Neutral Citation Number: [2019] EWHC 2043 (Admin)

Case No: CO/5754/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26/07/2019

Before :

MR JUSTICE PHILLIPS

- -

Between :

THE QUEEN
on the application of:

(1) PHOENIX LIFE HOLDINGS LIMITED
(2) PHOENIX LIFE ASSURANCE LIMITED
(3) PEARL GROUP MANAGEMENT SERVICES LIMITED
(4) PEARL GROUP SERVICES LIMITED **Claimants**

- and –

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

- -
- -

Kieron Beal QC (instructed by **PricewaterhouseCoopers LLP**) for the **Claimants**
Raymond Hill (instructed by **HMRC**) for the **Defendants**

Hearing dates: 2 to 4 October 2018
Further written submissions on 19 and 26 October 2018

- -

Approved Judgment

.....

Mr Justice Phillips :

1. The claimants are members of the Phoenix Group of companies, known as the Pearl Group until it was renamed in 2010. In these proceedings they apply for judicial review of the decision of the Commissioners for Her Majesty's Revenue and Customs ("the Commissioners" or "HMRC") made on 9 November 2017 ("the Decision"), upholding HMRC's rejection of a claim made exactly ten years earlier ("Claim") by the second claimant ("Pearl") and the fourth claimant ("PGSL").

2. The Claim was for repayment of significant amounts of under-recovered VAT input tax paid by Pearl in the period 1973 to 1997 ("the Claim Period"). Pearl was the representative member of the VAT group with registration number (VRN) 234 9868 22 ("the 234 VAT Group") throughout the Claim Period and submitted VAT returns in that capacity. HMRC[1] has now accepted that £6,999,207 was under-recovered by Pearl on those returns. In 2003 PGSL replaced Pearl as the representative member of the 234 VAT Group.

3. Pearl and PGSL both left the 234 VAT Group in April 2005 (in circumstances described below) and joined a newly formed VAT group numbered 860 2114 63 ("the 860 VAT Group"), PGSL becoming the representative member. When the Claim was made on 9 November 2007 it was made by both Pearl and PGSL.

4. On 30 April 2008 the 860 VAT Group was dissolved, Pearl joining VAT group 369 4465 10 ("the 369 VAT Group"), of which the third claimant ("PGMS") was and remains the representative member. From that date, the Claim was pursued in the name of PGMS.

5. The Claim was submitted well in advance of 31 March 2009, the date by which such claims (known as *Fleming*[2] claims) were required to be made pursuant to s.121 of the Finance Act 2008[3]. However, it was not until 2012 that HMRC objected that PGMS was not the correct claimant, and not until December 2013 that HMRC explained that none of the Phoenix group had a valid claim as (i) the right to repayment belonged to the 234 VAT Group, through its representative member at the time the Claim was made; (ii) Pearl had ceased to be the representative member of the 234 VAT Group by the time of the Claim was made and (iii) any claim by or on behalf of the correct company would be out of time.

6. The alleged issue arose because, in December 2004, the Pearl Group and its life assurance business, then part of the Henderson group of companies, had been sold to new owners[4], thereby separating the two groups. In March 2005, following completion of the sale, Henderson Administration Ltd ("HAL") had become the representative member of the 234 VAT Group and, about one month later, Pearl ceased to be a member of that group, joining the 860 VAT Group. HMRC asserted in 2013 that HAL (and not

[1] Schedule 11 of the Value Added Tax Act 1994 provides that the Commissioners shall be responsible for the collection and management of VAT.
[2] *Fleming (t/a Bodycraft) v HMRC* [2008] UKHL 2, applying *Marks & Spencer plc v HMRC* [2003] QB 866 ECJ.
[3] Disapplying and replacing the 3-year limit introduced in 1997, following the decision in *Fleming*.
[4] The purchaser was Life Company Investor Group Limited, a UK company owned by Sun Capital Partners and TDR Capital.

Pearl or PGSL) was the correct claimant when the Claim was made in 2007, as HAL was then the representative member of the group which had the Claim.

7. Pearl contends that the entitlement to claim the repayment of VAT was retained by it pursuant to the terms of the 2004 sale, so PGSL was entitled to claim as the representative member of the VAT group of which Pearl was a member when the Claim was made. Further, the Henderson group has confirmed, in unequivocal terms, that any recovery of input tax relating to the period prior to 2004 is due to Pearl/Phoenix and not to HAL or any other member of the Henderson group, and that any payments due to HAL should be paid to the Phoenix group.

8. HMRC has nonetheless maintained its stance and has rejected not only Pearl's primary contention but also alternative approaches. In particular, HMRC has rejected the argument that it has (and should exercise) a discretion (i) to permit Pearl's claim for repayment of VAT Pearl under-recovered to be made other than by the representative member of the 234 VAT Group; or (ii) to treat the Claim as having being made on behalf of HAL; or (iii) to allow HAL to claim out of time, in each case asserting that it has no power to do so.

9. HMRC formally rejected the Claim on 24 July 2017 (but modified its reasoning on 25 August 2017). As referred to above, on 9 November 2017, following a review, HMRC made the Decision under challenge, upholding its earlier rejection of the Claim.

10. The claimants' application, and the hearing before me, proceeded on the assumed basis that, after March 2005, any claim for repayment of the VAT under-recovered by Pearl should have been made by HAL as the (then) representative member of the 234 VAT Group. Whilst the claimants' grounds for judicial review in these proceedings include an assertion that HMRC's decision was wrong in law because Pearl was entitled to claim (either on its own behalf or on behalf of HAL, HAL having ratified such agency), Mr Beal QC recognised on behalf of the claimants that, as those arguments are also being advanced by way of statutory appeal, it was neither necessary nor appropriate that they be determined by way of judicial review.

11. Instead the claimants focused on their grounds that, assuming the Claim should have been made in the name of HAL, the Commissioners' refusal of the Claim (a) was conspicuously unfair and/or an abuse of power, (b) failed to take into account a material consideration, namely, that HAL had confirmed that any refund should be paid directly to Pearl, (c) was in breach of EU law, and (d) was in breach of the European Convention on Human Rights.

12. The Commissioners' response to those grounds is simple. They contend that, although there was a right to a repayment of VAT, they were under a duty to ensure that the Claim was made by the party entitled to the repayment and within time. As HMRC was not responsible for the fact that the Claim was made by the wrong claimant and did not represent, prior to 31 March 2009, that it had been made by the correct claimant, the Commissioners were obliged to take the technical objection (when its existence was, belatedly, appreciated) and were not acting unfairly or otherwise unlawfully in so doing. Conversely, the Commissioners contend, it was for the claimants to ensure that the Claim was made through the correct company by the 31 March 2009, having by that date made any necessary arrangements with HAL to permit them to do so, either in HAL's name or as an assignee of HAL's rights.

The legislative background and its interpretation

(a) Claims for repayment of VAT input tax

13. Section 25 of the Value Added Tax Act 1994 ("VATA 1994") provides as follows:

> "(1) A taxable person shall-
>
> (a) in respect of supplies made by him, and
>
> (b) in respect of the acquisition by him from other member States of any goods,
>
> account for any pay VAT by reference to such periods (in this Act referred to as "*prescribed accounting periods")* at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.
>
> (2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.
>
> ……
>
> (6) A deduction under subsection (2) above and payment of a VAT credit shall not be made or paid except on a claim made in such manner and at such time as may be determined by or under regulations; and, in the case of a person who has made no taxable supplies in the period concerned or any previous period, payment of a VAT credit shall be made subject to such conditions (if any) as the Commissioners think fit to impose, including conditions as to repayment in specified circumstances."

14. The manner in which a claim for a deduction or payment of a credit in respect of input tax is to be made is set out in regulation 29 of the VAT (Amendment) Regulations 2009, SI 2009/586 as follows, amending the version in place when the Claim was made in 2007, which was to materially the same effect:

> "(1) [Subject to paragraph (1A) below], and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable [save that, where he does not at that time hold the document or invoice required by paragraph (2) below, he shall make his claim on the return for the prescribed accounting period in which he holds that document or invoice]."

15. Section 121(2) of the Finance Act 2008 provides:

> "The requirement in section 25(6) of VATA 1994 that a claim for deduction of input tax be made at such time as may be determined by or under regulations does not apply to a claim for deduction of input tax that became chargeable, and in respect of which the claimant held the required evidence, in a prescribed accounting period ending before 1 May 1997 if the claim is made before 1 April 2009."

(b) VAT groups

16. Section 43A of VATA 1994 provides that companies established in the UK under common control are eligible to be treated as members of a group, thereby implementing the Sixth Council Directive of 17 May 1977 (77/338/EEC). Article 4(4) of that Directive provided that Member States may treat as a single taxable person persons who, while legally independent, are closely bound to one another by financial, economic and organisational links. An equivalent provision is now found in Article 11 of Council Directive 2006/112/EC, which came into force on 1 January 2007.

17. Section 43 of VATA 1994 provides that

> "(1) Where under [sections 43A to 43D] any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and-
>
> …. all members of the group shall be liable jointly and severally for any VAT due from the representative member."

18. In *Taylor Clark Leisure plc v Revenue and Customs Commissioners* [2018] UKSC 35 a company claimed repayment of overpaid VAT within the statutory time limit, relating to a period when it had been a member of a VAT group but not its representative member. After the expiry of the time limit, the representative member asserted that any repayment should be to it, and initiated proceedings to that effect. The Supreme Court held that:

> "29. … It…follows from the operation of section 43 of VATA that where there have been overpayments of VAT by the representative member of a VAT group, the person entitled to submit a claim during the currency of a VAT group, unless the claim has been assigned, is either the current representative member of the VAT group or a person acting as agent of that representative member."

19. The representative member's claim to any repayment therefore failed as it had not made the claim (and any claim it thereafter made would be out of time) and the company that had made the claim had not done so as the agent of the representative member.

The facts and the evidence

(a) The basic chronology

20. During the Claim Period, Pearl had accepted that certain aspects of its insurance activity were within the VAT regime but exempt from VAT, with the result that it also accepted that it could not recover VAT incurred on its expenditure attributable to such activities and did not seek to do so.

21. In May 2005, however, the Court of Justice of the European Union held, in *Kretztechnik AG* [2005] ECR I-4357, that the issue of shares was not an activity within the VAT regime and that expenditure connected with that process was therefore not "attributable" to that activity from a VAT perspective, but to the overall economic activity of the company in question, which was taxable. The company was therefore entitled to recover VAT paid on its expenditure.

22. Applying the CJEU's reasoning, the Pearl Group (in common with other life assurance businesses) asserted that its acceptance of premiums by way of direct investments into life funds in return for a defined ownership stake was not a supply for VAT purposes: it claimed that Unit-Linked products, Annuities, Pensions and Investment Bonds were all outside the VAT regime, with the result that VAT on expenditure previously attributed to such supplies (and therefore not recovered as they had been treated as exempt from VAT) could now be reclaimed.

23. As stated above, PGSL made the Claim on 9 November 2007 (by letter addressed to Richard Prentice at HMRC) as the representative member of the 860 VAT group (of which Pearl was then a member) and on behalf of Pearl and the 234 VAT Group "and All Previous Registrations". The total claimed was £16,162.627.

24. On 13 February 2008 Chris Hardwick, a Senior Indirect Tax Specialist officer of HMRC, acknowledged receipt of the Claim (having taken over responsibility for the Pearl Group from Mr Prentice) and asked for extensive further information, including which companies sold the products covered by the Claim and the VAT registration number of those companies or the VAT group within which they were included.

25. PGSL replied on 16 July 2008, providing details of the calculation of the Claim (which was reduced to £14,822,953) and details of the VAT registrations. That letter was acknowledged on 22 July 2008 by Robert Kensell, an Indirect Tax Specialist at HMRC, who had by that time taken over from Mr Hardwick.

26. On 23 December 2008 Mr Kensell wrote to PGSL, stating that some of the information requested by Mr Hardwick had not been provided (but asking nothing further about VAT registration details).

27. In late March 2009, just before the limitation period expired, the Pearl Group filed further but separate claims for under-recovered VAT (referred to as the Transfer of a Going Concern ("TOGC") claim and the Car Fleet Bonus ("CFB") claim), in which the history of the VAT Group changes for Pearl, together with the demerger of the Henderson Group and Pearl Group in 2005, were explained in detail.

28. Between May 2009 and February 2011 Mr Kensell corresponded with the Pearl Group as to the details of the Claim (but not any question of entitlement) and also the other claims which had been lodged. During that period, at a meeting on 15 September 2010, between Pearl's advisers, PricewaterhouseCoopers LLP ("PwC"), and HMRC, HMRC stated that the Claim would be rejected as a matter of policy.

29. On 16 December 2010 Mr Kensell emailed the Phoenix Group (as it had now become) stating that he had recommended repayment of the TOGC claim.

30. On 2 March 2011 the CFB claim was approved by Mr Kensell.

31. By letter dated 21 February 2011 HMRC rejected the Claim on substantive grounds, stating as follows:

> "…the Commissioners do not accept Pearl's view that the principles of the *Kretztechnik* case apply to what they describe as the investment elements of the products described in the claims for overpaid input tax by Pearl…"

32. Following a review by officer Tracey Watkins, HMRC affirmed its decision to reject the Claim by letter dated 7 June 2011. Ms Watkins accepted that the Claim was made in time, but reasoned that the principle in *Kretztechnik* did not apply because Pearl was supplying insurance services to its customers (in the form of contracts of insurance), not accepting investments.

33. On 5 July 2011 PGMS filed a Notice of Appeal in the First-Tier Tribunal, Tax Chamber, challenging the rejection of the Claim (The First Appeal").

34. On 29 June 2012 HMRC filed its Statement of Case in response to the First Appeal. Paragraph 6 stated:

> "The Appeal in relation to Pearl is bound to fail as the Appellant [PGMS] is not entitled to claim on behalf of Pearl VAT allegedly under-recovered by Pearl in the period before it was a member of the Appellant's VAT group."

35. On 16 December 2013 a meeting took place between Phoenix, PwC and HMRC. Sheila Brown, an Indirect Tax Specialist at HMRC, reiterated HMRC's opinion that PGMS had no entitlement to claim, explaining (for the first time) that as the VAT group of which Pearl was a member during the Claim Period was still in existence, entitlement to claim remained with the representative member of that group, but that it was now too late for that company to submit a claim. On 23 December 2013 Mrs Brown sent an email to the Phoenix Group in which she repeated that explanation.

36. In May 2016 the claimants and HMRC agreed to a general stay of the First Appeal.

37. On 20 June 2017 the Henderson Group wrote to HMRC, confirming that at no point since the demerger in 2005 has it considered that it owns or retains any right to make a claim or receive repayments for VAT relating to the historic life business operations of Pearl.

38. By letter dated 24 July 2017 HMRC formally rejected the Claim on entitlement grounds, but incorrectly stated that this was because HAL was the representative member of the 234 VAT Group throughout the Claim Period, Pearl being a "subsidiary member" of that group. The letter also recorded that HMRC had accepted that input tax had been under-deducted, the amount accepted standing at £6,999,207.

39. On 25 August 2017, by letter from officer Christopher Finegan, HMRC accepted the mistake in the letter of 24 July, but maintained its rejection of the Claim because HAL (and not Pearl) had been the representative member of the 234 VAT Group when the Claim was made on 9 November 2007.

40. On 3 November 2017 the Henderson Group confirmed that if any sums were due to it in relation to the subject-matter of the Claim, they should be paid directly to the Phoenix Group.

41. As stated above, on 9 November 2017 HMRC's decision to reject the Claim was upheld following a review. The Claim Form in these proceedings was issued on 24 November 2017 and the Statement of Facts and Grounds was served the same day.

42. On 8 December 2017 the Claimants also filed a Notice of Appeal in the First-Tier Tribunal, Tax Chamber, challenging the decision of 9 November 2017 "the Second Appeal").

43. On 16 February 2018 Supperstone J granted the claimants permission to apply for judicial review. The Commissioners served Detailed Grounds of Resistance on 18 April 2018, together with a three-page witness statement of Alistair Niven, an officer of HMRC. Mr Niven's statement consisted almost entirely of submission and argument.

(b) Initial disclosure by the Commissioners

44. In a letter to HMRC dated 2 May 2018 on behalf of the claimants, PwC objected to the failure of HMRC to disclose any documents relating to or provide any explanation of its decision making-process. In responding on 10 May 2018, HMRC stated as follows:

> "It is a trite point that parties to litigation do not owe each other a duty of care, and while it may be unfortunate that neither party correctly analysed which Pearl entity was the correct claimant until the limitation period had elapsed, absent bad faith and/or the creation of a legitimate expectation, the Commissioners are entitled – and we would say in the interests of fairness to the general body of taxpayers normally expected – to refuse to accept a claim made out of time."

45. The letter nevertheless enclosed contemporaneous notes made by Ms Brown in relation to PGMS' tribunal appeal, the earliest of which, dated 29 June 2012, reads as follows:

> "identified that substantial part of claim not made by correct taxable person as pearl was in henderson VAT group and that VAT group is still extant therefore only the rep member of that VAT group can claim …"

46. HMRC accepted an ongoing duty of candour, but stated that, at that stage, it did not appear that any other disclosure went to the existence of or failure to exercise any discretion.

(c) The Commissioners' undertaking to the court

47. On 5 July 2018 the claimants made an application for specific disclosure, complaining that the short witness statement served by the Commissioners and their limited disclosure failed adequately to explain HMRC's decision-making process.

48. At the hearing of the application on 8 August 2018 before Morris J, the Commissioners gave an undertaking to serve further witness evidence which:

> "…(i) provides any further relevant information - and any significant documents - which explain the Defendants' consideration of the Claimants' claim for repayment during the five-year period from the making of the claim on 9th November 2007 until Mrs Sheila Brown's note of 29th June 2012 identifying that a substantial part of the claim was not made by the correct person, including in particular an explanation (insofar as possible) as to why no question of the Claimants' entitlement to make the claim was raised during that period and (ii) confirms that there is no documentary material prior to that dated 29 June 2012 already disclosed related to the identity of the appropriate claimant for repayment of under-recovered input VAT and (insofar as possible) explaining the circumstances of Ms Brown's composition of that note."

49. That undertaking was recorded in an order sealed on 10 August 2018, by which the Commissioners were also ordered to serve evidence covering the relevant chronology of facts from 9 November 2007 to Mrs Brown's email of 23 December 2013 and to produce one or more witness statements reflecting their undertaking and the further information required by 24 August 2018.

(d) The Commissioners' further disclosure and explanation

50. On 23 August 2018 the Commissioners served the first witness statement of Mr Finegan, exhibiting substantial documentation, including documents which revealed the following:

i) On 20 November 2007 Mr Prentice emailed numerous officers of HMRC, including Mrs Brown, notifying them of the Claim. Mr Prentice asked Mrs Brown to note the "*Fleming*" claim and asked if there was any other information she needed;

ii) On 5 May 2011 Ms Watkins (who was undertaking a review of the initial rejection of the Claim) emailed Mr Kensell in relation to whether entitlement to claim had been checked. Ms Watkins asked to be "put out of her misery", saying "One of the first things I have to consider is the entitlement to make the claim which I know you will have considered" and referring to the fact that "the Henderson VRN only came into existence on 01.04.77".

iii) Mr Kensell replied the next day, referring to the fact that he had spoken to Ms Watkins and stated "Any entitlement to make a claim was considered in the light of Fleming guidance".

iv) On 15 September 2011 Mr Kensell emailed HMRC's solicitors' department, stating:

> "VRN 234 9868 22 Rep Member: Henderson Administration Ltd
>
> [Pearl] was a member of the aforementioned from 01.04.77 to 14.04.05 and during this time was also the Rep member of the group. [Pearl] then joined [the 860 VAT Group].
>
> ……
>
> Finally, I can confirm that [PGSL and PGMS] … had standing to make the relevant claims."

v) On 1 February 2012 Mr Kensell sent an email to another HMRC officer, forwarding his email of 15 September 2011 and reiterating that PGSL and PGMS had standing to make the Claim.

vi) On 26 June 2012 the solicitors' department at HMRC sent the Commissioners' draft defence in the Tribunal Appeal to various officers, including Mr Kensell and Ms Brown, for review and comment. It appears that Counsel had asked, in footnote 5, about entitlement to claim.

vii) The same day Mr Kensell replied, including to Ms Brown, stating:

> "I can confirm that the matter of entitlement to claim was resolved fairly shortly after the claims were made"

viii) On 29 June 2012, the date Mrs Brown made her first note on the issue of entitlement, Mrs Brown emailed HMRC solicitors and Mr Kensell, stating:

> "I have not been closely involved in this so this point may have been covered. The main claim was made by PGS in 2007 and they made reference to previous VAT registration numbers. My understanding is that in the period of the claim Pearl was a member of the VAT group 234 9868 22 (now Henderson's) registration number is still in existence. The Fleming guidance states:- "
>
> 14.2 Claims by VAT groups
>
> Where an overdeclaration of output tax or underdeclaration of input tax is made by a VAT group, the entitlement to claim remains with the representative member of that VAT group for as long as the group remains in existence. This applies regardless of any changes in the composition of the VAT group. Thus the only person who can make a claim for output tax overdeclared or input tax underclaimed by a member of a VAT group is the

> company that is the representative member of the VAT group at the time when the claim is made.
>
> This would mean the representative member of 234 9868 22 would be the person to submit the claim and to whom any payment should be made. It is of course now too late for the representative member of 234 9868 22 to submit a claim.

ix) There was no written response to Ms Brown's email from Mr Kensell or from any other officer.

(e) Further evidence as to HMRC's consideration of the entitlement issue

51. On the first day of the hearing on 2 October 2018 I expressed concern that, in view of Mr Kensell's emails in 2011 and 2012, HMRC had not complied with its undertaking to provide an explanation as to why no question of the Claimants' entitlement to make the claim was raised prior to 29 June 2012. In particular, the absence of any explanation from the officers who dealt with the claim in the period 2007-2009 was difficult to understand, particularly as all three of them remained employed by HMRC.

52. On 4 October 2018, the third and final day of the hearing, the Commissioners produced a second witness statement of Mr Finegan, in which he stated:

> "4. I have now directly contacted Richard Prentice, Chris Hardwick and Robert Kensell, respectively the Officers who dealt with this claim in its early stages. I have received responses from all of them. Richard Prentice (…the Officer who initially responded to the Claimants upon receipt of the claim in 2007) states that he cannot recall the specifics of this claim since he dealt with many at that time. He advised that all records relating to Fleming would have been captured to EF. He also stated that he has no other documents or information.
>
> 5. Chris Hardwick's response advised that he was involved with the Claimants for a few months in 2007- 2008 but that he recalls very little of the VAT issues discussed at the time. His primary recollection does not relate to *Fleming* or *Kretztechnik* claims and he advised that anything from that period would be on EF. He has informed me that any notebooks, e-mails or other correspondence that he might have had would have been destroyed long ago in accordance with HMRC data retention policies."

53. The Commissioners also produced a witness statement of Mr Kensell dated 3 October 2019, in which he stated:

> "3. I took over conduct of this matter sometime in the middle of 2008. Prior to that the case had been handled initially by Richard Prentice and the tax specialist was Chris Hardwick. I can say that the steps that would have been taken on receipt of such a claim

> would have been as follows. In relation to a claim made on behalf of a VAT group, it would have been necessary to check
>
> > "Was the entity part of the VAT group during the period of the claim? Was the correct entity making the claim? Did the entity have an entitlement to the claim? Were any tax periods out of time"?
>
> Once that had been done, the claim would have been referred to a *Fleming* Theme tax expert to check my recommendation to repay or refuse the claim. The claim would have been accompanied by an Action Sheet.
>
> 4. Unfortunately owing to the lapse of time I cannot now recall what consideration was given to the question of who the correct representative member of the relevant VAT group was, and whether I specifically considered it or simply assumed that this had already been done in receipt of the claim.
>
> 5. What I can say is that had this been recognised as an issue, it would have been raised with the Claimants at an early stage. It was no part of HMRC's strategy for handling the claims arising out of the *Fleming* decision to conceal potential objections of that sort…
>
> 6. In particular I do not recall having any role in Sheila Brown's reconsideration of entitlement and (although I accept I was copied into it) I do not recall seeing Sheila's email of 2012. I would not have been particularly interested in the details of an individual claim at that time because it was no longer part of my daily casework responsibility."

54. In a letter to the court dated 19 October 2018, two weeks after the hearing concluded, HMRC stated that Mrs Brown had been spoken to, but she could not clarify anything by way of explanation as to how the original claim was accepted in 2007. The letter did not enclose details of what Mrs Brown had said, but those details had been supplied to the claimants and were forwarded to the court by Mr Beal on 26 October 2018. HMRC recorded Mrs Brown's account as follows:

> "At the time the claim was received in London in 2007, she was based in Edinburgh and was not connected to the claim other than to log it because she was responsible for logging significant claims in the Finance and Insurance sectors. She had involvement in later Fleming Claims and her checks included ensuring that the claimant was the correct taxable person.
>
> Her understanding of how the claims were worked in general in London was that Tax Specialists deferred to Policy on technical issues because these claims were theme-worked issues regarding whether the argument of principle was accepted. There was often an understanding between the Tax Specialists and the business

> that the quantum would be considered after the principle argument had been looked at. After claims handling of this issue was transferred from London to Edinburgh, she was asked to look at it immediately before the Statement of Case was submitted. She went back to the basic checks as per the ones she had carried out on other Fleming claims and discovered that there was an issue regarding entitlement to claim. There was some uncertainty about the extent of the issue since the appeal was for three claims so, after consultation with Marco Criscuolo, it was decided to include the statement in the Statement of Case that the claim was bound to fail because the wrong person had claimed. This claim had already been rejected in full (hence the appeal), and her opinion at the time was that this was just another reason for the claim being rejected, in addition to existing technical arguments".

(f) Analysis of HMRC's consideration and determination of entitlement

55. Mr Finegan, in paragraph 64 of his first statement, summarised HMRC's position as follows:

> ".. I have not come across any evidence that HMRC was aware that the claimants did not have entitlement to claim prior to the involvement of Sheila Brown in 2012. Emails from Robert Kensell would, on the face of it, indicate that either (a) entitlement to claim had been checked by HMRC and accepted in error or (b) entitlement had not been checked but was assumed to have been confirmed. It is a matter of record that the HMRC personnel involved in the claim changed a number of times, particularly in the period immediately following receipt of the original claim. Additionally, the payment of separate claims to the second and third claimants in December 2010 would also indicate that HMRC had not identified the entitlement issue regarding the claimant, because if it had been such claims should also have been refused on the same grounds as the current one."

56. Mr Beal, on the other hand, submitted that the following matters should be inferred from the evidence: (i) that the question of entitlement was resolved by HMRC soon after the Claim was made; (ii) that the resolution was in favour of the claimants; and (iii) that an adverse finding would have been brought to the claimants' attention. Mr Beal further stressed that there was no evidence whatsoever that a mistake was made by any officer of HMRC.

Did HMRC consider and determine the issue of entitlement prior to 31 March 2009?

57. Although none of the officers who dealt with the claim following its receipt in 2007 (but before the expiry of the limitation period in March 2009) recollects considering the question of whether the claim was made by the correct claimant, and no record has been retained of such consideration, the evidence that the issue was considered (and determined in favour of the claimants) is overwhelming:

i) Mr Kensell states unequivocally, in his witness statement, that it would have been necessary, before referring the matter to specialists, to check that "...the correct entity [was] making the claim", no doubt being one of the "basic checks" to which Mrs Brown referred and which resulted in her to identifying the problem in 2012;

ii) There is no doubt that the Claim was referred to tax specialists, indicating that the preliminary checks had been carried out and considered to have been passed;

iii) Ms Watkins, in her email to Mr Kensell of 5 May 2011, stated she knew that he "will have considered" the question of entitlement. Mr Kensell spoke to Ms Watkins, then confirmed in writing that "entitlement to make a claim was considered…". This was not a casual or off-the-cuff confirmation: Mr Kensell knew that Ms Watkins was conducting a review of the rejection of the claim and that she first had to consider the question of entitlement;

iv) In his internal emails of 15 September 2011 and 1 February 2012 (including to the solicitors' department) Mr Kensell expressly confirmed that PGSL and PGMS had standing to make the Claims.

v) Mr Kensell again confirmed to colleagues at HMRC on 26 June 2012, in unequivocal terms, that the matter of entitlement had been resolved shortly after the Claim was made and the companies did have standing to make the Claim. The context was again formal and required candour and precision, namely, the response to a question from Counsel for the purpose of finalising HMRC's statement of case in the First Appeal.

vi) Mr Kensell, in his witness statement (made after Mr Beal had set out his contentions as to the inferences that should be drawn) does not suggest that he made a mistake in writing any of the above emails (indeed, he does not refer to them at all).

58. I therefore conclude that HMRC did consider the question of entitlement to claim in the period before 31 March 2009. Indeed, given that information as to the relevant VAT groups was provided by the Pearl Group in July 2008, by which time Mr Kensell had taken over conduct of the Claim (and given Ms Watkins' assumption, which Mr Kensell did not contradict), it is readily apparent that it was Mr Kensell who would have been responsible for carrying out such consideration, and his subsequent emails confirm that he did so, in or shortly after July 2008. It is also apparent that the determination made by Mr Kensell was that the claimants had standing to make the Claim.

Did Mr Kensell make an error in determining entitlement?

59. It is apparent from his internal emails that Mr Kensell well knew the facts relevant to the issue of entitlement and that he also considered the relevant guidance:

i) In his email to the solicitors' department of HMRC on 15 September 2011, Mr Kensell set out in clear terms (in capital letters, in bold and underlined), that HAL was the representative member of the 234 VAT Group and that Pearl had been a member of that group from 1977 until April 2005 and had also been the representative member during that time. In that context, Mr Kensell expressly

confirmed that Pearl had standing to make the claim. Further, there is no reason to believe that he had any different information when, in his words, "the question of entitlement was resolved fairly shortly after the claims were made"

ii) Mr Kensell expressly informed Ms Watkins in his email of 6 May 2011 that entitlement to claim was considered in the light of *Fleming* guidance (such guidance including advice that the only company that can make a claim for input tax underclaimed by a member of a VAT Group is the representative member of the group when the claim was made).

60. The question is whether it can be inferred (as Mr Finegan suggests) that Mr Kensell, despite having considered entitlement on a fully-informed basis, had accepted it "in error". On the basis of the evidence adduced by the Commissioners, I cannot find that such a mistake was made:

i) Mr Kensell had been an officer of HMRC for 16 years in 2008 and must be assumed to be careful and competent as well as very experienced;

ii) Determining entitlement was a "basic check" which could be carried out easily and quickly, just as Mrs Brown did on 29 June 2012;

iii) Further, Ms Watkins considered the question of entitlement in May 2011 and was alive to issues concerning the 234 VAT group (hence "can you put me out of my misery"). She and Mr Kensell had a telephone discussion, referred to by Mr Kensell in his email in response. Mr Kensell thereafter confirmed that entitlement to claim had been considered and Mr Watkins took no point on entitlement in her review decision of 7 June 2011. Neither Mr Kensell nor Ms Watkins has given any evidence as to their discussion, nor the basis of the conclusion they reached, let alone evidence that they both were operating under a mistaken understanding;

iv) Indeed, Mr Kensell does not suggest in his witness statement that he was, at any time during the period in question, labouring under a misapprehension as to the relevant requirements, nor that he otherwise made a mistake;

v) When Mrs Brown identified a problem with entitlement on 29 June 2009, she obviously called into question the settled view held by the officer dealing with the case, the solicitors' department at HMRC and the numerous other officers Mr Kensell had informed that the issue of entitlement had been determined in favour of the claimants. Opening up such an issue after the expiry of the limitation period, in direct contradiction of the existing HMRC internal stance, must have raised questions and provoked enquiries. Yet there is no documentary or any other evidence as to what steps were taken to investigate the position. Mr Kensell's rather surprising evidence is that he does not recall Mrs Brown's email on the point and that he was not interested in the issue. It appears to be his evidence that he was not thereafter asked about his previous emails confirming that entitlement had been checked and that the claimants did have standing.

61. The Commissioners nevertheless maintain that a mistake must have been made. They invite the inference that, had Mr Kensell (or any other responsible officer) appreciated

that the claim should, technically, have been made by HAL, that point would undoubtedly have been taken.

62. The difficulty with that contention is that Mr Kensell's statement does not even recognise, let alone address and explain, the fact that he made several unequivocal statements in 2011 and 2012 to the effect that entitlement had been checked and the claimants had standing to make the Claim. Given that the statement was made in the course of the hearing, after Mr Kensell's emails had been considered in detail in court, that omission is quite remarkable. It is all the more remarkable because Mr Finegan referred to Mr Kensell's emails in his first witness statement and referred to having "directly contacted" Mr Kensell in his second witness statement (signed the day after Mr Kensell's statement). But he gives no explanation as to why Mr Kensell did not deal with his emails. The unfortunate conclusion is that either Mr Kensell was not sent or shown his emails and asked to explain them, or his explanation was not helpful to the Commissioners' case. Either outcome places the Commissioners in (yet further) breach of their undertaking to the court. Far from providing a factual basis for the inference the Commissioners seek to draw, Mr Kensell's statement invites inferences adverse to the Commissioners' position.

63. Mr Kensell does state in his witness statement that, if the question of the correct representative member of the relevant VAT group had been recognised as an issue, it would have been raised with the claimants at an early stage. However, that evidence appears to be carefully worded and takes the matter no further forward, failing as it does to address what would have amounted to an "issue". Most notably, Mr Kensell does not (i) state that the Claim should have been made by HAL and that the claimants should have been told that there was an issue as to entitlement or (ii) recognise that he (or another officer) may have made an error.

64. Neither does the fact that Mr Kensell authorised the payment of other claims in relation to Pearl's business whilst a member of the 234 VAT Group take the matter any further. It simply demonstrates that Mr Kensell had reached the same decision as to entitlement in relation to each claim. It does not assist as to whether that view was based on a mistake.

(g) Conclusion as to HMRC's consideration and determination of entitlement

65. I therefore conclude that Mr Kensell considered entitlement, on a fully informed basis, in or about 2008 and determined that the claimants did have standing to make the Claim. The Commissioners have failed to establish (the evidential burden plainly being upon them) that such determination was the product of an error by Mr Kensell or any other officer.

66. It follows that I find that HMRC knew, prior to the end of the limitation period, that the Claim was not made by the representative member of the 234 VAT Group (as required by the *Fleming* guidance), but nevertheless determined that no issue of entitlement would be raised and that the Claim could be pursued by the claimants. It may be that Mr Kensell decided not to apply the *Fleming* guidance strictly because of an appreciation that the demerger had resulted in Pearl's entitlement to repayment of under-recovered VAT being vested in what was now a Henderson VAT group, but that would be to speculate in circumstances where the Commissioners have not arranged for Mr Kensell to explain his thinking.

The challenge to HMRC's decision

67. The claimants' primary public law challenge to the Decision is on the ground that it was so "conspicuously unfair" as to be irrational. The claimants accept that HMRC made no express representation prior to the expiry of the limitation period that the Claim had been made by the correct parties, but nevertheless assert that the effective "*volte face*" on the issue of entitlement, after the expiry of the time limit for a claim by HAL, was capricious and therefore unlawful.

(a) The legal principles

68. In *R v IRC, ex parte Preston* [1985] 1 AC 835 the House of Lords considered the circumstances in which a decision of the Commissioners could be challenged on the ground of unfairness. Lord Templeman, with whom all members of the House agreed, accepted that the Commissioners were under duty to act fairly toward individual taxpayers, but at p. 864D explained the limited circumstances in which a decision would be open to challenge on that basis as follows:

> "… a taxpayer cannot complain of unfairness, merely because the commissioners decide to perform their statutory duties including their duties under section 460 to make an assessment and to enforce a liability to tax. The commissioners may decide to abstain from exercising their powers and performing their duties on ground of unfairness, but the commissioners themselves must bear in mind that their primary duty is to collect, not to forgive, taxes. And if the commissioners decide to proceed, the court cannot in the absence of exceptional circumstances decide to be unfair that which the commissioners by taking action against the taxpayer have determined to be fair. The commissioners possess unique knowledge of fiscal practices and policy. The commissioners are inhibited from presenting full reasons to the court for their decisions because of the duty of confidentiality owed by the commissioners to each and every taxpayer.
>
> The court can only intervene by judicial review to direct the commissioners to abstain from performing their statutory duties or from exercising their statutory powers if the court is satisfied that "the unfairness" of which the applicant complains renders the insistence by the commissioner on performing their duties or exercising their powers an abuse of power by the commissioners.
>
> In most cases in which the court has granted judicial review on grounds of "unfairness" amounting to abuse of power there has been some proven element of improper motive..."

69. Lord Templeman continued at p.866F as follows:

> "In the present case, the appellant does not allege that the commissioners invoked section 460 for improper purposes or motives or that the commissioners misconstrued their powers

> and duties. However, the *H.T.V.* case and the authorities there cited suggest that the commissioners are guilty of "unfairness" amounting to an abuse of power if by taking action under section 460 their conduct would, in the case of an authority other than Crown authority, entitle the appellant to an injunction or damages based on breach of contract or estoppel by representation. In principle I see no reason why the appellant should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the appellant because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy. There may be cases in which conduct which savours of breach of conduct or breach of representation does not constitute an abuse of power; there may be circumstances in which the court in its discretion might not grant relief by judicial review notwithstanding conduct which savours of breach of contract or breach of representation. In the present case, however, I consider that the appellant is entitled to relief by way of judicial review for "unfairness" amounting to abuse of power if the commissioners have been guilty of conduct equivalent to a breach of contract of breach of representations on their part."

70. Lord Templeman further added, at p. 868E:

> "Save in exceptional circumstances such as those which obtained in the *Self-Employed* case [1982] A.C. 617, I do not think it would be proper for the commissioners to absolve a taxpayer from a tax liability of which the commissioners were unaware."

71. Those principles were considered in *R v Inland Revenue Commissioners, ex parte Unilever plc* [1996] STC 681, CA, a case in which the Revenue had, for many years, permitted Unilever to set-off losses against profits earned in the same year outside the statutory two-year limit, despite having no express statutory power to extend or waive that time limit. When the Revenue eventually refused to permit such late set-off without giving notice of its change of stance, Unilever challenged that decision successfully by way of judicial review on the ground of unfairness.

72. The Court of Appeal recognised that the Revenue had made no clear, unambiguous or unqualified representation and had not been under a duty to speak such as to give rise to an estoppel. Neither had the Revenue acquiesced or waived non-compliance because it had not been aware of it, the evidence being that the Revenue had simply failed to notice that the claim was late. Further, the court recognised that it could not, except in exceptional circumstances, decide to be unfair that which the commissioners had determined to be fair. Against that background, Sir Thomas Bingham MR stated at p. 690F as follows:

> "I would in general terms accept almost all these points… But I am very uneasy at the conclusion which the argument is said to

compel in this case. Unilever is, I think, entitled to make a number of points on the facts of this case:

(1)The courts have not previously had occasion to consider the facts analogous to those here. The categories of unfairness are not closed, and precedent should act as a guide not a cage. Each case must be judged on its own facts, bearing in mind the Revenue's unqualified acceptance of a duty to act fairly and in accordance with the highest public standards.

(2) The taxpayer's entitlement to deduct trading losses from other profits in the same year, although provided by statue, gives effect to a very basic principle. A tax regime which did not provide such an entitlement could scarcely be regarded as equitable. A right of set-off against earlier or later accounting periods is less fundamental. But a tax on corporation's profit which did not permit account to be taken of trading loss would be offensive to ordinary notions of fiscal fairness.

(3) While a statutory provision is not to be overridden or disregarded simply because it is regulatory, it is not irrelevant in considering the overall picture that the provision is regulatory. It is one thing for the Revenue to forgive tax which Parliament has ordained shall be collected; it may be quite another for the Revenue to neglect a statutory time limit which, given the Revenue's dealing with a particular taxpayer, lacks any useful purpose.

(4) While the Revenue did not formally exercise their power under s 42(5) of the Taxes Management Act 1970 to determine the form in which a claim for loss relief should be made, they did (by sending Unilever blank profit estimate schedules from the 1960s onwards) indicate the basic information they required at the first stage. When the form was amended and elaborated in 1988, following discussion between the parties, information was sought on other reliefs but not loss relief.

(5) Had the Revenue indicated a wish to be told when trading losses were being deducted from profit in the estimated profit schedules the Unilever could have complied without difficulty, cost or inconvenience. Giving this information would have involved no disadvantage to Unilever and no advantage to the Revenue.

……

(9) Even if it be accepted that the Revenue were under no legal duty to Unilever to draw attention to the time-limit when the first 'late' computations claiming loss relief were received, the Revenue would no doubt have done so had they noticed the delay and regarded it as significant…. If the Revenue's argument is

> correct, Unilever is seriously prejudiced by the fact that the point is taken now and not before.
>
> (10) On an objective but untechnical view, it would be hard to regard Unilever as owing £17m additional tax to the Revenue. If this tax is due it can fairly be regarded as an adventitious windfall, accruing to the Revenue through the understandable error of an honest and compliant taxpayer, shared over many years by the Revenue.
>
> These points cumulatively persuade me that on the unique facts of this case the Revenue's argument should be rejected. On the history here, I consider that to reject Unilever's claims in reliance on the time-limit, without clear and general advance notice, is so unfair as to amount to an abuse of power…"

73. Simon Brown LJ stated at p. 694H as follows:

> "Of course legal certainty is a highly desirable objective in public administration as elsewhere. But to confine all fairness challenges rigidly within the *MFK* formulation- requiring in every case an unambiguous and unqualified representation as a starting point- would to my mind impose an unwarranted fetter upon the broader principle operating in this field: the central *Wednesbury* principle (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223) that an administrative decision is unlawful if 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it' (see *Council of Civil Service Unions v Minister for the Civil Service* [1085] AC at 410 per Lord Diplock). The flexibility necessarily inherent in that guiding principle should not be sacrificed on the altar of legal certainty.
>
> 'Unfairness amounting to an abuse of power' as envisaged in *Preston* and the other Revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power. As Lord Donaldson MR said in *R v ITC, ex p TSW*: 'The test in public law is fairness, not an adaptation of the law of contract or estoppel.'
>
> In short, I regard the *MFK* category of legitimate expectation as essentially but a head of *Wednesbury* unreasonableness, not necessarily exhaustive of the grounds upon which a successful substantive unfairness challenge may be based.

> Still less it is necessary to force such a challenge into the straight-jacket of a private law plea of misrepresentation, waiver, acquiescence of some form of estoppel…
>
> Not least will this be so when considering the effect of time limits. These indeed are treated variably even in private law. Sometimes the failure to act within a stipulated time limit will be strictly penalised, even when repeatedly overlooked in the past ...
>
> And there is this too to be said. Public authorities in general and taxing authorities in particular are required to act in a high-principled way, on occasions being subject to a stricter duty of fairness than would apply as between private citizens. This approach is exemplified in cases such as *R v Tower Hamlets London BC, ex p Chetnik Developments Ltd* [1988] AC 858 and *Woolwich Equitable Building Society v IRC* [1992] STC 657, [1993] AC 70 and reflected in Lord Mustill's reference in *Matrix-Securities* (see [1994] 1 WLR 334 at 358) to 'the spirit of fair dealing which should inspire the whole of public life'.
>
> Whilst, therefore I for my part accept that the Revenue's conduct here complained of would probably not fall foul of any constraining principle of private law (not even that of estoppel by convention), I cannot regard that as decisive of the case in their favour.
>
> Any unfairness challenge must inevitably turn on its own individual facts. True, as Lord Templeman made clear in *Preston,* it can only ever succeed in 'exceptional circumstances'. True, too, the court must always guard against straying into the field of public administration. In these circumstances I am very ready to accept that rare indeed will be the case when a fairness challenge will succeed outside the *MFK* parameters. It is certainly difficult to envisage many situations when, absent breach of a clear representation, a highly reputable and responsible body such as the Revenue will properly will be stigmatised as having acted so unfairly as to have abused their powers- here their power to accept late claims. But I am satisfied that there exists no legal inhibition to such a conclusion…"

74. *Preston* and *Unilever*, and the concept of "conspicuous unfairness" were considered by the Supreme Court in *R v Competition and Markets Authority, on the application of Gallaher Group Ltd* [2018] UKSC 25. Lord Carnwath stated as follows:

> "I have quoted at some length from these judgments to show how misleading it can be to take out of context a single expression, such as "conspicuous unfairness", and attempt to elevate it into a free-standing principle of law. The decision in *Unilever* was unremarkable on its unusual facts, but the reasoning reflects the case law as it then stood. Surprisingly, it does not seem to have

> been strongly argued (as it surely would be today) that a sufficient representation could be implied from the Revenue's consistent practice over 20 years …. It seems clear in any event from the context that Simon Brown LJ was not proposing "conspicuous unfairness" as a definitive test of illegality, any more than his contrast with conduct characterised as "a bit rich". They were simply expressions used to emphasise the extreme nature of the Revenue's conduct, as related to Lord Diplock's test. In modern terms, and with respect to Lord Diplock, "irrationality" as a ground of review can surely hold its own without the underpinning of such elusive and subjective concepts as judicial "outrage" (whether by reference to logical or moral standards).
>
> 41. In summary, procedural unfairness is well-established and well-understood. Substantive unfairness on the other hand - or, in Lord Dyson's words at para 53, "whether there has been unfairness on the part of the authority having regard to all the circumstances" - is not a distinct legal criterion. Nor is it made so by the addition of terms such as "conspicuous" or "abuse of power". Such language adds nothing to the ordinary principles of judicial review, notably in the present context irrationality and legitimate expectation. It is by reference to those principles that cases such as the present must be judged."

(b) Application of the principles in this case

75. In view of my findings of fact above, the Decision completed a total reversal of HMRC's fully-informed determination, made in 2008, not to object to the Claim on the basis of the entitlement of Pearl and/or PGSL to make the Claim, a reversal made years later and at a time when the claimants could no longer take the simple steps to reformulate and re-submit the Claim (with the authority of HAL) within the limitation period.

76. It is not suggested, and I have not found, that HMRC deliberately withheld notice of the technical objection until the limitation period had passed, which would have constituted an improper motive and an undoubted abuse of power[5]. On the contrary, Mr Kensell determined (albeit internally) that the technical point would not be taken by HMRC and standing would be accepted, a position which was maintained following Ms Watkins' review in 2011.

77. On the other hand, the Commissioners have provided no proper (nor indeed any) explanation as to how, why and by whom the determination made by Mr Kensell (and widely communicated internally by his emails) and accepted by Ms Watkins came to be reversed.

78. In my judgment, having determined prior to the expiry of the limitation period not to take the technical objection, the Commissioners' reversal of that position after its expiry without a change of circumstances or any other good reason, was not lawful as a matter

[5] See *Preston* at p. 870D.

of public law. As the original internal decision was not communicated to the claimants, it is not a case of "conduct equivalent to a breach of contract or breach of representations", but it is plainly a case where the Decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Certainly a decision maker who felt bound by the highest public standards could not have done so.

79. It follows, in my judgment, that the Decision was irrational and, if a separate concept, conspicuously unfair. The claimants also had a legitimate expectation that, if HMRC appreciated before the expiry of the limitation period that there was a technical problem with the Claim which could readily be cured, they would be notified of that objection in reasonable time or the point would not thereafter be taken, an expectation which was breached by the Decision.

80. Indeed, it is not clear to me whether the Commissioners would contend to the contrary on the basis of the facts as I have found them to be. Their stance in these proceedings has been premised on the assertion that HMRC was unaware of the technical problem with standing prior to Ms Brown's intervention in 2012, a stance which (as I have set out above), ignores Mr Kensell's emails and his interaction with Ms Watkins.

81. In view of the above conclusion it is unnecessary to consider the claimants' alternative contentions that the Decision breached their Human Rights and/or numerous principles of EU law.

Conclusion

82. For the above reasons the Decision must be quashed and the Commissioners ordered to pay the Claim (to the extent its quantum has been accepted by HMRC). Given the Commissioners took ten years to reject the Claim on the basis of a technical objection which could and should have been raised, if it was going to be, within weeks of details being provided by the claimants, and further given their lamentable failure to provide or obtain from HMRC's officers a proper explanation of the decision making process, despite an undertaking given to the court, I see no scope for remitting the matter to them for yet further consideration

83. Whether payment of the Claim should be justified by permitting HAL to make its own claim out of time (against an undertaking to pay the proceeds to the claimants) or by some other route is a matter on which I will hear further argument, but may ultimately be for the Commissioners to decide.