Sir James Eadie QC on behalf of HMRC before us (see below):

> "Further, I do not accept the Revenue's argument that it finds support in *Rowe* at paragraph 96," … "because those passages are not dicta to the effect that if there had been a legitimate expectation based on a clear promise it would not be conspicuously unfair to ignore it."

28. On the other hand, the judge saw force in rival arguments for HMRC. In summary, he said that the clear promises relied upon by the claimants had been made to them as taxpayers but Parliament had made it clear that the reason why they had been made no longer governed whether payment of tax in dispute on the appeal should be postponed by giving to HMRC the power to reverse the existing agreements and promises made by them. This gave a "macro-political" reason for departure from the earlier promises made and a powerful argument that the prima facie distinction between cases in which postponement agreements had been made and other cases had limited force. The making of a postponement agreement remained a relevant consideration, but this factor went to the weight to be afforded to it.

29. In paragraph 181 of the judgment, the judge articulated twelve factors upon which HMRC could rely on against the factors favouring the claimant which he had set out in paragraph 155. They were as follows:

> "181. Although in my view the Claimants have established the eight circumstances set out in paragraph 155 hereof**,** I consider that the Revenue can rely on the following circumstances to support the giving of APNs to the Claimants:
>
> (i) the accepted arguability of its case on the tax dispute and the discovery dispute,
>
> (ii) the related point that the arguability condition of a valid APN is satisfied,
>
> (iii) the change in the threshold test to postponement of the payment of disputed tax,
>
> (iv) notwithstanding the Revenue's initial reaction and approach to the DOTAS arrangement, the lack of complication of the arrangement and the early disclosure of its application by AML and its employees, that arrangement has an underlying artificiality or tax avoidance purpose that:
>
> (a) naturally puts it into in that type of case that is described as "marketed tax avoidance" in, for example, the Government responses I have referred to, and
>
> (b) alerts the Claimants to the point that they are entering into such an arrangement in reliance upon a view taken of the tax advantages it gives,

(v) the point in (iv) (b) means that if the Claimants did not plan their finances on the basis that they might have to pay more tax they were or should have been aware that they were taking a risk.

(vi) if they are not artificial or shams, and so can support the tax advantages claimed, the loans are repayable and so if the Claimants have not planned their affairs on that basis they were taking a risk,

(vii) the Claimants do not assert that pending resolution of their tax appeals they are faced with the Catch 22 situation of having to repay the loans and pay the disputed tax,

(viii) the detriment relied on by the Claimants is based on (a) assertions that the scheme introduced by Parliament is draconian, and (b) the cash flow and other pressures created by the APNs (which I accept exist), rather than any particular difficulty caused by their need to make payment at an earlier date than they would have done if the risk they took resulted in more tax being payable after any tax dispute was resolved,

(ix) the Claimants in their evidence do not convincingly advance reliance or detriment arising from any understanding caused or reinforced by either actions and omissions of the Revenue, or the point that initially the Revenue accepted or appeared to accept that the DOTAS arrangement worked in the way its promoters asserted and advised,

(x) as I do not accept the point made by the Revenue in correspondence that the COP 8 Investigation is separate from its dealings with individual taxpayers it can be relied on to show that the Revenue was investigating the DOTAS arrangement and so had not accepted that it worked,

(xi) the Claimants or many of them and the relevant officers of AML and AIOM would be aware or could readily find out that delays by the Revenue are not uncommon and there is no evidence of them pressing for answers and final decisions by the Revenue, and

(xii) the discovery assessments were issued within the 4 year time limit set by s. 34 of the TMA and although they dispute the validity of those assessment (the discovery dispute) the Claimants do not rely on any earlier time period or event giving them finality."

30. The judge said that HMRC had not considered these points in reaching their decision and, accordingly, they did not avoid the conclusion that they had acted in a manner that was "conspicuously unfair". This did not, however prevent HMRC resisting the claim made in this case if their points founded a conclusion that "as a matter of substance" there was "no abuse of power". His conclusion on this appears at paragraph 184 of the judgment as follows:

> "184. Applying the principles on abuse of power set out in paragraphs 34 to 41 hereof, I have concluded that the strengths of the Revenue's alternative arguments outweigh the strengths of the Claimants' arguments and the core of that conclusion is that:
>
> (i) the macro-political policy issues flowing from the terms and underlying purpose of the APN legislation undermine the force of the clear and unambiguous promises given by the postponement agreements because the legislation provides a change in the underlying statutory test and approach to the issue when disputed tax should be paid,
>
> (ii) those macro-political policy issues provide a weighty factor in favour of the conclusion that the giving of APNs is unlikely to be an abuse of power if the arguability of the tax dispute and other conditions for giving them are satisfied, as they are here, although they do not warrant a "one approach fits all" approach or one that has regard only to those policy issues reflected in legislative change, and
>
> (iii) the strengths of the Claimants' case identify a number of valid criticisms of the approach and decision making of the Revenue but assessed with the rival strengths of the Revenue's case relating to the particular circumstances of the Claimants and the approach taken by it to them, the Claimants' assertions of conspicuous unfairness to them are effectively based on the change that Parliament has enacted and do not found an abuse of power."

31. The judge dismissed the claim. He refused permission to appeal and, while ordering that existing costs orders made in the appeal should stand, there should be no order as to the remainder of the costs of the claim. Permission to appeal to this court was given to the claimants by Floyd LJ by an order of 28 March 2018.

32. Upon delivery of the judgment, HMRC had applied for its costs of defending the claim. In a supplemental judgment of 27 July 2017, the judge expressed surprise that that application had been made and he noted the claimants' application that the parties should bear their own costs. The judge agreed with the claimants on this point and found that (paragraph 8 of the Supplemental Judgment):

> "(i) the Revenue lost on its main argument which had dictated its approach in giving the APNs and during the proceedings,
>
> (ii) that approach effectively ignored basic principles of good administration (see paragraph 165 of the judgment) and so fell significantly below the standards the public and so taxpayers are entitled to expect,
>
> (iii) the long delays identified in the judgment were no fault of the Claimants,
>
> (iv) the Revenue's explanation in evidence for the long delays and the change in its position needed de-coding and lacked clarity and appropriate focus (see paragraphs 122 to 142 of the judgment) and so fell significantly below the standards the Court and the parties to litigation are entitled to expect from the Revenue, and
>
> (v) I found points (ii) and (iv) particularly troubling and it seems to me that it is appropriate for them to be reflected in a costs award in the hope that this will encourage the Revenue to consider them at appropriate legal and administrative levels and to take appropriate steps to avoid them being repeated."

(H) The Appeal and my own conclusions

33. The claimants argue, through Mr James Ramsden QC, that the judge's decision was wrong. They do so on two grounds. First (Ground 1), it is said that,

> "The factors identified in paragraph [181] were not sufficient to outweigh the conclusion that the Respondents had abused their power in issuing the APNs in contravention of the earlier postponement agreements. Moreover, certain of the factors either carried no weight or should properly be placed on the other side of the balance…"

Secondly (Ground 2), it is said that,

> "Having found that the Respondents had acted unlawfully and in a manner amounting to an abuse of power in issuing the APNs, the learned judge ought to have simply ordered that the APNs be quashed instead of going on to consider whether there were factors which the Respondents *might* [emphasis in the original] have relied on (but in fact did not even consider) to justify their conduct and thus their decision lawful… ".

34. Each of these grounds was amplified in the full Grounds themselves and in Mr Ramsden's written and oral arguments.

35. By a Respondents' Notice, HMRC invite the court to uphold the judge's order on a further ground. It is argued that the judge was wrong to conclude that HMRC's approach to issuing APNs ignored the principles of good administration and was conspicuously unfair. On the contrary, it is said that the approach to the issue of APNs was consistent both with the express terms and the purpose of the statutory scheme under which they were operating and did not give rise to any unfairness. On this basis also, HMRC invite the court to revoke the judge's "no order for costs" and to order that they should have their costs of defending the claim, to be assessed on the standard basis (if not agreed). Permission to appeal on these points as to the costs order was granted by Hickinbottom LJ by his order of 28 June 2018.

36. To a degree, as it seemed to me, the claimants' two grounds of appeal were run together in Mr. Ramsden's oral argument. At the outset of his submissions to us, Mr Ramsden submitted that he was relying upon a substantive legitimate expectation arising from the clear and unequivocal promises made in the postponement agreements, but he accepted that the conferring of the statutory power to override such postponements, enacted by the amendments to TMA s.55, was clearly a weighty factor in any consideration of whether the decision by HMRC to go back on the promises was lawful. However, the legislative power conferred by FA 2014 s.219 to serve APNs remained a power and did not impose an obligation upon HMRC to do so. Given the immediacy of the legislative change, argued Mr Ramsden, it was incumbent upon HMRC to consider all the circumstances before giving APNs in these cases, including the factors identified by the judge in paragraph 155 of his judgment, before deciding to go back on the promises to postpone. It was, he said, clear that HMRC gave no consideration at all to those factors and the judge was right to decide that that amounted to unfairness in making the decisions in question. Given that unfairness in the face of the earlier promises, the APNs ought to have been quashed, without further ado, and without regard to the factors in favour of HMRC's stance found by the judge to have outweighed those operating in favour of the claimants. In the circumstances of this case, it was submitted the revocation of the postponement agreements by use of APNs amounted to an oppressive use of the statutory power in s.219.

37. In answer to a question put by Hamblen LJ in the course of argument, Mr Ramsden accepted that the judge made no express finding of "oppression". However, he said that the apparent acceptance by HMRC of the workings of this uncomplicated scheme in the claimants' tax affairs in the interim pending appeals and the long delays over several years, in which no new facts had emerged warranting any change of approach, indicated oppressive use of the power when it was invoked so immediately when it became available under FA 2014.

38. In this context, Mr Ramsden said that it was "no coincidence" that the issue of the APNs was coupled with an offer by HMRC to settle the outstanding issues, with concessions on interest and penalties. This suggested, he argued, that the APNs were merely being used as part of an overall strategy for disposing of these many outstanding cases. This feature militated against the judge's finding of a "macro-political" factor, founded solely upon implementing the legislative policy, behind the giving of the notices; they were not designed in these cases, said Mr Ramsden, simply to achieve the statutory aim of changing the cash flow advantage pending appeal, but rather they were aimed as a tool in a strategy to force an overall solution to the

outstanding cases. Mr Ramsden accepted, however, that this was not a finding made by the judge.

39. Mr Ramsden reminded us of the passages in the majority judgment in the Privy Council in *Paponette v A-G of Trinidad and Tobago* [2012] AC 1, 14 and 16 (paragraphs 37 and 46-47) indicating that once a relevant clear and unequivocal promise is given by a public body and is established, as is accepted here it was, the burden shifts to the authority to justify the frustration of the expectation that the promise will be fulfilled and that "good administration as well as elementary fairness" requires that the authority takes into account the fact of the promise as a relevant factor in deciding whether to act inconsistently with it. HMRC had not done that here.

40. We were also referred to the judgment of Nugee J in *R (Veolia Landfill Ltd. & anor.) v HMRC* [2016] EWHC 1880 (Admin) upon the principle governing objective justification of a frustration of taxpayer legitimate expectations, in particular paragraphs 152 -154. Mr Ramsden emphasised the concluding passage of paragraph 154 where Nugee J said:

> "154. The starting point is the judgment of the Court of Appeal given by Lord Woolf MR in *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213 (***"Coughlan"***). Here the health authority had assured Miss Coughlan that a particular facility for the long-term disabled (as she was) would be her home for life, but later decided to close the facility and move her somewhere else. Lord Woolf's judgment classified cases where a public body proposed to depart from some previous statement into three: (a) where the public body was only required to bear in mind its previous policy or representation, giving it such weight as it thinks fit; (b) where the promise or practice induced a procedural legitimate expectation, for example of being consulted; and (c) where the promise or practice induced a legitimate expectation of a substantive benefit. It is not disputed that if, as I have found, the taxpayers in the present case had a legitimate expectation, it is of this third type. Lord Woolf's judgment makes it entirely clear that in this third category the review by the Court is not limited, as it is in the first category, to a review on *Wednesbury* grounds: the Court itself has the task of "weighing the requirements of fairness against any overriding interest relied upon for the change of policy", and when necessary has to determine "whether there is a sufficient overriding interest to justify a departure from what has been previously promised" (at [57]-[58]). A bare rationality test would constitute the public authority judge in its own cause, as a decision to prioritise a policy change over legitimate expectations would almost always be rational even if unfair (at [66]); the relevant question was whether the decision was an abuse of power (at [67]); and abuse of power might take many forms, including reneging, without adequate justification, on a lawful promise or practice (at [68]). The proper test, which emerged from the revenue

> cases such as *R v IRC ex p Unilever plc* [1996] STC 681 (***"Unilever"***), was whether the decision was so unfair as to amount to an abuse of power; and in such a case there was no question of the Court deferring to the Inland Revenue's view of what was fair (at [78]). The propriety of the authority's decision should be tested by asking whether the need which the authority judged to exist (in that case to move Miss Coughlan to a different facility) outweighed its promise (in that case that the existing facility would be her home for life) (at [83]). On the other hand, although it is for the Court to balance the conflicting interests, not just to assess the rationality of the public body's decision, Lord Woolf does say (at [89]):
>
> > "in drawing the balance of conflicting interests the court will not only accept the policy change without demur but will pay the closest attention to the assessment made by the public body itself."

Mr Ramsden said that he urged that passage upon Charles J and he submitted that there was no reason to think that it does not survive as a good statement of the law.

41. For these reasons, Mr Ramsden concluded his argument upon ground 1 by saying that, having found conspicuous unfairness, the judge should have stopped there, as there was no indication that HMRC gave any real consideration to the factors later identified by the judge as justifying a departure from the postponement agreements made. However, in so far as the judge did consider those additional factors, it was argued that none outweighed the unfairness in HMRC's change of approach which the judge had found. He said that appeal ground 2 depended upon the same fundamentals as those underlying ground 1. The case was based upon a substantive legitimate expectation arising from the postponement agreements which was not "parasitic" upon any procedural default: HMRC's argument before us was, he submitted, that the judge was entitled to find unfairness transformed into fairness by the factors picked up in paragraph 181 of the judgment which had not borne upon HMRC's thinking at the relevant time.

42. Sir James Eadie QC for HMRC emphasised again the clear legislative policy which was apparent from the introduction of the APN regime and the change in the provisions as to postponement of payments pending appeals which had to be read together. Parliament intended to reverse the cash flow position in DOTAS cases, including in cases in which there were pending appeals. He pointed out that the legislation clearly applied to schemes, and to taxpayers who used them, prior to the legislative change. He referred us to Simler J's judgment in *Rowe* at paragraph 96, quoted and approved by this court on appeal as being "impeccable" in that case ([2017] EWCA Civ 2105 at [40] and [82] per Arden LJ, as she then was). Simler J had said this at paragraphs 95 and 96 of her judgment:

> "95. …since the new powers are contained in primary legislation, even if the claimants could have identified an expectation, based upon previous legislation or the practice adopted by HMRC, this cannot give rise to a common law right, enforceable in the Courts, constraining Parliament's

> constitutional power to enact primary legislation which changes the previous position: see Wheeler v Office of the Prime Minister [2008] EWHC 1409 (Admin), per Richards LJ at [41]. Once FA 2014 came into force following the democratic processes entailed in the passing of primary legislation, no common law "legitimate expectation" could trump that legislative power.
>
> 96. As to Mr Southern's argument that the statute itself did not prevent HMRC from honouring the expectations in this case given the existence of the statutory discretion which could have been exercised consistently with the legitimate expectations of these claimants, the difficulty with that argument is that a statutory discretion must be exercised consistently with and not running counter to, the primary legislation. The legislation, on its face, makes clear that it was intended to apply to existing as well as post-enactment schemes. FA 2014 expressly removes rights that previously existed under s.55 TMA in respect of all appeals (whenever made); and expressly extends the accelerated payment regime to all DOTAS schemes, irrespective of when those schemes were adopted, notified or when investments into them were made. The definition of "tax appeal" makes clear that it is not limited to appeals post enactment (see s.203 and Schedule 32 para 3(2)(b)). Similarly so far as the definition of DOTAS arrangements is concerned, there is nothing in FA 2014 to restrict its application to DOTAS arrangements invested in only after enactment: see ss.219(5) and (6). The definition extends for example to "notifiable arrangements to which HMRC has allocated a reference number" save for the express carve out in subsection 6. Parliament has accordingly legislated for taxpayers such as the claimants, who have chosen to participate in DOTAS arrangements (likely to be tax avoidance schemes), so as to remove the cash flow advantage of holding onto the disputed sums during a dispute concerning the efficacy of the avoidance scheme. The statutory discretion cannot be exercised in the manner suggested by Mr Southern consistently with the terms of the legislation."

Sir James also referred us to paragraph 97 of Green J's judgment in *Walapu* broadly to similar effect and saying that,

> "…there can be little doubt but that in the Finance Act 2014 Parliament intended the new regime to apply to extant legacy tax avoidance cases".

43. In short, Sir James did not accept that the making of the postponement agreements was a matter of particular distinction between the present cases and those considered in *Rowe*, *Walapu* and *Vital Nut*. (Cf. paragraph 166 of the judge's judgment, referred to in paragraph 27 above).

44. As already mentioned, neither before the judge nor before us, did HMRC argue that the antecedent postponement agreements were irrelevant to a consideration whether APNs should be served in these cases. Nor was it said that the legislative policy required the giving of such notices as a matter of obligation once the statutory criteria were satisfied. However, it was submitted that the introduction of the APN regime and the amendment of the postponement agreement provisions meant that such agreements made under the old regime could properly be revisited in the light of the evident legislative policy.

45. I find it clear from the previous cases cited above that the APN regime was indeed intended to apply to tax avoidance schemes in existence and operation before the new legislation came into force. It is evident that Parliament envisaged that antecedent postponement agreements in the existing appeals could be reviewed in the light of the new statutory scheme.

46. Sir James made seven propositions in support of the lawfulness of HMRC's approach in the present cases. With some reservations, which I will indicate, I accept the propositions advanced.

47. First, it was submitted, a postponement agreement made under the pre-2014 statutory regime was conditioned by and dependent upon that regime and its continuance. It could not be seen as a free-standing agreement or promise existing under the then prevalent legislative framework which would hold good irrespective of legislative change. The agreements had been made under the original statutory provisions that envisaged broadly that postponement would either be agreed or ordered by the FTT where there was a good arguable case to be advanced by the taxpayer. In these cases, it is accepted that there are arguable points to be determined by the FTT. That regime, however, had been changed in FA 2014.

48. Secondly, the new legislative provisions are of fundamental importance in considering the agreements made under the old statutory regime. It is pointed out that Charles J recognised as much in paragraph 171 of his judgment. Summarising a section of the Government's responses to consultation on "Tackling marketed tax avoidance", Charles J said:

> "171. Paragraph 2.6 of a chapter entitled "Typical taxpayer journey" and the foreword to those responses of the Government also provide a clear confirmation, should it be needed, of the Revenue's point that by giving a power to give an APN after tax has been postponed pursuant to s. 55 of the TMA the underlying intention of Parliament was that, whilst an appeal as to the effectiveness of a marketed tax avoidance arrangement was determined, the position on where the disputed tax lies should no longer be based on a presumption or test that the taxpayer would hold the disputed tax if he had reasonable grounds for asserting and believing that it was not payable (and so the s. 55 TMA test)."

49. Sir James added that the new provisions "removed the right to postponement". I would not go quite so far. I accept the importance of the new provisions, as argued. However, postponement is not abolished altogether. The old rules apply except where

APNs are served. They do not answer expressly whether or not such notices should be served where there has been an antecedent postponement agreement. The decision whether to serve and APN (and so bring to an end any postponement) is one to be made by HMRC, subject to any relevant public law constraints, such as are under consideration in these proceedings. I do not accept Sir James's bald statement at the end of his first proposition (as I noted it at the time) that "the premise for the right of postponement was removed" by statute.

50. Thirdly, however, (and it may be that my reservation just expressed was in reality accepted by this third of Sir James's propositions), a discretion remains under the new regime, and the discretion has to be exercised in accordance with public law principles. Old postponement agreements were not rendered irrelevant.

51. Nonetheless, fourthly, the third proposition was qualified. It is a key feature of public law controls over "open-textured" discretions that such discretions must be exercised consistently with, and to promote, the underlying statutory purpose for which they are conferred. In this context, it is submitted that FA 2014 is intended to apply to ongoing cases, subject to appeal. It is suggested that in most old cases before the new Act, there would have been postponement pending arguable appeals. It is submitted that this has now been "unwound". In contrast, the ability to give an APN would be similarly "unwound" if the making of an antecedent postponement agreement had to be respected come what may. Reference is made again here to paragraph 96 of Simler J's judgment in *Rowe* (quoted above) and in particular to the final sentences of that paragraph. Thus, submitted Sir James, the statutory purpose must control the nature of the discretion to issue an APN, even where there has been a prior postponement agreement.

52. Fifthly, Sir James adopted the judge's statement in paragraph 177 of the judgment as follows:

> "177. In other words, the clear promise relied on by the Claimants has been made to them as taxpayers but Parliament has made clear that the reason why it was made no longer governs whether payment of the tax in dispute on the appeal should be postponed by giving the Revenue a power to effectively reverse the existing agreements and promises made by them."

It is this consideration that the judge invoked at paragraph 184 (i) of the judgment when he said:

> " …
>
> (i) the macro-political policy issues flowing from the terms and underlying purpose of the APN legislation undermine the force of the clear and unambiguous promises given by the postponement agreements because the legislation provides a change in the underlying statutory test and approach to the issue when disputed tax should be paid, …"."

However, said Sir James the "macro-political" factor related not just to a change in executive policy which undermined a previous express promise, as is frequently the case where it is sought to argue that legitimate expectations are about to be unlawfully frustrated. Rather, here the "macro policy" derived from the higher authority of primary legislation.

53. Sixthly, it was said that if the fact of the promise in these cases remained a factor in the assessment to be made, it was one that fed into the discretion only in exceptional circumstances. It is submitted (again) that this is inherent in sub-paragraphs 184 (i) and (ii) of the judge's judgment, which were correct. It is said that if "exceptionality" exists in any case, it would be for the taxpayer to prove it and to demonstrate, in the present cases, that the exception was causally linked to the postponement promise that was made.

54. One must be careful, in this context, not to be over-general in assessment of HMRC's approach in a manner that whittles down the statutory discretion so far as to render it non-existent. A statutory discretion is just that and it must be exercised conscientiously in all the circumstances.

55. In this court in the *Rowe* and *Vital Nut* appeals, Arden LJ considered a similar submission to Sir James's sixth proposition. At paragraphs 70 to 75, she said this:

> *"(3) HMRC wrong to exclude from their policy any consideration of the scheme's effectiveness?*
>
> 70. One aspect of the duty of fairness is that, in general, a decision-maker may not fetter his discretion. However, it is well established in public law that a decision-maker may formulate a policy to enable him to exercise a discretion consistently provided that it is not applied so rigidly that it precludes the proper exercise of discretion in each case. As Lord Reid, with whom the majority of the House agreed, held in *British Oxygen Co Ltd v Board of Trade* [1971] AC 610, 624:
>
> "a ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say …"
>
> 71. The judge held that the claimants would have to show that their circumstances were exceptional. HMRC submit that the taxpayer has to show that its approach is manifestly unreasonable. Ms Simor submits that this makes the protection afforded by judicial review meaningless. There never was an assessment of the effectiveness of the arrangements in this case on the correct basis. The claimants were never properly informed of HMRC's view on effectiveness. Ms Simor further submits that HMRC did not follow its own procedure, but we

were not taken to the evidence to support this and it was not addressed by HMRC in their submissions and so I do not consider that this court can deal with that submission. Finally, HMRC could not answer the question whether there were any exceptional reasons why an APN should not be issued since the decision-maker did not have the relevant material before him.

72. Mr Eadie submits that, on general public law principles, it is open to HMRC to have a general policy about issuing APNs/PPNs which is subject to exceptional cases and that it is for the person who wields the discretion to make rational judgments about what matters are, or are not, to be taken into account in exercising that discretion: see *R (Khatun) v Newham London Borough Council* [2005] QB 37.

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

74. HMRC's policy is to issue APNs and PPNs in every case where the Conditions have been fulfilled, save in exceptional circumstances. The claimants say that HMRC should have explained how they exercise their discretion to determine what circumstances were exceptional. This has not occurred and the claimants go so far as to say that this was a violation of the duty of candour to the court.

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

56. When pressed by Jackson LJ in argument as to how HMRC identified "exceptional" cases, Sir James responded, "It all depends." He was unable, for example, to answer my Lord's follow-up question whether the concept included "compassionate circumstances". He said that he did not know HMRC's position on that. It seems to me to be as well, therefore, for HMRC to bear in mind in these cases Arden LJ's strictures against over rigidity in the application of a policy such as this, which should not be cumbered about by questions as to who bears the burden of satisfying HMRC's non-statutory criteria as to what might be "exceptional". The simple rule is, as Arden LJ said, the internal policy must not preclude a proper exercise of the statutory discretion in each case.

57. Seventhly, given the sixth point, it is said that no exceptionality has been shown and none has been asserted beyond the mere fact of the postponement agreements. I venture no view on this and none seems necessary for our decision on this appeal. Again as Arden LJ said in the paragraphs just quoted "…the circumstances which are likely to constitute exceptional will be varied and case-specific".

58. I broadly accept Sir James's first five propositions which essentially resemble the judge's final assessment of the overriding considerations advanced by HMRC before him as set out in paragraph 184 of the judgment, already quoted, with which I also agree.

59. I do not accept Mr Ramsden's criticism of the structure of the judge's judgment which would have had him cut off his consideration of the matter at the stage where he found established the factors in the claimants' favour, as set out in paragraph 155 of the judgment, and concluded that HMRC's approach in deciding to give the APNs ignored principles of good administration and constituted "conspicuous unfairness". In my judgment, the judge was entitled to go on to consider what he classed as HMRC's alternative argument, recorded in paragraphs 167 and following of the judgment, in considering the overall lawfulness or otherwise of the giving of the APNs. To stop the consideration of the overall position after deciding that there had been conspicuous unfairness on HMRC's part in failing to take into account the factors identified at paragraph 155 would have been highly artificial and would have been likely to result merely in reconsideration of the matter afresh and further delay.

60. In my judgment, the judge's concluding passages of his judgment in which he identified and assessed the "alternative arguments" amply justified the final conclusion that he reached, balancing all the factors. Contrary to the appellant's Ground 2, the judge did not find there had been an "abuse of power": he held that the unfairness which he had found was outweighed by other factors with the result that there was no abuse of power. He said that expressly in paragraph 183 of the judgment.

61. I have not so far addressed the Respondents' Notice in which HMRC contests the judge's finding that there was any unfairness at all in these cases, let alone conspicuous unfairness. In support of the submission, it was said in oral argument that the judge had been wrong to proceed on the basis that HMRC's policy was one of "one size fits all"; HMRC never said that they could always give an APN if the statutory criteria were met in any given case. We were referred again to the "exceptional cases" caveat, which HMRC had set for themselves, and to paragraphs 70 to 75 of this court's judgments in *Rowe*, already quoted above. For my part, I do not consider that that goes anywhere near meeting the judge's finding on this part of

the case. Sir James submitted (without specifying which) that some of the factors picked out by the judge in paragraph 155 of his judgment did not seem to be causally related to HMRC resiling from the postponement agreements. I am far from sure that that is the case. It seems to me that the judge was correct in identifying features which, as a whole, went directly to questions of whether HMRC should have considered those features and so whether it was fair to issue the APNs in these particular cases and so deprive the claimants of the benefit of the previously reached agreements for postponement.

62. I would add that the judge's conclusion that there had been a failure of "good administration" and "conspicuous unfairness" was clearly based upon a thorough-going review of the entire history of this DOTAS arrangement, the claimants' use of it and the long period of activity and inactivity in dealing with the scheme generally and with the individual claimants' affairs. That is a review that this court was not invited to undertake in the limited submissions addressed to us on the issue. Sir James's submissions upon the Respondents' Notice issues occupied about 10 minutes of the hearing. Mr Ramsden's took about the same. We were referred to none of the written materials, summarised in the judge's judgment, upon which the judge's conclusions were founded. This was clearly an inadequate basis upon which to second-guess the judge's analysis of the case's history and his findings of poor administration and unfairness.

63. This court has said on more than one occasion recently that a review of a judge's decision on appeal has to give due weight to the distinct advantage that a first-instance judge has in assessing and evaluating evidence, even if the evidential material is entirely in writing: see *Smech Properties Ltd. v Runnymede Borough Council* [2016] EWCA 42 at [29] (per Sales LJ), *R (Bowen & Stanton) v Secretary of State for Justice* [2017] EWCA Civ 2181 at [65-72] (a judgment of my own, with which the Master of the Rolls and Rafferty LJ agreed) and *Bawa-Garba v The General Medical Council* [2018] EWCA Civ 1879 at [63] to [67] (per the Lord Chief Justice, the Master of the Rolls and Rafferty LJ).

64. The arguments on the Respondents' Notice issues before us did no more than scratch the surface of the Respondents' Notice issues: see and compare paragraphs 88 to 150 of the judge's examination of this topic. I see no reason, therefore, to disturb the judge's findings in these points which appear on their face to be fully and properly reasoned. I would, therefore reject the additional reasons for upholding the judge's order which are proposed in paragraph 2 of Section 6 of the Respondents' Notice.

65. HMRC's appeal against the costs order made by the judge, for which permission was given by Hickinbottom LJ, depends entirely upon their proposed additional reasons for upholding the substantive part of his order, as advanced in the Respondents' Notice. As I have just indicated, I would reject those reasons. Accordingly, I would also dismiss HMRC's cross-appeal against the judge's costs order.

66. I would add that when it was appreciated that only one day had been set aside for the hearing of the appeal, in contrast to the 1 ½ day estimate given by Floyd LJ, in granting permission for the claimants' appeal grounds and before the Respondents' Notice was served, I directed further enquiry to be made of the parties as to the adequacy of the hearing time. I was told that the one day estimate had already been

confirmed with the parties as adequate in May 2018 and this was repeated upon my own enquiry immediately before the hearing.

(I) Proposed Result

67. I would dismiss both the appeal and the cross-appeal.

Lord Justice Hamblen:

68. I agree.

Lord Justice Peter Jackson:

69. I also agree.