Neutral Citation Number: [2023] EWHC 2213 (Ch)

HC-2016-001715
HC-2017-000622

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 13 September 2023

Before:

MASTER MCQUAIL

- -

Between:

HM Revenue & Customs Commissioners **Claimants**

- and -

John Patrick Walsh **Defendants**

- -

Galina Ward KC and Evie Barden (instructed by **HMRC Solicitor's Office)** for the **Claimants**
Harriet Brown and Shane O'Driscoll (instructed by **Spencer West LLP)** for the **Defendants**

Hearing dates: 15 and 16 May 2023

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Approved Judgment

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MASTER McQUAIL

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Master McQuail:

Introduction

1. On 15 and 16 May 2023 I heard:
   (i) the claimants' (**HMRC**) Part 8 Claim issued on 2 June 2016 (**the Claim**) made pursuant to rule 73.10C of the CPR for an order for sale of a number of properties the subject of final charging orders following a judgment in default for £2,511,147.13 (**the Default Judgment**) having been entered against the defendant (**Mr Walsh**) on 10 March 2014; and
   (ii) Mr Walsh's application (**the Application**) dated 11 November 2016 under Part 13 of the CPR to set aside or vary the Default Judgment.

2. The underlying tax debt consists of four VAT assessments and penalty assessments, 20 income tax and CGT assessments made under section 29 Taxes Management Act 1979 (**TMA**), three determinations of penalties in relation to income tax and CGT and six penalty assessments for 2012 made under Schedule 55 and 56 of Finance Act 2009. The earliest assessments relate to the tax year ending in 1993.

3. Mr Walsh's position is that he first became aware of the Claim in August 2016, and thereafter applied for permission from the First-tier Tribunal (**FTT**) to appeal the assessments and determinations out of time. The Claim and Application were stayed by agreement pending the outcome of that application to the FTT. While four of the assessments were varied or withdrawn, the application was otherwise unsuccessful, and no appeal was brought against Judge Nicholl's decision. Her judgment is dated 29 August 2018 (**the FTT Judgment**). Mr Walsh accepts he has no further route to challenge the underlying assessments and does not dispute the factual findings of the FTT. However, Mr Walsh contends the Application should be allowed so that he may defend the Underlying Claim and, if that contention fails, he nevertheless resists enforcement of the charging orders.

4. Mr Walsh says that he never intended not to comply with his obligations to pay tax but received poor advice which he did not question for many years. Mr Walsh's explanation for his inattention to his taxation affairs is that his wife was diagnosed with cancer in about 2000 and died in 2004 causing him substantial distress such that he did not work for a period when he was caring for his wife and daughter and thereafter only returned to work in mid-2007. More recently Mr Walsh has suffered from poor health himself, including a diagnosis of prostate cancer in March 2019, surgery to remove a tumour and a stroke in December 2020.

History of Mr Walsh's Relevant Affairs

5. In the following paragraphs I set out in summary the history of Mr Walsh's activity relevant to his taxation affairs. This summary is derived from the FTT Judgment.

6. Mr Walsh operated a haulage business from 1987 until about 1996 when he sold that business and set up a new van transport business. The businesses were operated from a yard in Silvertown. On 31 May 2007 Mr Walsh signed a contract for the sale of the yard. The sale completed on 17 April 2008, by which time the van business had ceased. Mr Walsh invested the proceeds of the sale in a property known as Wooodways, Benkins Lane, Noak Hill, RM4 1LB (**Woodways**), which is now his home, as well as a number of residential properties which he arranged to have refurbished and then let out.

7. Judge Nicholl's conclusion as recorded at [5.13] of the FTT Judgment was that the evidence of Mr Walsh's ability to acquire, refurbish and let residential properties between 2008 and 2016 demonstrated that he was able to continue to manage his affairs, including his letting business, and to engage others as necessary for that purpose notwithstanding the effects of his bereavement.

8. At some point after the purchase of Woodways Mr Walsh instructed the VAT office to send correspondence there.

9. Mr Walsh had purchased a property at 54 Myrtle Road, Romford Essex, RM3 8XS (**54 Myrtle Road**) in 1989 and that was where he lived with his wife, until her death, and their daughter. Mr Walsh moved out of 54 Myrtle Road in January 2010 to go travelling. His daughter moved to Woodways once it was refurbished at some point in 2010. 54 Myrtle Road was also refurbished before itself being let out.

10. From January 2010 Mr Walsh travelled round Europe in his caravan returning to the UK approximately monthly, in part to attend to his letting business. In October 2015 he returned to live at Woodways with his daughter and her family.

11. HMRC wrote to Mr Walsh to advise that they had opened an investigation into his tax affairs on 22 June 2010. That letter was sent to 54 Myrtle Road. Royal Mail's records show that it was signed for by Mr Walsh's daughter on 24 June and that a further letter was signed for by his son-in-law on 9 August. Mr Walsh claimed he did not receive the letters. The tenant who moved to 54 Myrtle Road once Mr Walsh's daughter left was a Mr Ellis who was known to Mr Walsh and was still living there at the time of the FTT hearing. Further letters were sent to 54 Myrtle Road by HMRC requesting that Mr Walsh make contact.

12. On 4 March 2013 Mr Walsh, having become aware that HMRC were trying to contact him, called Ms Luk of HMRC to arrange a meeting which took place in Southend on 8 March 2013. Mr Walsh was warned at the meeting that his income tax and CGT problems were serious, that if he did not cooperate assessments would be raised and charges placed on his properties.

13. At the meeting Mr Walsh repeatedly told HMRC that he had no address. Mr Walsh's oral evidence at the FTT hearing that he told HMRC at that meeting to use Woodways as his address was rejected. HMRC had prepared a bundle of papers for Mr Walsh to take away from the meeting on 8 March 2013, but Mr Walsh chose not to do so and gave his permission for HMRC to retain the papers. Mr Walsh provided his VAT records to HMRC immediately following the meeting, but he did not otherwise engage further.

14. On 20 September 2013 HMRC sent a pre-decision letter to Mr Walsh at 54 Myrtle Road. On 30 October 2013 HMRC issued section 29 tax assessments and penalty assessments to Mr Walsh at 54 Myrtle Road. The assessments were largely based on information from Mr Walsh's VAT records, land registry information and information from the local council.

15. Mr Walsh's next contact with HMRC was when he called Ms Luk on 7 August 2014 to arrange to collect the bundle of correspondence from HMRC which he did on 13 August 2014. Mr Walsh's account is that he handed these papers to his new tax adviser known to him only as "Paul", from whom he heard nothing further.

16. In August 2016 Mr Ian Mercer, the tenant of another of Mr Walsh's properties, brought a package of documents to him which Mr Walsh first looked at on 8 August 2016. The package included papers relating to the Claim. Mr Walsh instructed a solicitor, Mr Gilbert, who in turn instructed an accountant, Mr Sobell, who produced a report dated 3 November 2016 upon which Mr Walsh relies as showing his true tax liabilities to be of the order of £635,359 exclusive of interest.

17. The FTT Judgment records at [5.17] the following findings of fact:

> "Mr Walsh had no residential address in the United Kingdom from January 2010 until he returned to live at Woodways in 2015 but that he used Woodways as his address for VAT purposes.
>
> …
>
> "On his own evidence Woodways was not his residential address in 2013 as he did not have an address, and so his last residential address was [54] Myrtle Road until he returned from travelling in 2015. This is supported by his statement that he used [54] Myrtle Road for his passport renewal application in 2014 because it had been issued to that address and he had no other address."

18. At [5.31] of the FTT judgment the judge recorded that in his report Mr Sobell identified that the capital gain on the sale of the Silvertown yard had been assessed in the wrong tax year because HMRC did not have access to the sale contract with the result that HMRC agreed that the assessment for the penalty determination for 2009 might be appealed and identified a number of other errors which meant that the penalty assessment for 2011 might be appealed.

19. In the following paragraph the judge noted that Mr Sobell himself did not have full information and that he had relied upon information from Mr Walsh with regard to matters which were put in question by Mr Walsh's own evidence. For example Mr Walsh told him Woodways was his home, but in evidence said it was a business property. Mr Sobell made reference to employees while Mr Walsh said that he did not have employees or a payroll. Mr Sobell also made an error in relation to the date of purchase of 54 Myrtle Road.

20. [18] of the FTT Judgment reads as follows:

> "In *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290 Woolf J identified the obligations placed on HMRC in order to come to a view as to the amount of tax to the best of their judgment. Assuming that there is some material before HMRC on which they can base their value judgment, they must perform that function bona fide but they "should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to their best judgment, is due". In *Rahman (trading as Khayam Restaurant) v Customs and Excise Commissioners* [1998] STC 826 Carnwath J commented on Woolf J's guidance and added that in order for a tribunal to treat an assessment as invalid, it needs to find, for example, that the assessment has been reached "dishonestly or vindictively or capriciously" or that it is a "spurious estimate or guess in which all elements of judgment are missing", being in substance "tests [that] are indistinguishable from the familiar *Wednesbury* principles."

21. [42] of the FTT Judgment reads as follows:

> "The assessments under section 29 TMA are necessarily estimates, being made in the absence of disclosure from Mr Walsh. It is not appropriate for me to consider the underlying appeals, but I note that Mr Sobell acknowledged that Ms Luk only had the VAT information and third party information available and that, subject to errors in calculation which were noted and accepted by HMRC as such and disputed information/figures used, they were understandable. I have not found that this led her to make deliberately careless or unfair decisions in relation to the preparation and notifications of the decisions to Mr Walsh. Ms Luk acted in the same way when dealing with Mr Walsh's affairs as she did in relation to other taxpayers' affairs."

The Course of the Claim and the Application

22. HMRC issued its claim in the County Court against Mr Walsh on 24 January 2014 in respect of his outstanding tax liabilities (**the Underlying Claim**). The Underlying Claim was served by sending it by post to Mr Walsh at 54 Myrtle Road.

23. On 10 March 2014 the Default Judgment was entered the total of £2,511,471.13 being £2,509,601.13 for the debt and interest to the date of the judgment and £1,870 for costs.

24. On 3 April 2014, RN Limited, HRMC's nominee, obtained an interim charging order (**the First ICO**) over 54 Myrtle Road.

25. On 4 April 2014, RN Limited obtained interim charging orders (**the Second ICOs**) over a further ten properties. These include:

(i) Woodways;
(ii) 2 Lewes Road, Romford, Essex. RM3 7YR (**2 Lewes Road**); and
(iii) 28 Chippenham Road, Romford, Essex, RM3 8EX (**28 Chippenham Road**).

26. On 22 July 2014, all of the interim charging orders were made final (**the FCOs**).

27. HMRC issued the Claim on 2 June 2016.

28. Mr Walsh requested an extension of time to file his acknowledgement of service and evidence. HMRC agreed to an extension of time for the acknowledgment of service, which was filed on 24 August 2016, and three extensions of time for his evidence, which was filed on 5 October 2016.

29. On 26 September 2016, the Claim was listed for hearing on 15 November 2016.

30. On 30 September 2016 Mr Walsh signed a witness statement in the Claim explaining that he had been advised that his liabilities were "vastly overstated."

31. On about 11 November 2016, Mr Walsh made the Application to the CCMCC for the Default Judgment be set aside or varied, pursuant to rule 13.2 of the CPR, alternatively, rule 13.3(1)(a) or (b). In his first witness statement in support of the Application dated 11 November 2016), Mr Walsh stated that:

(i) he was unaware of the Underlying Claim, the First ICO, the Second ICOS or the Final Charging Orders until 8 August 2016, when he became aware that a claim had been issued against him by HMRC. His position was that as HMRC were aware that

he no longer resided at Myrtle Road the claim form was not validly served on him at that address so that the Court must set aside the Default Judgment under rule 13.2;
(ii) Melvyn Sobell, an accountant, had advised him the Underlying Claim was vastly overstated and his actual liabilities were in the sum of £635,359.000. In the circumstances, he said there was a real prosect of successfully defending the Underlying Claim for any amount greater than that figure, alternatively that the Default Judgment should be varied to that figure; and
(iii) he intended to sell such of the Properties as would meet what Mr Sobell advised were his tax liabilities and he considered he would obtain a better price than would be obtained by HMRC.

32. In the circumstances HMRC agreed a consent order adjourning the hearing of the Claim.

33. On 14 November 2016, Master Teverson approved a consent order transferring the Application to the High Court and listing the Claim together with the Application for a hearing on 9 January 2017.

34. Pursuant to Master Teverson's order, HMRC filed witness statements in response to the Application from Christine Casson dated 28 November 2016 and Patricia Luk dated 30 November 2016.

35. HMRC agreed to Mr Walsh's request for an extension of time for filing his evidence in reply and he served further witness evidence dated 13 December 2016.

36. On 14 December 2016, the Court re-listed the hearing on 24 February 2017.

37. On 20 February 2017 Mr Walsh applied to the FTT to appeal against HMRC's assessments or determinations of Mr Walsh's income tax, capital gains tax and VAT liabilities and penalties for the tax years 1992-1993 to 2010-2011 (**the Appeal**). The Appeal was made out of time and Mr Walsh therefore had to apply for an extension of time for the Appeal.

38. On 23 February 2017, HMRC and Mr Walsh agreed an order staying the Claim and the Application until a date 14 days after either a refusal of the application to appeal out of time or the determination of the Appeal.

39. On 24 March 2017, HMRC received a payment of £341,059.50 from the sale by Mr Walsh of 2 Lewes Road.

40. On 4 April 2017, HMRC received notice of the Appeal and a hearing date was set for 16 August 2017. That hearing was postponed at the request of Mr Walsh's representatives.

41. On 21 June 2017, HMRC received a payment of £311,254 from the sale by Mr Walsh of 28 Chippenham Road

42. The application for an extension of time for the Appeal was listed on 3 October 2017. On Mr Walsh's application directions for disclosure and witness statements were given.

43. The application for an extension of time was heard on 2 and 3 May 2018. The FTT Judgment is dated 29 August 2018. The FTT refused to allow Mr Walsh to bring a late appeal save in respect of two assessments which were withdrawn by HMRC in addition HMRC agreed one penalty determination and one penalty assessment might be appealed.

44. Mr Walsh's period for appealing the FTT Decision expired on 27 November 2018. Thereafter it took until November 2019 for HMRC to clarify the withdrawn assessments, and finalise the amount of Mr Walsh's debt.

45. In late 2019, because Mr Walsh's indebtedness was increasing, because he was not filing tax returns in respect of rental income or capital gains arising from his properties, HMRC decided it needed to pursue enforcement. Accordingly, HMRC sought updated valuations and an updated certificate of debt, which was finalised on 31 January 2020.

46. In early April 2020, HMRC's solicitors informed this Court that the Appeal had concluded and the stay should be lifted.

47. On 17 April 2020, Mr Walsh's solicitors wrote to HMRC to suggest a directions hearing and an agreed directions order was made on 19 May 2020.

48. On 10 December 2020, HMRC's solicitors wrote to the High Court asking when the matter would be listed and received no response.

49. In July 2021, HMRC's solicitors made further enquiries of the Court. It transpired that a Word version of the 23 February 2017 consent order had not been filed. A Word version was provided on 10 August 2021.

50. On 6 September 2021, HMRC requested a signed consent order from Mr Walsh's representatives.

51. Meanwhile HMRC had a moratorium in place on collection activity due to the pandemic and did not return to regular collection activity until late 2021.

52. On 10 November 2021, HMRC's solicitors telephoned the High Court to ask about the progress of the Claim and were advised that a directions hearing had been listed for 22 November 2021. A notice of hearing was issued on the same day.

53. On 19 November 2021, by a consent order Mr Walsh was to file and serve a witness statement in support of the Application and in opposition to the Claim, including any amended grounds, if so advised, by 4pm on 17 January 2022; HMRC were to file and serve a witness statement in opposition to the Application and in support of the Claim by 4pm on 14 March 2022; Mr Walsh was to file and serve evidence in reply by 4pm on 9 May 2022; and the Application and the Claim were to be listed for hearing

54. On 2 February 2022, by an order of Deputy Master Bowles, those directions were varied extending the deadlines for evidence and the hearing window.

55. On 24 March 2022, Mr Walsh filed his fourth witness statement pursuant to those directions, which set out at his amended grounds in support of the Application and opposing the Claim, being:

(i) HMRC have inordinately and inexcusably delayed in prosecuting the Claim and Underlying Claim resulting in (a) the proceedings being in breach of his rights under Article 6 of the European Convention on Human Rights (the ECHR); (b) an abuse of process because of the prejudice to Mr Walsh which means he cannot have a fair trial – whether at common law or under the ECHR;
(ii) the Claim and the Underlying Claim would result in HMRC's unjust enrichment, since the assessments in question did not reflect the true amounts owed. There can be no public interest in taxpayers paying more tax than they properly owe, and to allow HMRC to collect such amounts will unjustly enrich them;
(iii) granting orders for sale would amount to a breach of Article 1 of the First Protocol (**A1P1**) to the ECHR as it would deprive Mr Walsh of his possessions to meet an incorrect tax assessment; and
(iv) granting orders for sale would amount to a breach of Article 8 to the ECHR as it would result in Mr Walsh losing his home, Woodways, and splitting up his family, given he lives there with his daughter, her husband and his two grandchildren.

56. On 25 May 2022, by an order of Deputy Master Nurse, the deadlines for HMRC's evidence and Mr Walsh's evidence in reply were extended.

57. On 30 May 2022, HMRC filed and served a further witness statement from Christine Casson.

58. On 25 July 2022, Mr Walsh filed and served his fifth witness statement.

The Current Position

59. As at 4 October 2022, the amount outstanding of the Judgment Debt, following the sale of 2 Lewes Road and 28 Chippenham Road and the FTT Decision, was £1,328,483.57 (**the Outstanding Liability**). Interest continues to accrue, but Mr Walsh objected to HMRC's updated calculation being provided to the Court at the hearing.

60. The total value of the properties remaining subject to the FCOs is £3,250,000 or £2,775,000 if Woodways is excluded. HMRC's position, if the Claim succeeds, is that it will only sell the properties to the extent necessary to recover the debt owed.

The Application

Relevant Provisions of the CPR and Case Law

61. CPR 6.9 provides how a claim form is to be served if the defendant has not given an address for service. The table in 6.9(2) provides that, subject to paragraphs (3) to (6), an individual is to be served at his or her usual or last known residence. The following subparagraphs provide:

> "(3) Where a claimant has reason to believe that the address of the defendant referred to in entries 1, 2 or 3 in the table in paragraph (2) is an address at which the defendant no longer resides or carries on business, the claimant must take reasonable steps to ascertain the address of the defendant's current residence or place of business ("current address").
> "(4) Where, having taken the reasonable steps required by paragraph (3), the claimant —
>
> > (a) ascertains the defendant's current address, the claim form must be served at that address; or

(b) is unable to ascertain the defendant's current address, the claimant must consider whether there is—

(i) an alternative place where; or

(ii) an alternative method by which,

service may be effected.

"(5) If, under paragraph (4)(b), there is such a place where or a method by which service may be effected, the claimant must make an application under rule 6.15.

"(6) Where paragraph (3) applies, the claimant may serve on the defendant's usual or last known address in accordance with the table in paragraph (2) where the claimant —

(a) cannot ascertain the defendant's current residence or place of business; and

(b) cannot ascertain an alternative place or an alternative method under paragraph (4)(b)."

62. Judgment in the Underlying Claim was entered under Part 12 of the CPR in default of an acknowledgment of service. CPR 12.3(1) provides that judgment in default of acknowledgment of service may be obtained only if the defendant has not filed an acknowledgment of service or a defence to the claim and the relevant time for doing so has expired. The time for filing an acknowledgment of service or a defence does not start to run until the claim is served, and judgment must therefore be set aside if the claim has not been properly served.

63. CPR 13 provides as follows:

"13.2 The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because–

(a) in the case of a judgment in default of an acknowledgment of service, any of the conditions in rule 12.3(1) and 12.3(3) was not satisfied;

(b) in the case of a judgment in default of a defence, any of the conditions in rule 12.3(2) and 12.3(3) was not satisfied; or

(c) the whole of the claim was satisfied before judgment was entered.

"13.3 (1) In any other case, the court may set aside or vary a judgment entered under Part 12 if –

(a) the defendant has a real prospect of successfully defending the claim; or

(b) it appears to the court that there is some other good reason why –

(i) the judgment should be set aside or varied; or

(ii) the defendant should be allowed to defend the claim.

"(2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly."

64. A "real prospect of success" has the same meaning as in the test for summary judgment under Part 24, that is that the defence has realistic as opposed to fanciful prospects. The burden is on the defendant to satisfy the Court that there is a good reason why a judgment regularly obtained should be set aside: see the judgment of Mr Hugh Sims QC in *Ince Gordon Dadds LLP v Mellitah Oil & Gas BV* 2022] EWHC 997 (Ch) at [37].

65. Promptness in the context of CPR 13.3(2) means acting with all reasonable celerity in the circumstances: *Ince Gordon Dadds* at [66].

66. Mr Walsh accepts that the Court must, when determining whether to exercise its discretion under CPR 13.3, also consider the test for relief from sanctions; see the discussion in *Ince Gordon Dadds* at [4-9].

67. Accordingly the Court must consider the three-stage test in *Denton v TH White* and the answers to the questions:

(i) is failing to file a defence a serious or significant breach?
(ii) was there a good reason for the failure to file a defence?
(iii) in all the circumstances of the case should the Court exercise its discretion to set the Default Judgment aside so as to enable it to deal justly with the application taking into account the need for litigation to be conducted efficiently and at proportionate costs and to enforce compliance with rules, practice directions and orders?

Summary of Mr Walsh's Position on the Application

68. At the hearing Mr Walsh did not pursue any argument that service of the Underlying Claim at 54 Myrtle Road was not service at his last known residential address and therefore was not good service. It was submitted that by serving at and sending correspondence to that address HMRC are at fault for Mr Walsh not receiving correspondence and that that is a relevant circumstance and constitutes a good reason for the purpose of CPR 13.3(1)(b).

69. Mr Walsh contends that the Default Judgment should be set aside or varied under 13.3(1)(a) because he has a real prospect of successfully defending the claim or under 13.3(1)(b) because there is other good reason to set aside or vary or allow him to defend.

70. Mr Walsh says that he has real prospects of success in defending the Underlying Claim on one or more of the following bases:

(i) unjust enrichment;
(ii) under ECHR, Article 1 Protocol 1 (A1P1): the Defendant's has a right to peaceful enjoyment of his property, and any interference with that right must be lawful and proportionate;
(iii) under ECHR, Article 6 the Defendant has a right to a fair trial, which includes a right to resolution of his issues in a timeous manner;
(iv) it is an abuse of the Court process to recover sums which should never properly have been due in tax; and
(v) the delay in resolving matters is a breach of Mr Walsh's right at common law to a fair trial.

71. Alternatively Mr Walsh says that there is other good reason to set aside or vary the judgment or allow him to defend the claim which is said to be the manifest unfairness of letting HMRC over-recover from him to the significant extent that they are seeking to do in the circumstances of the history of this case, in particular that he did not receive correspondence, was suffering the effects of his bereavement and latterly his own poor health, and has struggled to manage his tax affairs.

72. As to the promptness of the Application Mr Walsh says that he did not delay once he knew about and understood the seriousness of the situation and that he cooperated with HMRC following the March 2013 meeting.

73. As to relief from sanctions Mr Walsh acknowledges the seriousness of his default but relies upon the matters referred to in the previous two paragraphs as an explanation and a reason for the Court to grant relief.

74. Remarkably, notwithstanding that the Application was made in late 2016 Mr Walsh has not produced any draft of a defence to the Underlying Claim.

Summary of HMRC's Position on the Application

75. HMRC's position is that the judgment in the Underlying Claim was regularly obtained, none of Mr Walsh's arguments have real prospects of success and there is no other good reason for granting him relief. HMRC also say that Mr Walsh has failed to act promptly and cannot satisfy the three-stage *Denton* test.

Real prospect of successfully defending the claim

Relevant Statutory Framework

76. The Value Added Tax Act 1994 provides:

(i) at 73(1):

> "Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him."

(ii) at 73(9):

> "Where an amount has been assessed and notified to any person under section 73(1), (2), (3) or (7), (7A) or (7B) above it shall, subject to the provisions of the act as to appeals, be deemed to be an amount of VAT due from him and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced."

(iii) by section 83(1) that an appeal against an assessment shall lie to the tribunal.

77. The Taxes Management Act 1970 provides:

(i) at 29(1) that:

> "If an officer or the Board discovers, as regards any person … and a year of assessment
> (a) that an amount of income tax or capital gains tax ought to have been assessed but has not been assessed…
> The officer or…the Board may make an assessment in the amount or further amount, which ought in their opinion to be charged in order to make good to the Crown the loss of tax."

(ii) at 30A(4) that:

> "After the notice of any such assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts."

(iii)) that the taxpayer's right of appeal against an assessment pursuant to section 1 is, by reason, of section 49A(2)(c), to the tribunal;

(iv) at section 50(10) that where an appeal is notified to the tribunal, the decision of the tribunal on the appeal is final and conclusive; and

(v) at section 100(4) that the determination of a penalty pursuant to section 100(1) may only be altered either in accordance with that section or on appeal.

78. Relevant also are the relief provisions in TMA 1970, as amended on 1 April 2010. The present section 33 of TMA states that Schedule 1AB contains provision for recovery of overpaid income tax and CGT.

79. Paragraph 1 of Schedule 1AB provides:

"(1) This paragraph applies where—

…

(b) a person has been assessed as liable to pay an amount by way of income tax or capital gains tax, or there has been a determination or direction to that effect, but the person believes that the tax is not due.

"(2) The person may make a claim to the Commissioners for repayment or discharge of the amount.

"(3) Paragraph 2 makes provision about cases in which the Commissioners are not liable to give effect to a claim under this Schedule.

…

"(6) The Commissioners are not liable to give relief in respect of a case described in sub-paragraph (1)(a) or (b) except as provided—

(a) by this Schedule and Schedule 1A (following a claim under this paragraph), or

(b) by or under another provision of the Income Tax Acts or an enactment relating to the taxation of capital gains.

"(7) For the purposes of this Schedule, an amount paid by one person on behalf of another is treated as paid by the other person."

80. Paragraph 2 provides:

(1) The Commissioners are not liable to give effect to a claim under this Schedule if or to the extent that the claim falls within a case described in this paragraph (see also paragraphs 3A and 4(5)).

…..

(5) Case D is where the claim is made on grounds that –

(a) have been put to a court or tribunal in the course of an appeal by the claimant relating to the amount paid or liable to be paid

…

(7) Case F is where the amount in question was paid or is liable to be paid -

(a) in consequence of proceedings enforcing the payment of that amount brought against the claimant by Her Majesty's Revenue and Customs, or

(b) in accordance with an agreement between the claimant and Her Majesty's Revenue and Customs settling such proceedings.

81. Paragraph 3A provides:

"(1) This paragraph applies where -

…

(b) relief would be available under this Schedule but for the fact that -

…

(ii) the claim falls within Case F(a) (see paragraph 2(7)(a)), or

(iii) more than 4 years have elapsed since the end of the relevant tax year (see paragraph 3(1)), and

(c) if the claim falls within Case F(a), the person was neither present nor legally represented during the enforcement proceedings in question.

(2) A claim under this Schedule for repayment or discharge of the amount may be made, and effect given to it, despite paragraph 2(4), paragraph 2(7)(a) or paragraph 3(1), as the case may be.
(3) But the Commissioners are not liable to give effect to a claim made in reliance on this paragraph unless conditions A, B and C are met.
(4) Condition A is that in the opinion of the Commissioners it would be unconscionable for the Commissioners to seek to recover the amount (or to withhold repayment of it, if it has already been paid).
(5) Condition B is that the person's affairs (as respects matters concerning the Commissioners) are otherwise up to date or arrangements have been put in place, to the satisfaction of the Commissioners, to bring them up to date so far as possible.
(6) Condition C is that either -

(a) the person has not relied on this paragraph on a previous occasion (whether in respect of the same or a different determination or tax), or (b) the person has done so, but in the exceptional circumstances of the case should be allowed to do so again on the present occasion.

Mr Walsh's Unjust Enrichment Defence

82. Mr Walsh's case is that HMRC would be unjustly enriched if the Default Judgment were not set aside or varied because the assessments, determinations and penalties are overstated and his true liability is such that the amount of the Outstanding Liability should be lower, and, on his best case, so low it they would now be discharged.

83. Mr Walsh places reliance upon the decision of the House of Lords in *Woolwich Equitable Building Society v IRC* [1993] AC 7. In that case the majority decided that there should be a reformulation of the law of restitution so as to recognise a prima facie right of recovery of payment of money paid pursuant to an ultra vires demand by a public authority, although the common law had previously only allowed recovery of money pursuant to an unlawful demand where the payment had been made under a mistake of fact or under limited categories of compulsion.

84. Mr Walsh contends that he falls outside the statutory regime so that a common law restitutionary remedy should be available to him. Secondly he says that paragraph 3A of Schedule 1AB should apply to him.

85. The Schedule 1AB provisions relevant to Mr Walsh's case are as follows:

(i) he was assessed as liable to pay income or capital gains tax but believes it is not due – Para.1(1)(b);
(ii) he may make a claim for discharge - Para.1(2);
(iii) there is no liability to give relief under Para.1(1)(b) except as provided by Schedule 1AB and 1A or another taxation statute – Para.1(6);
(iv) there is no liability to grant relief where the claim is made on grounds that have been put to a court or tribunal in the course of an appeal by Mr Walsh – Para.2(5) Case D(a);
(v) there is no liability to grant relief to the extent that the amount is to be paid in consequence of enforcement proceedings – Para.2(7) Case F(a);
(vi) relief would be available but for the fact the claim is within Case F(a) or more than 4 years have elapsed since the end of the relevant tax year and, in an F(a) case, the person was not present or represented during the proceedings a claim may be made and effect be given to it– Para.3A(1)(b) (ii) or (iii), and (1)(c) and (2);

(vii) there is no liability to give effect to a claim unless conditions A, B and C are met – Para.3A(3);
(viii) condition A: it would be unconscionable to seek to recover;
(ix) condition B: the taxpayer's other taxation affairs are up to date;
(x) condition C: the taxpayer has not relied on this paragraph previously, save in exceptional circumstances.

86. It is submitted on behalf of Mr Walsh that he would qualify to make a claim to relief save, possibly, for Condition B not being met. As to which it is said on his behalf that Mr Walsh is endeavouring to get his other taxation affairs up to date in order to comply with condition B which would enable him to fall within the section. Accordingly, Mr Walsh should, he says, be treated as if he had made a claim to relief and was entitled to the relief to the extent of the Outstanding Liability. To the extent that he is not so treated he says HMRC would be unjustly enriched.

87. Mr Walsh placed reliance on the decision of Proudman J in *Loebler v Revenue and Customs Commissioners* [2015] UKUT 152. In that case the Judge held that the taxpayer could be treated as if his mistaken completion of an option in a form, which led to the tax liability complained of, had been rectified. Mr Walsh says that the court may or should treat matters as if he had made an application for relief under Schedule 1AB and it had been granted and so reduce the amount of the Outstanding Liabilities accordingly.

HMRC's Response on Unjust Enrichment

88. HMRC submit that there is a complete statutory code relating to assessments and how they may be appealed and Schedule 1AB is a complete code relating to possible relief from any alleged over-assessment.

89. HMRC rely on the long-established principle that the Court will not go behind a tax assessment in civil proceedings: *Commissioners of Inland Revenue v Pearlberg* [1953] 1 WLR 331 per Denning LJ.

90. Mr William Trower QC, sitting as a Deputy High Court Judge, said this in The *Commissioners of Her Majesty's Revenue and Customs v Harris* [2011] EWHC 3094 at [12]:

> "Long before the enactment of these provisions, it was an established principle that the bankruptcy court will not go behind a tax assessment for the purposes of determining the existence or amount of a proof of debt (In re Calvert [1899] 2 QB 145). The assessment gives rise to a statutory debt and any challenge is to be made through the machinery laid down in the taxes legislation. The same principle is applicable where the taxpayer seeks to reopen in the context of ordinary High Court proceedings the question of whether he should be treated as indebted to HMRC in respect of the amount of a tax assessment which has not been successfully appealed: *IRC v Pearlberg* [1953] 1 WLR 331 in which Denning LJ summarised the position as follows:
> "If there has been no appeal to the Commissioners the debts become absolute and conclusive and their legal effect cannot be denied.""

91. Arnold J said this in *Vieira v Revenue and Customs Commissioners* [2017] EWHC 936 (Ch); [2017] 4 WLR 86 at [84]:

> "If the taxpayer has exhausted his rights of appeal against the tax assessment or is out of time for appealing, then the extent of the court's discretion is that stated in *Lam* and

> *Chamberlin*: the court will make a bankruptcy order unless, exceptionally, there is sufficient evidence that the assessment is fraudulent or collusive or that there has been some other glaring miscarriage of justice."

92. The principle in Pearlberg has been applied in the context of the statutory appeals process under the Competition Act 1998 by Morgan J in *Lindum Construction Co Ltd v Office of Fair Trading* [2014] EWHC 1613 (Ch); [2014] Bus LR 681 at [95]. In that case, the claimants argued that their common law entitlement to restitution of penalties that were paid to the Office for Fair Trading (OFT) on the basis that the methodology for calculating the penalties was erroneous in law, as determined by the tribunal in appeals brought by others, so the OFT was unjustly enriched by receipt of those sums and that common law right was not affected by the provisions of the Competition Act 1998 dealing with appeals to the tribunal. Morgan J said this:

> "120. A statutory appeal was the exclusive method of challenge available to the claimants. In the absence of a statutory appeal by them, they remain bound by the decision and by the penalties imposed on them. Accordingly, those claimants who have paid the penalty imposed on them are not able to challenge such penalty by bringing a common law claim for its restitution. Lindum, which has not paid the full amount of the penalty imposed on it, remains liable to pay the outstanding amount."
>
> "121. My conclusion can also be expressed in the following way. The claimants cannot, consistently with the statutory scheme, establish the ingredients of a claim in restitution, based on the principle in the *Woolwich Equitable Building Society* case [1993] AC 70. To bring such a claim, the claimants would have to establish that the penalties were unlawfully exacted. The claimants cannot say that the penalties were unlawfully exacted when they were imposed under a statutory scheme which, in the events which have happened, has resulted in those penalties being binding on the claimants. It is therefore lawful for the OFT to receive payment of those penalties. It is also lawful under the scheme for the OFT, in reliance on section 37 of the 1998 Act in particular, to recover any unpaid penalty."

93. HMRC rely also upon the case of *Wallace v HMRC* [2017] EWHC 3115 in which Chief Master Marsh (as he then was) considered the question whether the regime for recovery of overpaid income tax included in the section 33 and Schedule 1AB TMA as introduced in 2010 was a complete statutory scheme which left no room for any common law claim in unjust enrichment.

94. The Chief Master analysed the decision of the Court of Appeal in *Monro v Revenue and Customs Commissioners* [2008] EWCA Civ 306 which had considered the previous overpayment relief regime under the previous section 33 of the TMA. He concluded that the new scheme, like the old, was an exclusive "parallel universe" to the common law and included an express exclusivity provision at paragraph 1(6). In the case before him, where the taxpayer was seeking to avoid the four year limitation period in Schedule 1AB, he struck out the claim in unjust enrichment.

95. The Chief Master pointed out that *Woolwich* was a case in which the tax demand was ultra vires and a nullity so that section 33 was not engaged at all. He also distinguished the case of *Deutsche Morgan Grenfell v IRC [2006] UKHL 449* another case, in which a restitutionary claim was allowed on the basis that it was not concerned with an assessment so that the section 33 provisions were again not engaged.

96. HMRC say that there is no prospect that Mr Walsh could succeed on an unjust enrichment claim: his Appeal has not been allowed to proceed out of time and he remains bound by the assessments and determinations, so he remains liable to pay the Outstanding Liability. Mr Walsh could not succeed on a case that HMRC have been unjustly enriched at his expense.

97. Further HMRC say the assessments and determinations are not demonstrably incorrect. The assessments were based on estimates because Mr Walsh did not provide disclosure, as the FTT Judgment records. His application for permission to appeal out of time was refused in part on the basis that HMRC's officers had acted correctly in making assessments. The FTT Judgment records that the information provided by Mr Walsh to Mr Sobell on which Mr Sobell's opinion as to Mr Walsh's liabilities was based was not entirely reliable and that the merits of the Appeal were not sufficiently clear to have a role to play in determining whether an extension of time should be granted. The statutory machinery for challenging the assessments and penalties has been exhausted. The tax is a debt now due.

98. As to the argument based on an analogy with the unmade claim for rectification in the *Loebler* case: HMRC say that it cannot be extended to encompass the situation where a taxpayer has not made an application pursuant to the statutory scheme, particularly where the application was presumably not made because Mr Walsh must know it would be doomed to fail. Even if Mr Walsh is not caught by case D because his claim has already been put to the FTT, he is certainly not compliant with Condition B. Mr Walsh has made no application and there is no likelihood any such application would succeed.

Unjust Enrichment Defence – Analysis and Conclusions

99. Mr Walsh's case appears to be that the Outstanding Liability would be lower if he had provided full information to HMRC at an earlier time. However HMRC's obligation under the assessment provisions where information has not been provided is to exercise its judgment on the basis of the information available, without being Wednesbury unreasonable: *Van Boeckel* and *Rahman* as referred to in the FTT Judgment.

100. The FTT refused permission to Mr Walsh to advance his appeal out of time. The remaining assessments and determinations that underlie the Outstanding Liability are statutory debts which cannot be challenged in the Underlying Claim as *Pearlberg* and the other authorities to which HMRC referred make plain. Put another way as Morgan J did in *Lindum* Mr Walsh cannot consistently with the statutory scheme make out a case in unjust enrichment. To do so he would have to establish that the assessments were unlawful.

101. I do not consider that there is any basis here for distinguishing the analysis of Chief Master Marsh in *Wallace*, which followed what he described as the powerful basis for the analysis of the previous regime by the Court of Appeal in *Munro*. The section 1AB scheme is a further bar to any restitutionary claim.

102. Even if that were not correct, Mr Walsh has not made any claim pursuant to the Schedule 1AB statutory scheme for relief or discharge, let alone a successful one. If such an application were made it would fall to be determined by HMRC pursuant to the terms of the statutory scheme. In circumstances where it is plain, that even if case D does not apply, Mr Walsh cannot presently satisfy Condition B and so any claim for relief or discharge would fail.

103. I do not accept that it is possible to apply *Loebler* by analogy to circumvent the statutory scheme. It would be quite different treating a narrowly circumscribed statutory route to relief as if it had been made and succeeded from treating a claim to rectification as though it had been made, when the plain fact is that Mr Walsh would be unable to meet at least one of the pre-conditions to eligibility within the statutory scheme.

104. Even if, contrary to my conclusions, an unjust enrichment defence to the Underlying Claim were available to Mr Walsh, his case that the assessments are wrong is based on Mr Sobell's November 2016 report, which the FTT concluded could not be accepted as entirely reliable. The assessments were made in accordance with the statutory scheme. The submission that they are wild estimates or made other than by HMRC acting entirely in accordance with the scheme and applying appropriate judgment in circumstances where the underlying evidence was incomplete because of Mr Walsh's own failure has no convincing basis on the evidence.

105. I conclude that there is no real prospect of Mr Walsh succeeding in defending the Underlying Claim on the basis of an unjust enrichment argument.

Mr Walsh's Defence based on ECHR, A1P1

106. A1P1 of ECHR provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

107. Mr Walsh relies upon the following in aid of his argument that he has a defence to the Underlying Claim based on his A1P1 right to peaceful enjoyment of his property:

(i) any interference must fulfil certain criteria, which are to comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised: *Beyeler v. Italy* [2002] ECHR 33202/96 [108-114];

(ii) the existence of a legal basis in domestic law is not sufficient to satisfy the principle of lawfulness, the legal basis must also be compatible with the rule of law and must provide freedom from or guarantees against arbitrariness: *East West Alliance Limited v. Ukraine* [2014] ECHR 19336/04) at [67]

(iii) the principle of lawfulness also presupposes that the applicable provisions of domestic law are "sufficiently accessible, precise and foreseeable in their application": *Lekić v. Slovenia* [2018] ECHR 36480/07 [95];

(iv) Foreseeability requires the relevant law to be formulated with sufficient precision to enable citizens to regulate their conduct by foreseeing, to a degree that is reasonable under the circumstances, the consequences which a given action may entail. Although the consequences need not be foreseeable with absolute certainty, since excessive rigidity is undesirable: *Centro Europa 7 S.r.1. and Di Stefano v. Italy* [2012] ECHR 38433/09 [141];

(v) *Lelas v. Croatia* [2010] ECHR 55555/08 means that in relation to arbitrariness, the requirement of foreseeability is not met if the application or interpretation of legislation has been unexpected, overly broad, or bordering on the arbitrary;

(vi) the second limb of A1P1, expressly provides for an exception as regards the payment of taxes or other contributions however, such justification is required to strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, or in other words, there must be a reasonable relationship of proportionality between the means employed and the aims pursued: *Bulves AD v Bulgaria* [2009] STC 1193, [62].

108. It is submitted on behalf of Mr Walsh that the process of assessment is not proportional and is arbitrary and unforeseeable. There is no indication in law how any estimate of taxation will be made. The safeguards of the FTT appeal provisions and the relief provisions are not sufficient to combat the arbitrariness of the estimation process.

109. It is submitted that an over-estimation of the tax due from him does not strike a fair balance between Mr Walsh and the general community because the means employed exceed those necessary to secure the payment of the correct tax and that amounts to an interference with Mr Walsh's right to his property in the form of the excess tax.

110. Mr Walsh submits that the estimation process has been wrongly used in a punitive manner. He says that any punishment should only be in accordance with the penalty and interest regime that exists to compensate HMRC for the failure to pay tax on time and to dissuade taxpayers from failing to comply with the relevant legislation. He says that there is no justification for insisting that amounts be paid that are not owed according to the legislation.

111. To the extent that it is said that the "proper" amount of tax is the amount recorded in the assessments no longer subject to challenge, it is submitted that that is not compatible with the principle of lawfulness because the excessive interference with property is not foreseeable and is arbitrary. Nor, it is said, is it compatible with the principle of proportionality since it is not a means of ensuring compliance with the legislation but a means of requiring Mr Walsh to pay more than is required by the legislation. The law should only allow the charging of a reasonable estimate.

112. It is said that the estimation process is simply not compatible with the Defendant's A1P1 rights.

HMRC's Response on A1P1

113. HMRC do not dispute that A1P1 is engaged if any interference or deprivation of property is unlawful, arbitrary, disproportionate or unforeseeable.

114. Mr Walsh must rely on section 6 of the Human Rights Act 1998 to say that it would be unlawful for HMRC to act incompatibly with the ECHR.

115. The Underlying Claim arises from rights invested in HMRC by primary legislation. Parliament has already struck the appropriate balance between Mr Walsh and the community. In those circumstances, it cannot have been unlawful for HMRC to issue a claim for the sums due on the assessments and determinations.

116. Mr Walsh's submissions on this aspect veer into suggesting that the statutory scheme is unlawful, in circumstances where there is no challenge to the scheme and the Court must therefore proceed on the footing that the scheme is proper and lawful.

117. HMRC point out that the language of the cases relied upon by Mr Walsh is not mandatory or prescriptive.

118. Counsel for HMRC referred me to the judgment of McCombe LJ in *R (Rowe and others) v Revenue and Customs Commissioners* [2018] 1 WLR 3039 at [197], where the Judge said:

> "As Simler J also pointed out, at para 139, in areas of taxation legislation and policies, the contracting states have a wide margin of appreciation: *Bulves AD v Bulgaria* [2009] STC 1193, at para 63. In such matters, the public authority is better placed than the courts to determine how community interests and those of the individual are to be balanced: again *James v United Kingdom* (1986) 8 EHRR 23, para 50. Tax measures are entitled to particular deference: see per Barling J in *Allan v Revenue and Customs* Comrs [2015] STC 890 (emphasis added)"

119. The submission that the assessments are arbitrary or wild estimates has already been rejected by the FTT. The Judge found that Mr Walsh was treated by its officers in the same way as they treated others.

120. The FTT's refusal of permission to appeal was based on HMRC having acted correctly. The FTT concluded that the information provided to Mr Sobell by Mr Walsh was not wholly reliable and the claimed merits of Mr Walsh's position were found not to be sufficiently clear to play a role in the FTT's decision.

121. If the merits of Mr Walsh's case that the liabilities are so out of line with any true position were as strong as is suggested those merits would have been pressed in the FTT and would have had a bearing on the outcome, which they did not.

122. The legislation provides that if an individual taxpayer does not provide the required returns or information then HMRC will make an estimate. That is sufficient to comply with the foreseeability requirements. The protection given is an appeal to the FTT the possibility of a further appeal if the merits could be established to a sufficient degree.

123. It is not unlawful to resort to estimates and a process of estimates does not make the process arbitrary. It is hard to see how anything other than estimates could form the basis of assessments if a taxpayer fails to provide information. The safeguard is the element of judgment that must be applied.

124. HMRC dispute Mr Walsh's characterisation of the process of assessment as a punishment, rather it is a consequence of the statutory scheme which draws a fair balance between the individual and the state where the taxpayer has not provided information.

A1P1 Analysis and Conclusions

125. HMRC accepted that four of their assessments and determinations were wrong on the basis of Mr Sobell's report. HMRC stand by the other assessments, and the FTT refused Mr Walsh permission to appeal out of time against them.

126. Mr Walsh had the opportunity to run his A1P1 argument in the FTT or on an appeal from that decision but did not do so.

127. The balance is struck by Parliament in enacting the statutory scheme as to what happens when a taxpayer fails to provide information from which his liability may be accurately determined. HMRC must proceed by estimates, must give notice of those estimates with a time limit for the bringing of any appeal and provisions for seeking extensions of time. All that is part of the lawful legislative scheme and is not incompatible with A1P1.

128. In the absence of full information provided by the taxpayer HMRC can inevitably only estimate taxation liabilities by reference to such information as has been provided and such information as may be available from other sources. That is clearly foreseeable and not arbitrary. It is also proportionate to proceed in that way. HMRC cannot be expected to do the taxpayer's work for him.

129. The first safeguard for the taxpayer is the element of judgment that must be applied in making estimates. The FTT found that HMRC did not make deliberately careless or unfair decisions in making the assessments and treated Mr Walsh in the same way as it treated other taxpayers. Mr Sobell's view was that the estimates were understandable, given the information available to HMRC.

130. The further safeguards for taxpayers, including Mr Walsh, are the ability to seek a review of any assessments made, the ability to appeal to the FTT and the ability to appeal from the FTT. In the interests of finality there are time limits for all those steps, but it is also possible for the taxpayer to request extra time if the circumstances warrant it, as Mr Walsh sought unsuccessfully to do by his application to the FTT to appeal out of time. In addition, the relief provisions in Schedule 1AB are available if the conditions are met. These are adequate safeguards to combat any arbitrariness or lack of foreseeability of the estimation process.

131. Where a taxpayer fails to engage with HMRC as Mr Walsh has done, notwithstanding that he was aware by at latest March 2013 that he had serious taxation problems, for HMRC to proceed on the basis of estimates is the only way to strike a fair balance between Mr Walsh and the general community. That means does not exceed the means necessary; it is the only means to secure payment of tax.

132. If, as the FTT found, the estimation process has been lawfully carried out it leads to the statutory debts upon which HMRC sued Mr Walsh in the Underlying Claim. There is no room left to argue that the debt is excessive and that there is any interference with Mr Walsh's A1P1 rights.

133. I do not consider that Mr Walsh has any real prospect of defending the Underlying Claim on the basis of an argument that his A1P1 rights have been unlawfully infringed.

Other Good Reasons

Mr Walsh's Argument on Delay

134. Mr Walsh relies upon ECHR, Article 6 as requiring his case to be heard within a reasonable time and relies on his common law right to a fair trial. It is pointed out on his behalf that caselaw emphasises the importance of administering justice without delays which

might jeopardise its effectiveness and credibility: *H. v. France*, [1992] ECHR 18020/9, [58]; *Katte Klitsche de la Grange v. Italy* [1994] ECHR 12539/86, [61]: *Scordino v. Italy (no. 1) Application no*. 36813/97, [224]. It is submitted that an accumulation of breaches by the State constitutes a practice that is incompatible with the Convention: *Bottazzi v. Ita*ly [1999] ECHR 34884/97, [22].

135. It is submitted on behalf of Mr Walsh that "the State" includes the Courts and HMRC, encompassing delays that are both those of the Court and those that are HMRC's. It is submitted that the Defendant has not received a fair trial because of the delays (excluding delays caused by the Defendant):

(i) it is said that the whole of the proceedings must be taken into account: *König v. Germany*, App. No. 6232/73 [98] so that the proceedings before the FTT are also part of the "proceedings" for these purposes. This also includes the period of HMRC's investigation: *Janosevic v. Sweden and Västberga Taxi Aktiebolag* application 34619/97)

(ii) there is said to be a significant delay from the start of HMRC's investigation not only to the hearing but also to the Judgment and the delay is said to be attributable to HMRC's conduct in the period, so that the Defendant has not had a fair assessment of his position;

(iii) the cumulative delays are said to result in a reasonable time being exceeded: *Deumeland v. Germany*, [1986] ECHR 9384/81, [90];

(iv) "Long periods during which the proceedings ... stagnate..." without any explanations being forthcoming are not acceptable *Beaumartin v. France*, [1994] ECHR 15287/89 [33]; and

(v) Mr Walsh is not to be blamed for making full use of the remedies available to him : *Erkner and Hofauer v. Austria* [1987] ECHR 9616/81, [68]

136. In all these circumstances, it is said to be clear that Mr Walsh's Article 6 rights and his rights at common law to a fair trial have been compromised.

HMRC's Argument on Delay

137. HMRC say that Mr Walsh's Article 6 complaint can only relate to the period from issue of the Underlying Claim on 24 January 2014 either until the date of the Default Judgment on 10 March 2014 or, possibly, until the FCOs were made in July 2014.

138. The Application is to set aside the Default Judgment entered on the Underlying Claim. Any argument that there was a delay which amounts to "some other good reason" for setting aside the Default Judgment, depends on identifying delay which relates to the Underlying Claim.

139. HMRC's short answer to Mr Walsh's complaint is that there was no delay between the issue of the Underlying Claim and the entry of the Default Judgment: the period from issue to judgment was 45 days.

140. Accordingly there was no delay between the issue of the Underlying Claim and the obtaining of the Default Judgment and there can be no "good reason" why the Default Judgment obtained on the Underlying Claim should be set aside. Subsequent delay (which HMRC do not accept) in enforcement of the Default Judgment cannot be a good reason to set aside that judgment.

141. Mr Walsh sought the stay of the Application and the Claim pending the outcome of his FTT appeal. Once the appeal period had expired it was not unreasonable for HMRC to wait to see if Mr Walsh would pay. In any event, at all times thereafter Mr Walsh was in as good a position as HMRC to ensure that the Application was brought on for hearing. Instead he consensually with HMRC postponed matters until 2023.

142. Therefore, it is said, the Court does not need to consider Article 6 of the ECHR and Mr Walsh's rights to a fair trial at common law. For the avoidance of doubt HMRC say:

(i) delay, even a long delay, cannot by itself be categorised as an abuse of process without there being some additional factor which transforms the delay into an abuse: *Wearn (t/a Jonathan Wearn Productions) v HNH International Holdings Ltd* [2014] EWHC 3542 (Ch) at [67] and [69-[72] per Barling J. Critically, a defendant cannot let time go by without taking action so where delay does cause prejudice to him he cannot say that is entirely the fault of the claimant:

(a) there has not been a long delay in this case. HMRC have progressed the Application (and the Claim) cooperatively with Mr Walsh, who repeatedly sought extensions of Court deadlines and brought the Appeal, which was itself not progressed rapidly. After the conclusion of the Appeal and time to appeal elapsing, delays were attributable to a combination of COVID-19 and difficulties in communicating with the Court. After directions were given in September 2021, the parties have by agreement varied the deadlines twice;

(b) there are no aggravating factors such as warehousing by HMRC. Mr Walsh's declining health is unfortunate but does not amount to an abuse of process on HMRC's part, especially where, had the Appeal not been brought, the matter could have been dealt with at the hearing set down on 24 February 2017, that is before his prostate cancer diagnosis and his stroke.

(ii) Article 6.1 of the ECHR provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Mr Walsh cannot complain that delay subsequent to the Default Judgment prejudices his entitlement to a fair hearing on the Underlying Claim. In the period post-Default Judgment the points in (i)(a) and (b) apply.

143. HMRC point out that it cannot logically be said by Mr Walsh that a period of time during which the Application has been on foot can be a delay which affords any ground for complaint by him or a good reason to set aside the Underlying Judgment. The longer that period has gone on the further into the future has receded the trial that he says he wants. That would amount to saying that the Default Judgment should be set aside in order to have the argument that Mr Walsh says it is too late to fairly argue.

Conclusions on Delay

144. To the extent that I should take account of the investigative stage of HMRC's processes from the sending of the first letters in June 2010 until the issue of the assessments in October 2013. I am unable to conclude that there was any delay for which HMRC rather than Mr Walsh could be blamed or that the period impacted on Mr Walsh's right to a fair trial.

145. HMRC sought to engage with Mr Walsh by corresponding at an appropriate address as the FTT concluded. Even after he had become aware of HMRC's interest in his affairs and contacted them in March 2013 and at the meeting was told of the serious consequences of not engaging Mr Walsh failed to fully cooperate, so that the assessments that were made in October 2013 were inevitable. This period was not one of delay which prejudiced Mr

Walsh's right to a fair trial, rather it was a period in which it remained open to Mr Walsh to participate in the process of establishing his liability, but he chose not to take that opportunity.

146. The further period of some 3 months before issue of the Underlying Claim was a reasonable one to allow Mr Walsh to engage with the assessments and, if he disagreed, request a review or seek to appeal, again giving Mr Walsh the opportunity to participate in the process.

147. The Underlying Claim was issued and Default Judgment entered within 45 days and the FCOs made just outside a total of 6 months from issue. This period was not one in which I can accept that there was any delay.

148. I accept HMRC's submission that the period since the Default Judgment, or certainly since the making of the FCOs, is not relevant to the question of a fair trial of the Underlying Claim and could not amount to a good reason for setting aside that judgment. If it were otherwise there would be a perverse incentive for judgment debtors to drag out applications to set aside judgments in order to enable them to argue that the judgment debt should not be enforced against them.

149. No jeopardy to the effectiveness or credibility of the Default Judgment could arise because of any delay subsequent to its date

150. If I am wrong about delay since the date of the Default Judgment or the FCOs it nevertheless seems to me that the period since the date of the Default Judgment or the FCOs cannot amount to a period in which the proceedings have stagnated. Mr Walsh sought the stay of the Application while he pursued the remedy given to him by statute of making an appeal to the FTT and thereafter consensually agreed to postponements of the final determination of the Application.

151. Mr Walsh's position is that he has been deprived by delay of the right to a fair trial under Article 6 or at common law. I do not understand that the argument can be advanced as amounting to a defence with a real prospect of success, rather than as a good reason under section 13(3)(b) which would have the effect of allowing Mr Walsh to defend the Underlying Claim. I consider illogical an argument that subsequent delay can be prayed in aid of the remedy of setting aside the Default Judgment, absent some realistic defence to the Underlying Claim, so that Mr Walsh may defend the Underlying Claim at a trial that will necessarily take place at some further time in the future.

Mr Walsh's Argument on Abuse of Process

152. Mr Walsh relies on the passage in Lord Diplock's speech in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at page 536C that a court should entertain an abuse of process argument:-

> "... to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its rules of procedure, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.

153. Mr Walsh's position is simply that to allow HMRC to over-recover brings the administration of justice into disrepute and is manifestly unfair.

154. The alleged unfairness relied on includes HMRC's failure to bring communications to Mr Walsh's attention, Mr Walsh's vulnerability following his bereavement and his own poor health.

HMRC on Abuse of Process

155. HMRC say that there is no unfairness. The rules have been followed. HMRC did its best to engage with Mr Walsh. Mr Walsh failed to provide a channel by which communication might be kept open. His attention was only engaged once the Underlying Claim had been made. In the absence of arguable let alone realistic defences to the claim there is no good reason to set aside or allow Mr Walsh to defend.

Conclusions on Abuse of Process

156. The statutory provisions have resulted in the amount of the Outstanding Liability. In the absence of a defence with a real prospect of success Mr Walsh's contention that not setting aside the Default Judgment would result in over-recovery so as to bring the administration of justice into disrepute cannot succeed.

157. As to Mr Walsh not receiving communications, Mr Walsh was entirely the author of his own misfortune in that regard. He deliberately did not give an address for correspondence at the March 2013 meeting and positively asserted that he had no address. The power to make contact with HMRC was in his hands in circumstances where he knew that he had issues to address.

158. As the FTT judgment recorded Mr Walsh's reliance upon the effects of his bereavement as resulting in HMRC's processes being unfair is entirely undermined by the manner in which he set up and conducted his letting business in the years 2008-2016.

159. Mr Walsh's own health difficulties in recent years cannot be a good reason to set aside a Default Judgment dating from some years before those health problems.

Conclusion on Good Reasons

160. I am not satisfied, in the absence of any defences with real prospects of success, that any of reasons Mr Walsh advances amount whether separately or together to any good reason to set aside or vary the Default Judgment or allow Mr Walsh to defend the Underlying Claim.

Promptness

Mr Walsh's Position

161. Mr Walsh's evidence is that he became aware of the Claim on 8 August 2016 and that he acted promptly thereafter. Mr Walsh's explanation for the delay appears to be that Mr Sobell did not receive copies of the "HMRC Correspondence" until 22 September and there was a considerable amount of work required to prepare his report.

HMRC's Position

162. HMRC say that there is reason to doubt that it is the case that Mr Walsh only became aware of the Default Judgment on 8 August 2016. Mr Walsh had returned to the UK by October 2015 and had visited almost monthly prior to that as the FTT Judgment records. The FTT judgment also records that Mr Walsh knew the tenant who moved into Myrtle Road after it was refurbished and that the tenant was still living there at the time of the FTT hearing. HMRC submit that it is inherently incredible that Mr Walsh did not receive

documentation making him aware of the Underlying Claim before Mr Mercer handed him the large letter from HMRC on 5 August 2016.

163. HMRC submit that even if Mr Walsh's claim as to the time of his knowledge is correct, the Application was still not made with all celerity. It took three months from 8 August 2016 to 11 November 2016 for Mr Walsh to bring the Application. Mr Walsh has not identified what specific correspondence Mr Sobell did not have available to enable the preparation of his report.

164. Mr Walsh was given the opportunity to take copies of HMRC's documents away on 8 March 2013 but chose not to do so. Mr Walsh did collect a bundle of documents, including the assessments in August 2014 and handed them to "Paul" but failed to take action once it had become apparent to him that Paul was not progressing matters on his behalf. In the circumstances Mr Walsh had had all the information which he needed before 22 September 2016 so that Mr Walsh cannot blame anyone but himself for delay in Mr Sobell preparing his report. Finally, Mr Walsh made a witness statement opposing the Claim on 30 September 2016 and there is no reason why the Application could not have been made at the same time.

Conclusions on Promptness

165. I have some sympathy with HMRC's scepticism about the time at which Mr Walsh first became aware of the Claim, but I have not heard him cross-examined and the FTT Judgment does not contain any finding that he did have knowledge of the Default Judgment earlier than 8 August 2016.

166. The question then is did Mr Walsh act sufficiently promptly by waiting 3 months to make the Application? It was sufficiently clear to him that matters were serious that he had instructed legal and accountancy advisers by no later than 22 September, which is the date at which Mr Gilbert had instructed Mr Sobell and Mr Sobell was provided with the HMRC papers. To the extent that Mr Sobell was preparing a report as to Mr Walsh's claimed true indebtedness, the material he needed was in the knowledge of Mr Walsh and not in the HMRC papers. The HMRC papers would only have provided information about the estimation process. On 30 September 2016 Mr Walsh signed a witness statement in which he said he had been advised that that his liabilities had been vastly overstated. Even if Mr Walsh could not have acted before 30 September, he could and should have made the Application on that date, by which he knew enough to take the formal step of applying to set aside the Default Judgment. There is no explanation for the further six weeks of delay.

167. Accordingly the answer to the question whether Mr Walsh acted promptly must be answered in the negative.

Relief from Sanction

Mr Walsh's Position

168. Mr Walsh seems to accept that the failure to file an acknowledgement of service or defence was serious. He relies upon the alleged communication failures by HMRC and his personal circumstances as a good reason for the failure. In Mr Walsh's witness statement of 11 November 2016 he says that it would be just in all the circumstances because of the "vast disparity between the judgment debt and the amount of my assessed liabilities". (I take him to refer to the difference between the Outstanding Liability and the amount Mr Sobell's report indicates might be his liability (less the proceeds of the 2 properties sold)).

HMRC's Position

169. HMRC say Mr Walsh cannot meet the requirements for the test for relief from sanctions:

(i) the seriousness of the breach is self-evident;

(ii) there is no good reason for the failure. As the FTT concluded Mr Walsh knew no later than the meeting in March 2013 that he had issues to address and had the opportunity to take away copies of relevant documentation. He failed on that occasion to offer a channel by which he might be contacted. The assessments were sent to the correct address. Delay in Mr Walsh becoming aware of the Underlying Claim is due to his own failure to put in place appropriate systems for HMRC to contact him, in circumstances where he knew he had tax issues to address. Mr Walsh had Ms Luk's contact details as is apparent from the fact that he was able to use them to make arrangements to meet in March 2013 and to collect copies of the assessments in August 2014. He could have used them again at any time to make contact with HMRC or to provide a means of contact;

(iii) Mr Walsh's reliance upon a "vast disparity between the judgment debt and the amount of "my assessed liabilities" seems to require the Court to look behind the assessments and determinations. To set aside the Default Judgment in favour of HMRC many years after it was obtained would be unjust given the public interest in the timely and cost efficient collection of taxes.

Conclusions on Relief From Sanction

170. In relation to his serious default in failing to file an acknowledgment of service and filing a defence Mr Walsh relies as justifications on reasons which I have already decided do not amount to good reasons to set aside or vary the Default Judgment or allow Mr Walsh to defend the underlying claim. For the same reasons I conclude that those reasons are not sufficient to satisfy the second limb of the Denton test. In relation to the third limb, Mr Walsh is again seeking to argue that he has a good defence to the quantum of the Underlying Claim notwithstanding that it is based on regular statutory debts. In all the circumstances of the case and the time that passed between entry of the Default Judgment and the making of the Application, the time that has passed since then and the lack of any meritorious defence would be make the granting of relief unfair to HMRC.

171. I conclude that Mr Walsh is not entitled to relief from the sanction of Default Judgment having been entered.

Conclusions on the Application

172. For the reasons I have explained I do not consider that Mr Walsh has any real prospect of successfully defending the Underlying Claim on any of the grounds which he advances.

173. I also do not consider that any reason advanced by Mr Walsh amounts to a good reason to set aside or vary the Default Judgment or allow him to defend the Underlying Claim.

174. Even if I were wrong about either of those matters Mr Walsh has the further difficulty that he failed to act promptly in making his Application and cannot satisfy me that he should be entitled to relief from sanction.

175. I will dismiss the Application.

The Claim - Enforcement

176. Section 3(4) of the Charging Orders Act 1979 provides that a charge imposed by a charging order shall have the like effect and shall be enforceable in the same courts and in the same manner as an equitable charge created by the debtor by writing under his hand.

177. Fisher and Lightwood's Law of Mortgage 15th edition at 31.27 says this:

> "A charge imposed by a charging order made under the Charging Orders Act 1979 has the like effect and is enforceable in the same courts and in the same manner as an equitable charge created by the debtor by writing under his hand. The normal remedy for the chargee under an equitable charge under hand is an order for sale, although the court may also appoint a receiver."

178. CPR 73.10C provides:

> "(1) Subject to the provisions of any enactment, the court may, upon a claim by a person who has obtained a charging order over an interest in property, order the sale of the property to enforce the charging order…"

179. Article 8 of the ECHR provides that:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

180. His Honour Judge Purle QC (sitting as a Judge of the High Court) considered the compatibility of the power to enforce a charging order with the ECHR in *Close Finance Ltd v Pile* [2008] EWHC 1580 (Ch). He said at [12-13]:

> "The Convention right in question is the respect for private and family life and home and the enjoyment of possessions. It is of course in accordance with the law that a charging order has been made and, to the extent that it is now enforced, that will be in accordance with the law also. It will also be in the public interest to enforce charging orders generally because of the economic importance of ensuring that there is an efficient machinery for the enforcement of debt obligations, even though, unlike in the case of a legal mortgagee, this is not a debt obligation which was voluntarily provided as a secured obligation".
> "13.In those circumstances, I am quite satisfied that the power to enforce a charging order is compatible with the Convention. Indeed, the contrary is not argued. I am also satisfied, however, that, in applying the court's discretion, it must be applied in a way which gives due respect to the right of all those living in the property, not just the debtors, to have respect for their family life and their home. Against that must be weighed the rights of the chargee under the equitable charge, that is, to say the Claimant, not to have to wait indefinitely for payment or to have no means of enforcing its security."

Mr Walsh's Position on the Claim

181. Mr Walsh contends that enforcement of the FCOs would be a breach of his A1P1 rights and/or would be a breach of his Article 8 rights.

HMRC's Position on the Claim

182. HMRC point out that the Underlying Claim arises from rights HMRC has by virtue of primary legislation. That legislation was passed by Parliament having struck the appropriate balance between the rights of the individual taxpayer and the general interest in the collection of tax. In those circumstances it cannot have been unlawful for HMRC to issue the Underlying Claim and secure a Default Judgment.

183. Further HMRC say that obtaining the FCOs and then orders for sale of the Properties is a continuation of HMRC's lawful action. The ability to obtain a charging order to secure a judgment debt, and the process of enforcement arises from primary legislation and again Parliament has already struck the appropriate balance. The second limb of A1P1 specifically envisages the control of the use of property to secure the payment of taxes.

184. Having obtained the FCOs HMRC are in the position of a secured creditor. They have never been under any obligation to act to enforce their security and would have been entitled to simply await a sale by Mr Walsh, without any limitation period applying. The Claim (to enforce by sale) is a new and separate claim to the Underlying Claim with which the Application is concerned: *Yorkshire Bank Finance v Mulhall* [2008] EWCA Civ 1156.

185. Article 8 can only be engaged in respect of Mr Walsh's home i.e. Woodways. Although it is a draconian step to order a sale of a family home, it may be justified where, in reality, without sale the judgment debt would not be paid. For all the other of Mr Walsh's properties, Article 8 is irrelevant.

186. If other properties are tenanted they may be sold subject to those tenancies or after invoking the applicable process to obtain vacant possession.

187. As to Woodways little is said in Mr Walsh's evidence about the position of his daughter, son-in-law and grandchildren, other than that they live at Woodways. HMRC accept that Woodways is Mr Walsh's home and also that it appears Woodways has been adapted for his current medical condition.

188. Mr Walsh's properties subject to the FCOs, excluding, Woodways were valued in March 2022 by HMRC at an aggregate of £2,775,000. It appears that the Outstanding Liability would likely be cleared by sale or some or all of those properties other than Woodways.

189. HMRC seek an order for sale of all Mr Walsh's properties subject to the FCOs, including Woodways. They say Mr Walsh's Article 8 rights can be given effect by deferring the date for possession of Woodways by a year because:

(i) the deferral of the date of possession would allow for some or all of Mr Walsh's properties to be sold before Woodways so that HMRC can establish whether there is any shortfall on the Outstanding Liabilities prior to selling Woodways;

(ii) it would be unfair and unjust to order only one or more of Mr Walsh's remaining properties to be sold or to defer the sale of Woodways pending sale of those Properties given:

(a) the very long delay in Mr Walsh paying his tax liabilities;

(b) the very long delay in the reduction of the Judgment Debt since the Default Judgment was obtained in circumstances where Mr Walsh has been aware since March 2013 of his outstanding liabilities to HMRC;

(c) Mr Walsh's failure to sell more than two of the properties notwithstanding the length of time that has passed since he expressed an intention in his November 2016 witness statement to sell properties to meet his liability;
(d) the possibility that the current values of Mr Walsh's properties are lower than the estimated values obtained by HMRC in March 2022 given the uncertainties of the present state of the property market;
(e) the certificate of debt does not include interest on the Default Judgment or HMRC's costs of the Claim or the Application which also have to be taken into account;
(f) several of the other properties are occupied by tenants under assured shorthold tenancies, which may make sales less than straightforward; and
(g) sale of some or all of the properties appears to be the only way that HMRC will ever recover the Judgment Debt.

190. In those circumstances, HMRC asks that the Court should make orders for sale for all of the Properties bar Woodways and in respect of Woodways deferring the date for possession by a year.

Conclusions on the Claim

191. HMRC have FCOs over nine properties remaining in the ownership of Mr Walsh. Of those properties one, Woodways, is Mr Walsh's home and the home of other members of his family.

192. I have already explained that Mr Walsh's A1P1 rights would not have given him a defence to the Underlying Claim. For the same reasons I do not consider that those rights amount to grounds for resisting Orders for sale of any of Mr Walsh's properties subject to the FCOs. It is only in respect of Woodways that Mr Walsh's Article 8 rights are or may be engaged.

193. In view of the amount of the debt owed to HMRC, the period for which it has been outstanding and the lack of any realistic possibility that it will be paid other than by sale of Mr Walsh's properties subject to the FCOs I will make orders for sale of those properties other than Woodways.

194. If sufficient proceeds to clear all sums that Mr Walsh owes to HMRC are realised by sales of some or all of Mr Walsh's properties subject to the FCOs apart from Woodways, which seems at least possible on the figures, the question of any order for sale of Woodways being made will not arise and the question how Mr Walsh's Article 8 rights should be balanced with HMRC's rights will never fall to be determined.

195. I will adjourn the Claim so far as it relates to Woodways for a year.

196. This judgment will be handed down remotely and without attendance on 13 September 2023at 9:30 am. If consequential matters cannot be agreed there will be a further hearing held by MS Teams.