Neutral Citation Number: [2021] EWHC 3237 (QB)

Claim No: QB-2020-004697 & QB-2020-004698

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

The Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 19 November 2021

BEFORE:

MASTER DAGNALL

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BETWEEN:

DONATAS LABEIKIS AND OTHERS

-and-

EDUARDO KANG KIM AND OTHERS

Claimants

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Defendant

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SETU KAMAL (of Tax Chambers, 15 Old Square, London, WC2A 3UE) appeared on behalf of the Claimants.

SADIYA CHOUDHURY and SAM CHANDLER (Instructed by Solicitors Office and Legal Services, HMRC, 14 Westfield Avenue, Stratford, London E20 1HZ) appeared on behalf of the Defendant.

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APPROVED JUDGMENT

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No of folios: 466
No of words: 33,498

(Friday, 19 November 2021)

THE MASTER:

Introduction

1. This is my judgment in two linked claims on the defendant's (that is HMRC's) application brought by application notice dated 12 February 2021 to dispute the jurisdiction of this court and to seek to strike out for abuse of process. The claims are identical in practice and are brought by a substantial number of different claimants ("the taxpayers") under claim forms issued in 2020 under QB numbers 04697 and 04698 on 31 December 2020. It is said that it was done on that date to avoid potential prejudice arising from the withdrawal arrangements regarding Brexit and their possible effect on potential damages claims.

2. Each of the claim forms were a Part 8 claim form and they each seek declarations set out in the Particulars of Claim and submit that something which I will come to call "the loan charge" as defined in the Particulars of Claim is both invalid and incompatible with European law and a disguised criminal charge for the purposes of Article 6 of the Human Rights Convention.

3. One of the declarations sought is a declaration that the claimant should be entitled to recover from the UK Government any actual loss arising by reason of those matters, although there is no specific claim for damages, a matter to which I will return in due course.

4. The defendants, HMRC, contend that, firstly, this is a matter for the First-Tier Tribunal (Tax Chamber) and not for the courts. It is common ground that for the taxpayer to be able to bring this dispute to the First-Tier Tribunal would involve the Revenue first having either raised an assessment or at least having started an inquiry and where it is again common ground that that has not yet occurred. The Revenue's primary case is that the claimant should wait for that to occur and then bring the matter, should they so choose, to the First-Tier Tribunal.

5. The Revenue's second position is that, if that first is wrong and the matter is for the courts to decide rather than the Tribunal, then the appropriate procedure is that of a claim for judicial review in accordance with Part 54 of the Civil Procedure Rules and not an ordinary claim, whether by Part 7 or Part 8. Their third position is that, if they are wrong on the first two and an ordinary claim is permissible, then it should be the Part 7 procedure which should be used and not the Part 8 procedure.

6. I have had a lengthy bundle of documents, although the main points are matters of law. I have substantial written submissions, including supplemental submissions from both sides and I heard substantial oral submissions on 7 July and 1 September of this year.

7. This judgment is also going to be of some length, but I have kept it short in some ways due to considerations of time and if there are particular points which the parties consider, following judgment, ought to be dealt with in more detail, then I will consider as to whether or not I will include more when approving any transcript of this judgment.

8. The claims were brought under the Part 8 procedure of the Civil Procedure Rules, but each claim form is accompanied by particulars of claim, albeit that particulars of claim are a matter for the Part 7 procedure. Notwithstanding that, in Part 8 claims voluntary particulars of claim are often provided and the court often directs that they be produced. In this particular case the claimants say that on the primary issues of compatibility with European law and the Human Rights Act claim, there are no great issues of fact. These are really simply matters of law and they say that the Part 8 procedure is appropriate in accordance with CPR 8.2.

9. The fee which is paid for each claim form is £528. That is on the basis that the claim forms are not seeking financial relief but are only seeking declarations. If financial relief was sought, then a percentage of the amount claimed would have to be paid as the court fee up to the statutory maximum figure of £10,000.

<u>The Loan Charge</u>

10. The Particulars of Claim identify what is said to be the loan charge, much of which is common ground. It arises in the following general circumstances.

11. There have been attempts by HMRC over the years to impose tax charges upon the situations where employers have made payments into pension schemes, trusts and other corporate or third party arrangements which the employer and employee contend are legitimate uses of such constructs and legitimate obtaining of related tax reliefs, but which HMRC say are effectively disguised remuneration of the employees and ought to be taxed as such. These arrangements have featured, amongst other things, what are called "loans" made to the employees or relevant bodies.

12. The result is that the Revenue has over the years introduced various tax avoidance legislation. Under Part 7A of the Income Tax (Earnings and Other Pensions) Act 2003 tax liabilities will arise if a relevant person has taken a relevant step under a relevant arrangement. By Schedule 11 of the Finance Act (No.2) Act 2017, there was introduced a new provision that a "relevant step" for these purposes will have been taken if a loan, which includes certain transactions which are said to be quasi-loans, had been made to a "relevant person" on or after 6 April 1999, although this was subsequently changed to 9 December 2010 in relation to various loans, and if the loan remains also outstanding on 5 April 2019 or possibly later agreed date.

13. That effectively meant that certain tax charges, which for these purposes are termed "the loan charge", would arise if such a loan was in existence and was not repaid within a set period of time, which subsequently by provision of the Finance Act 2020 was extended to a date in September 2020. Related legislation extended these provisions to National Insurance as well as income tax.

14. There was a review carried out in 2019 which resulted in the provisions of the Finance Act 2020 which made changes to the dates and contained certain other provisions, somewhat (but only somewhat) ameliorating the basic provisions as far as the taxpayer was concerned. I note that HMRC may well say that other tax charges arise in any event on the taxpayer and the other bodies due to the underlying arrangements of which the loan is only one part or a related element, however I am concerned here with the loan charge.

15. The claimants say that the loan charge is incompatible with European Union law, which they say governed matters prior to Brexit and, they say, may well still govern the

position. They say that the loan charge and its provisions are contrary to the European Union's fundamental principle of freedom of establishment and various articles of the treaty governing the European Union and lack sufficient justification for these purposes. They seek declarations accordingly. They also say that the loan charge is contrary to the Human Rights Convention, and by extension the Human Rights Act, in two ways. First, they say it is a disproportionate interference with property rights within Article 1 of the First Protocol; secondly, they say it is a disguised penalty such as to fall to be treated as criminal charges within Article 6 of the Convention and they seek declarations to such effect. I also note that they further claim a declaration they should be entitled to recover from the UK Government any actual loss arising.

16. As I said earlier, the Revenue have not started any process to seek to charge tax or National Insurance based on the loan charge provisions. There is no present inquiry let alone any assessment and it is common ground that the claimants cannot at this point bring a challenge within the Tribunal system.

17. As it happens, challenges to the loan charge made on somewhat similar grounds have been rejected by various courts. Firstly, challenges on human rights grounds were rejected by the High Court in *R (on the application of Cartref) v HMRC* [2020] STC 516 and *R (on the application of Zeeman) v HMRC* [2020] STC 828. There has also been a challenge on European Union provision grounds rejected by the Scottish Court of Sessions in *Finucane v HMRC* [2021] SLT 665. However, HMRC accept ***before me*** that the challenges remain arguable and do not seek to strike out or seek summary judgment on that ground before me but rather base the applications before me on jurisdictional grounds as to which tribunal or court should determine the challenges and under what procedure. I therefore have to proceed on the basis that it might ultimately be found that the loan charge provisions involve breaches of European Union law and/or human rights law.

<u>The Remedies Claimed</u>

18. The remedies, as I have said, sought are declarations and declarations only, notwithstanding that one of the paragraphs claims a declaration of entitlement to recover any actual loss which might be thought to refer to a possible damages claim. During the

hearings I asked Mr Kamal, counsel for the claimants, as to whether any damages claim were actually being brought at this point in time. Mr Kamal produced a schedule of what he called "potential damages claims" saying that the claimants might suffer damage and may suffer future loss under numerous different heads. Ms Choudhury, counsel for the defendant HMRC, challenged whether any of those heads of damage could be sustainable in law or fact and her submissions had some real force. But it seems to me that I ought to be very hesitant to decide whether or not damages claims could actually exist, particularly where a challenge is made to them, on various heads of loss, on the basis of absence of particularisation.

19. However, during the hearing I also asked Mr Kamal carefully as to whether a damages claim was actually being brought as opposed to saying could potentially exist. Mr Kamal answered that question no. He said that the damages claim might be brought in the future but not now. He said that his clients, the taxpayers, wanted a declaration first and then, having obtained it, might then proceed onto other matters including damages. Mr Kamal said that it was premature to bring damages claims now because the effect of granting a declaration might be that HMRC would act, including as to not making various demands or assertions against taxpayers so as to avoid or at least reduce the damage which might be caused.

20. I raised the doctrine known as *Henderson v Henderson*, and the question as to whether or not this approach might be an abuse of process. Mr Kamal said that there was good reason to proceed in this particular way.

21. I am not sure that Mr Kamal is right about that, but I do not have to decide it. However, I do not see these claims as presently incorporating actual damages claims, firstly because they are not sought in the claim form; secondly because, if there were actual damages claims then a much higher fee would be payable; thirdly, because Mr Kamal says that they do not; and fourthly because if I just simply read the claim form, it does not claim damages.

The HMRC Procedural Challenges

22. In the light of that, I turn to the Revenue's primary claim that I should just simply decline jurisdiction and/or hold that the claims are an abuse on their primary and secondary grounds, the primary one being that it is within what they would call the exclusivity principle that the declarations are about the validity of tax law by the European Union or human rights terms and are matters for the Tax Tribunal. Their secondary approach being that declarations are effectively seeking to have the court declare that a statute is contrary to European law or human rights law and hence invalid and that that is a matter for judicial review under CPR Part 54, not an ordinary Part 8 claim. As I say, HMRC say this even though it is common ground that the taxpayer cannot presently challenge the loan charge legislation through the Tribunal system, because the Revenue has not yet taken steps which would enable the taxpayers to do so.

23. I have been taken through various lines of case law, which I will come on to in due course. The matter is not helped by the fact that in terms of different challenges to different provisions of the tax legislation and statutes, it does seem to me that HMRC's approach has been somewhat inconsistent, sometimes maintaining an exclusivity objection and saying the matter must go to the Tribunal, other times allowing the Part 8 route and in some circumstances saying that, if the Tribunal system is not the appropriate route, then judicial review must be used. It may be that that set of differing conduct may have induced these claimants to use the Part 8 procedure. However, the matter having been raised at a very early stage in these claims, it seems I must decide on the correct procedure and that is what I do in this judgment.

The Tax Exclusivity Principle and *Autologic*

24. HMRC first say that there is a general principle that tax issues should be decided within the tax tribunal system. They point to the fact that the Taxes Management Act 1970 lays down, now with reference to tribunals, but under previous versions to the legislation it was general and special commissioners, that where the Revenue seeks tax and there is either an ordinary assessment to tax, either from the taxpayer themselves for the self-assessment procedure or by a Revenue assessment, and what then happens is that there will either have been an assessment by the Revenue, or the Revenue will open an

inquiry into a situation which has either not been reported or has merely been self-assessed.

25. As far as such an inquiry is concerned, that inquiry will come to an end by a closure notice and flowing from which there will generally be some sort of new or adjusted assessment from the Revenue. Following such a Revenue assessment, or alternatively a refusal or failure by the Revenue to produce a closure notice, the legislation provides that the taxpayer can then appeal or apply to the First-Tier Tribunal. Thus, the way the system proceeds is that what is required for the taxpayer to be able to appeal or to apply to the First-Tier Tribunal, is an action on behalf of the Revenue, an assessment or possibly a closure notice or the opening of an inquiry (and when an application can be made if there is a refusal or failure to provide a closure notice). Counsel have also explained that it is possible that where there is a subsisting inquiry, in some circumstances under section 28ZA of the Taxes Management Act, it is possible to have an agreed issue of law referred to the Tribunal prior to a closure notice but this is only in the context of a subsisting inquiry.

26. It is common-ground that a taxpayer is thus in the position that, although once an inquiry has been opened they can effectively eventually force the Revenue to issue a closure notice and/or assessment by way of applying to the Tribunal, they cannot do that before an inquiry has actually been opened.

27. A second point of common ground is that the Tribunal can deal with challenges to the validity of the tax legislation, including under European Union law and the Human Rights Act, but that it cannot award damages or somewhat similar restitutionary monetary relief for money paid under a mistake of law or by compulsion.

28. In that context, Ms Choudhury very much based her submissions to start with on the decision of *Autologic Holdings plc v Inland Revenue Commissioners* [2006] 1 AC 118. This decision involved cases where taxpayers were challenging various advance corporation tax system and associated group relief provisions as being contrary to European law; having paid substantial amounts which they contended should never have been levied or paid they sought restitution and damages remedies. Paragraphs 11 to 15 of the decision are as follows:

"11. In resolving this question of jurisdiction the starting point is to note two basic principles. The first concerns the exclusive nature of the appeal commissioners' jurisdiction to decide certain types of disputes arising in the administration of this country's tax system. The present disputes concern claims for group relief. The way a taxpayer claims group relief depends on whether the claim relates to an accounting period before or after 1 July 1999. Before that date the corporation tax (pay and file) system was in force. This has now been replaced by the corporation tax (self-assessment) system. For present purposes this difference is immaterial. What matters is that, whichever system is applicable, an assessment which disallows a group relief claim cannot be altered except in accordance with the express provisions of the tax legislation. Statute so provides: see, in respect of the pay and file system, section 30A of the Taxes Management Act 1970 and, in respect of the self-assessment system, paragraphs 47(2) and 97 of Schedule 18 to the Finance Act 1998. Further, the statutory code makes its own provision for appeals. Under both the 'pay and file' system and the self-assessment system a taxpayer has a right of appeal to the appeal commissioners against assessments of tax, including amendments made by the revenue to a taxpayer's tax return. The appeal commissioners' findings of fact are final. In appropriate cases a further appeal lies to the High Court by way of case stated on a point of law. Where the appeal commissioners reduce the amount of an assessment, any overpaid tax must be repaid to the taxpayer, with a repayment supplement by way of interest as provided in section 825 of the ICTA.

12. Clearly the purpose intended to be achieved by this elaborate, long established statutory scheme would be defeated if it were open to a taxpayer to leave undisturbed an assessment with which he is dissatisfied and adopt the expedient of applying to the High Court for a declaration of how much tax he owes and, if he has already paid the tax, an order for repayment of the amount he claims was wrongly assessed. In substance, although not in form, that would be an appeal against an assessment. In such a case the effect of the relief sought in the High Court, if granted, would be to negative an assessment otherwise than in accordance with the statutory code. Thus in such a case the High Court proceedings will be struck out as an abuse of the court's process. The proceedings would be an abuse because the dispute presented to the court for decision would be a dispute Parliament has assigned for resolution exclusively to a specialist tribunal. The dissatisfied taxpayer should have recourse to the appeal procedure provided by Parliament. He should follow the statutory route.

13. I question whether in this straightforward type of case the court has any real discretion to exercise. Rather, the conclusion that the proceedings are an abuse follows automatically once the court is satisfied the taxpayer's court claim is an indirect way of seeking to achieve the same result as it would be open to the taxpayer to achieve directly by appealing to the appeal commissioners. The taxpayer must use the remedies provided by the tax legislation. This approach accords with the views expressed in authorities such as *Argosam Finance Co Ltd v Oxby (Inspector of Taxes)* [1965] Ch 390, *In re Vandervell's Trusts* [1971] AC 912 and, more widely, *Barraclough v Brown* [1897] AC 615.

14. In *Vandervell's* case [1971] AC 912, 939-940, Lord Wilberforce sought to clarify the limits of this 'exclusivity' principle. This principle, he said, is not to be taken to exclude the jurisdiction of the courts to decide a question of fact or law which is a basis for an income tax assessment where the taxpayer and the revenue so agree, provided the assessment to which the question relates has not become final and provided also the question, 'in form suitable for decision by the court', is not 'so close to the question of the assessment itself' that the court should decline to entertain it. But Lord Wilberforce was at pains to add that either the taxpayer or the revenue have the right to insist the statutory procedure should be followed.

15. Lord Wilberforce's formulation indicates that, apart from cases of straightforward abuse, there is an area where the court has a discretion. In *Glaxo Group Ltd v Inland Revenue Commissioners* [1995] STC 1075, 1083-1084, Robert Walker J put the matter this way:

> 'It is not easy to discern any clear dividing-line between High Court proceedings which are, and those which are not, objectionable as attempts to circumvent the exclusive jurisdiction principle. Possibly the correct view is that there is an absolute exclusion of the High Court's jurisdiction only when the proceedings seek relief which is more or less co-extensive with adjudicating on an existing open assessment: but that the more closely the High Court proceedings approximate to that in their substantial effect, the more ready the High Court will be, as a matter of discretion, to decline jurisdiction.'

I respectfully agree with this approach, subject to noting that, at least as a general principle, the taxpayer and the revenue are

> each entitled to insist that the statutory procedure for dealing with disputed assessments should be followed."

29. In paragraph 11, their Lordships considered to start with two basic principles. The first is that the then Commissioners (now the Tribunal) have an exclusive jurisdiction to decide certain types of tax dispute as provided by the Taxes Managements Act 1970. They go on to say that in circumstances where it is for the Tribunal to decide tax disputes by way of appeal or application to it, that it would disturb that statutory scheme if the courts were to decide it. They then refer to various decisions which I will come on to in due course, which state that it is therefore an abuse of process for a taxpayer to seek to have the matter decided by the courts.

30. However, secondly, they go on to the fact that there are limits in relation to this exclusivity principle, particularly where what is raised is something which is not a simple challenge to a tax assessment itself and saying that in those circumstances, the court has a discretion which has to, as with all judicial discretions, be exercised on a principled basis, although the line between what is and is not an abuse may not be clear, but it is more likely to be an abuse the closer that the challenge is a challenge to an existing assessment.

31. They then go on to deal with a second basic principle in paragraphs 16 onwards:

> "The second basic principle concerns the interpretation and application of a provision of United Kingdom legislation which is inconsistent with a directly applicable provision of Community law. Where such an inconsistency exists the statutory provision is to be read and take effect as though the statute had enacted that the offending provision was to be without prejudice to the directly enforceable Community rights of persons having the benefit of such rights. That is the effect of section 2 of the European Communities Act 1972, as explained by your Lordships' House in *R v Secretary of State for Transport, Ex p Factortame Ltd* [1990] 2 AC 85, 140, and *Imperial Chemical Industries Plc v Colmer (Inspector of Taxes) (No 2)* [1999] 1 WLR 2035, 2041."

32. In paragraph 16 it is said that there is the important second principle that European Union law and its directly applicable provisions, have priority over domestic legislation.

33. In paragraph 18, the judgment identifies that the claimants before the House of Lords actually fell into a number of different classes and in paragraph 19, two broad classes were identified. One was a class where it was still possible for them if they were right to obtain group relief, another class was a class of claimants who had effectively prevented themselves from already claiming group relief, perhaps because they had already paid the relevant tax, and were therefore seeking damages.

34. Paragraphs 20 to 29 are as follows:

> "20. In my view in the former of these two classes the category (1) claims in the High Court are misconceived. Where a claimant company can obtain through the statutory procedures the very tax relief of whose non-availability it is complaining, I see no justification for the company by-passing the statutory route and, instead, going to the High Court and claiming damages or a restitutionary remedy based on the proposition that the company has been wrongly refused the tax relief to which it is entitled under Community law.
>
> 21. Take a case where an inspector disallowed a claim for group relief and an appeal to the Special Commissioners is pending. If that appeal proceeds the Special Commissioners will give effect to all relevant directly applicable provisions of Community law. The Special Commissioners can refer any necessary questions to the European Court just as readily as the High Court. They can resolve any questions of fact which may arise on issues such as the amount of the losses claimed. They can enquire into the group structure to see if it meets the statutory requirements. Indeed, detailed questions of this character are more suited for determination by the Special Commissioners than the High Court, especially where large numbers of companies are involved. In short, in this example the claimant is still able to obtain the tax relief it seeks despite its claim having been refused by an inspector.
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> 22. The Autologic group exemplifies this factual situation. The material facts are that one of the companies in the group submitted corporation tax returns for the years ending 31 December 1999 and 31 December 2000 making group relief claims in respect of losses surrendered by two French subsidiaries. Having conducted inquiries into these returns, the inspector refused the claims and amended the returns accordingly. The claimant company appealed to the Special Commissioners against the revenue amendments. Corporation tax was paid on the basis of the amended

assessments. These appeals are still pending. An enquiry into the tax return for the year ended 31 December 2001 is still in progress. In the High Court Autologic claims that, in refusing to grant group relief in respect of the losses of the French subsidiaries, the revenue unlawfully failed to give effect to the E C Treaty. They claim as damages, and by way of restitution, the amounts of corporation tax overpaid. These are the category (1) claims.

23. In my view these claims in the High Court are prima facie a misuse of the court's process. These claims cover the same ground in all respects as the appeals pending before the appeal commissioners. The remedy sought is co-extensive with adjudicating upon existing, open assessments. The essence of the High Court claims is that these assessments were wrong, that the court should so hold, and that the court should itself calculate the amounts which ought to have been assessed and order repayment of the overpaid excess. There could hardly be a more obvious example of seeking to sidestep the statutory procedure.

24. The taxpayers say that recourse to the appeal commissioners is a poor alternative to the High Court proceedings. If their appeals succeed their position regarding interest and costs before the special commissioners will compare unfavourably with their position in the High Court. The appeal commissioners do not have power to award interest as such. The statutory repayment supplement is restricted to simple interest at a specified rate, usually about 1% below base rate, starting 12 months after the date the corporation tax was paid. The special commissioners' power to award costs is confined to cases where a party has acted wholly unreasonably in connection with the hearing: Special Commissioners (Jurisdiction and Procedure) Regulations 1994 S I 1994/1811, regulation 21. These limitations on the special commissioners' powers, it is said, offend the Community law principle which requires that relief for breach of Community rights must be effective.

25. I am not attracted by this submission. Appeals to the special commissioners when novel points of law arise are part of the ordinary statutory procedure. Usually the points of law concern United Kingdom tax legislation. But a dispute on the interpretation and application of Community law, and the need to refer questions to Luxembourg, do not make a case fundamentally different. Once the interpretation and application of Community law have been clarified by the European Court, the principal difficulty surrounding these appeals will be gone. Confining claimants to the statutory

route, with the interest and costs consequences just mentioned, can hardly be regarded as rendering this route to reimbursement 'excessively onerous', to adopt the phrase of Advocate-General Colomer in *D v Rijksbelanstingdienst* (Case C-376/03, 26 October 2004).

26. The Autologic group exemplifies cases where the statutory claims procedures have reached an advanced stage. In other cases the claims for group relief are less advanced. In some cases the claimant company is in time to make a group relief claim to the revenue but has not yet done so. The H J Heinz group is an instance of this. In other cases claims for group relief have been made and are still being considered by the revenue, as with the British Telecommunications group. In further cases claims have been made and refused and the claimants are in time to appeal to the appeal commissioners but have not yet done so. The Future Network group is an example of this.

27. In my view in each of these types of case the category (1) claims in the High Court are prima facie misconceived, for the reason set out above. The claimants are able to obtain the group relief to which they are entitled by following the statutorily-prescribed route. That is the route they should follow.

28. The taxpayers contend that to oblige all claimants to follow this route, especially those who have not yet made group relief claims to the revenue, would be inconsistent with the approach indicated by the European Court of Justice in the *Hoechst* case. As matters stand the revenue are bound to refuse claims for group relief where the surrendering company is not resident in this country. The European Court, it is said, has ruled that claimants should not be required to take futile steps of this nature when seeking to enforce their rights under Community law. In the *Hoechst* case [2001] Ch 620, 667, para 107, the European Court said:

> '... it is contrary to Community law for a national court to refuse or reduce a claim brought before it by a resident subsidiary and its non-resident parent company for reimbursement or reparation of the financial loss which they have suffered as a consequence of the advance payment of corporation tax by the subsidiary, on the sole ground that they did not apply to the tax authorities in order to benefit for the taxation regime which would have exempted the subsidiary from making payments in advance and that they therefore did not make use of the

> legal remedies available to them to challenge the refusals of the tax authorities, by invoking the primacy and direct effect of the provisions of Community law, where upon any view national law denied resident subsidiaries and their non-resident parent companies the benefit of that taxation regime.'
>
> The Court of Appeal regarded this ruling as determinative of these test cases.
>
> 29. I am unable to agree. The taxpayers' reliance on this ruling in the present cases is misplaced. The taxpayers are seeking to apply the European Court ruling out of context. In the *Hoechst* case this ruling was directed at rejecting a governmental defence based on the taxpayers' alleged lack of reasonable diligence in pursuing its claims. The *Hoechst* ruling was not directed at a situation where, as here, the claimants' claims have yet to be decided by the national court and there exists a statutorily prescribed route by which the claimants are able to obtain the tax relief they say is their entitlement under Community law. Which court or tribunal has jurisdiction to hear disputes involving rights derived from Community law is a matter for determination by each member state: see, for instance, *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbauesellschaft Berlin mbH* (Case C-54/96) [1997] ECR I-4961, 4996, para 40."

35. In paragraph 21, the judgment identifies that for those who can still claim group relief and have an appeal in existence to the Tribunal (at that stage the special commissioners) then they were in a position where they could still pursue that process being the one laid down by domestic law and raise their European Union points within it. In paragraph 23, it is said that for those taxpayers to come to the High Court, is at first sight a misuse of the court's process because they simply could use the domestic legislation of proceeding to the Commissioners (now the Tribunal). In paragraph 24 it was held that that was the case, notwithstanding there was some disadvantages, including with regards to claims for interest in proceeding to the Commissioners.

36. In paragraph 25, it was said that disadvantages with regards to interest and costs were not sufficient to displace the ordinary exclusivity rule. In paragraph 26 it was said the same applied, even if there was no open appeal, if it still possible to make an application for group relief to the Revenue, which the Revenue would have to deal with in one way or another. In paragraph 27 it was said again it was possible for the taxpayer to achieve

what they wanted by taking steps themselves and, even though that would require some reaction from the Revenue, the taxpayer would be able to insist upon that.

37. In paragraph 28, the judgment considers whether or not this is still good law, notwithstanding the European Union dimension and European Union case law. In paragraph 29, it was held that the mere fact that these were European Union challenges, did not prevent the exclusivity principle applying because the domestic law could legitimately lay down as to which court or Tribunal has jurisdiction to hear the relevant disputes, here the Tax Tribunal (albeit at the time of the *Autologic* decision the Commissioners).

38. Paragraph 30 reads:

> "Of course, to be compliant with Community law the remedial route prescribed by the legal system of a member state must be such that the rules 'are not less favourable than those governing similar domestic actions (principle of equivalence)' and, additionally, the rules must not render 'practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)': see the *Hoechst* case, para 85. The statutory route prescribed for group relief claims was not designed for claims in respect of non-resident companies. So, as United Kingdom law presently stands, at the initial step a taxpayers' group relief claim will inevitably be refused by the revenue. Further, as already noted, some statutory requirements will need adaptation to accommodate claims in respect of non-resident companies. But neither of these features should present any major problem. Neither of them renders the statutory route 'practically impossible or excessively difficult'. Adaptation of the formal requirements will be needed whichever route is followed, and the appropriate adaptation is a matter on which the Special Commissioners' practical expertise will be invaluable."

39. Thus, in paragraph 30 an important limitation was set as to this, namely it was recognised by the House of Lords that to be compliant with community law, the remedial route prescribed by the domestic legislation must be such that the rules "are not less favourable than those governing similar domestic actions (principle of equivalence)" and, additionally, the rules must not render "practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)". In the

remainder of that paragraph the House of Lords considers that certain problems the taxpayers said they were under did not affect either of those two essential principles.

40. In paragraphs 31 to 33 other points were also rejected. However, although that effectively disposed of the claims where the taxpayers were able to either have the matter determined then and there in front of the Commissioners or implement a process which would result in that happening, there were taxpayers who fell within other categories whose positions were dealt with in paragraphs 34 to 38 of the judgment to which I now come.

41. In paragraph 34, there is a reference to satellite claims, which the Commissioners would not have jurisdiction to determine and which were primarily the damages and restitutionary refund claims. In paragraph 35, various difficulties were identified with regards to those claims and in paragraph 36 it was said that the House could not conclude as to how far the difficulties went, but that the fact that those difficulties existed, was relevant in considering the discretionary question as to whether the taxpayers should have to wait, in a sense, for the ability to go to the Commissioners and have matters determined there.

42. In paragraph 37 the House reiterated the point that, where Parliament by domestic legislation had assigned the specialist tribunal responsibility for adjudicating on the relevant disputes, that as long as it was still possible to make an application to that Tribunal, then the primary course ought to be an application to that Tribunal.

43. In paragraph 38, the House went on to recognise that in those circumstances, at least if the taxpayer was right, there may have been a violation of European Union law and again repeated that European Union law requires that domestic law must ensure that the European Union law rights conferred on individuals are fully effective and that the obligation cannot be said to be fulfilled where the relevant member state government or entity (in this case HMRC) relies on the provisions of the domestic legislation to deprive the individual taxpayer of benefits.

44. They go on to say at the end of that particular paragraph that a claim for damages for breach of Community law is not in general the appropriate remedy when it is still possible to obtain the resultant benefits by an application to the relevant Tribunal.

45. They then, however, come to the more difficult question as to where it is not possible for the taxpayer to go to the Tribunal in paragraphs 39 to 43, which read:

> "39. Thus far I have been considering cases where the subject matter of the category (1) claims in the High Court is group relief claims which can still be allowed by the appeal commissioners if the claimants' Community law contention is correct. I now turn to the other class of cases, where this is not so. The most obvious example is where it is now too late, in respect of the relevant accounting periods, for a claimant to make a group relief claim to the revenue or to appeal to the appeal commissioners. The claimant is outside the prescribed time limits. The Paribas group is an instance of this, where the claim advanced in the High Court relates to group relief for an accounting period ending 31 December 1998. No group relief claim in respect of the losses in question has been made.
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> 40. Time bars of this character are commonplace. I see no reason to suppose the statutory time bars applicable to group relief claims are in themselves inconsistent with Community law: cf. *Steenhorst-Neerings v Bestuur van de Bedrijfvereiniging* (Case C-338/91) [1993] ECR I - 5475 and *Johnson v Chief Adjudication Officer* (Case C-410/92) [1995] ICR 375. This means that, in respect of this class of cases, it is now too late for the taxpayers to obtain group relief by following the statutory route. A similar view has, rightly, been expressed by the Court of Appeal in respect of an employment tribunal's jurisdiction to entertain claims for unfair dismissal involving directly applicable Community rights outside the statutory time limits: see *Biggs v Somerset County Council* [1996] ICR 364.
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> 41. In such cases the taxpayers' remedy necessarily lies elsewhere. In such cases the taxpayer's remedy is of a different character. The taxpayer's remedy lies in pursuing proceedings claiming restitutionary and other relief in respect of the United Kingdom's failure to give proper effect to Community law. The appeal commissioners have no jurisdiction to hear such claims. Such claims are outside the commissioners' statutory jurisdiction, and the commissioners have no inherent jurisdiction. Claims in this class should therefore proceed in the High Court. Difficult questions, both of domestic law and

> Community law, may arise about the time limits applicable to High Court claims of this character. Some of these questions were explored recently by the Court of Appeal in *Commissioners of Inland Revenue v Deutsche Morgan Grenfell Group plc* [2005] EWCA Civ 78. Those are not matters arising on these appeals.
>
> 42. I add one caveat. The revenue and the appeal commissioners have power to extend time limits for late amendments and late appeals. Before proceeding with their High Court claims claimant companies in this class of cases should therefore take the simple step of inviting the revenue or the appeal commissioners to extend the time limits appropriately. If this invitation is accepted, the claimants should proceed along the statutory route. If the invitation is declined, or if the revenue and the appeal commissioners have no power to grant the necessary extensions, the way will be clear for the High Court proceedings to continue.
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> 43. I recognise there may be instances where a claimant company has claims in both the classes I have described. In respect of some accounting periods a company may have made a group relief claim or still be in a position to make such a claim, in respect of more distant accounting periods it may now be too late for the company to put forward such a claim. The need for one company to pursue proceedings before the appeal commissioners and separately and additionally in the High Court is unfortunate. But this possibility is inherent in the distinction between the two classes of case: the distinction between obtaining the tax relief to which the claimant is entitled and obtaining damages for unlawful failure to make such relief available. Unless the circumstances are exceptional, having claims in both classes is not a sufficient reason for a company declining to make a group relief claim in respect of accounting periods where this can still be done."

46. In paragraph 39 they identify the problem of where it is too late for a taxpayer to appeal to the Tribunal, there being a statutory time limit bar. In paragraph 41, they recognise that in those cases the taxpayer's remedy necessarily lies elsewhere and is not a remedy seeking to have the Tribunal declare the position with regards to tax law as such, but a remedy seeking some sort of relief in relation to the failure to give proper effect to the European Union law. In paragraph 42 they identify that the court might well take the approach of saying that the matter would still be an abuse if HMRC had not been invited to consent to an extension of any time limit, but even there recognised that if the Revenue

had been asked to consent and had refused or there was no power to them to consent or to have the Tribunal extend the time limit, then the way would be clear for High Court proceedings to continue.

47. In paragraph 43, they again identify the difference between (i) actually being able to seek and seeking the Tribunal's tax decision and (ii) not being able to seek the Tribunal's tax decision and claiming damages for failure to provide in that case the relevant tax relief as being the essential distinction for the purposes of the case before them.

48. In paragraph 44, by way of conclusion, the House therefore considered that certain categories of case were an abuse and certain others were not. However, in relation to those which were an abuse, rather than strike them out, they made an order that the cases should be stayed so that it would be more easy to accommodate any other unforseen turn of events, that is to say that the relevant claims and the relief which was sought in the civil claim should, rather than simply be refused, should be left in abeyance for the taxpayer to adopt the proper procedure but with provision to deal with problems should they arise.

49. I do bear in mind in the analysis of *Autologic*, that there the difficulties which were identified by the taxpayers and the successful taxpayers or classes of taxpayer, were on the basis that it was now too late for them to be able to achieve recourse for the asserted breaches of European Union law by way of application or appeal to the Tribunal. The situation before me in this case is somewhat different. This is an assertion that it is too early for the taxpayer to be able to achieve such recourse. *Autologic*, at least in relation to its analysis of case where an attempt to claim group relief could still have been made (leading to a potential Revenue refusal and then a right to appeal to the Tribunal, and thus where it was held to be abusive for the taxpayer simply to apply to the court), is also distinguishable on the basis that this is not a case where the taxpayer can do something which will result in the Revenue having to undergo a particular procedure which will eventually lead to the Tax Tribunal.

50. The taxpayers say, and it seems to me that this is relatively common ground, that they simply cannot force the Revenue to do anything and with the result that they simply cannot achieve a resolution of their assertions that the loan charge provisions are contrary

to European Union law; they are simply in a state of limbo and at the mercy of the Revenue to see if, and when, and if ever the Revenue decides to do something. It is that, it seems to me, which Mr Kamal says is a situation which is contrary to the principle of effectiveness in European Community law and which the House of Lords in *Autologic* said was a principle which is effectively binding on the national legislation of the national courts.

Further Authorities following *Autologic*

51. The next case which Ms Choudhury took me to was *Thin Cap v HMRC* [2010] STC 301. This was a different challenge to advance corporation tax and anti-avoidance rules, again based on European Union law. In paragraph 13, it is recorded that the relevant civil claims were effectively being brought for compensation and relief and the question of *Autologic* was raised at a previous hearing. However, in paragraph 14 it was recorded that the Revenue had decided not to take any jurisdictional issues of an *Autologic* nature and appear to have accepted that the matter should be dealt with by the court and under an ordinary civil claim procedure and not by way of judicial review. It does seem to me that this may be an example of a somewhat inconsistent approach being taken by the Revenue over the years, but, because the jurisdictional points were not taken, it seems to me that the decision is of no real assistance as far as the issues which I have to decide.

52. I was then taken to the *Test Claimants in the FII [Franked Investment Income] Group Litigation v Revenue & Customs Commissioners* [2009] STC 254. This was one of a series of cases regarding claims based on the FII rates and assertions that they were inconsistent with European Union legislation. Various remedies were sought, including in particular restitution on the basis of monies paid either under mistake of law or alternatively unlawful demands for tax. Again, the Revenue did not take any points based on exclusivity or judicial review.

53. Mr Kamal, in terms of this sequence of cases, has also taken me to *HMRC v Cotter* [2014] 1 All ER 1, which raised the question as to whether or not the county court was able to deal with matters of what had actually been assessed in an assessment where the taxpayer wished to say that they should not have to pay the relevant assessed amounts because they had a subsequent year's claim for loss relief which would reduce the overall

liability but which claim for loss relief the Revenue were not prepared to accept. At paragraph 29 it was restated that the Tribunal has exclusive jurisdiction to hear appeals against assessments for tax, *Autologic* being cited as authority for that. The paragraph goes on to say that what was being dealt with was not the assessment of tax in relation to a particular year of assessment, which was on what the Revenue were suing in the court, but how the Revenue had dealt with a loss relief claim relating to a later year.

54. In paragraph 32 it was held that the county court was not being asked by the Revenue to rule on the validity of the claim for loss relief, nor was it concerned with any appeal against the assessment to tax which the Revenue was relying on. All it was seeking to do was to deal with the question as to where there was in fact an assessment which itself, and whether the taxpayer was liable to it, was not being challenged.

55. In paragraph 32 it was held that that was simply a matter for the county court not for the Tax Tribunal. However, the loss relief claim being a matter of substantive tax law, was, where the Revenue were not prepared to accept it, itself a matter for the Tribunal. Thus the taxpayer found themselves in the situation that the fact that the taxpayer was making a loss relief claim which would go to the Tribunal simply did not affect the underlying question for the county court ,which was as to whether or not there was an existing assessment, that is to say, the one for the earlier year, which gave rise to a debt enforceable in the county court. Since there was no challenge to that assessment, the House of Lords held that as (i) such a debt simply existed and (ii) the county court could not (as only the Tribunal could) deal with the other challenge being to the refusal of loss relief for the later year; that therefore the outcome of the appeal should be that the county court's judgment for the assessment sum should simply stand.

56. It seems to me that that case for my purposes is simply another case which makes clear that, where there is an outstanding assessment or process of assessment, then that is a matter for the Tax Tribunal and not for the court.

57. Ms Choudhury then took me to the decision of *Knibbs v HMRC* [2019] 1 WLR 731. This was a situation where the Revenue had refused various loss relief claims and the taxpayer was contending that the Revenue could not actually inquire into those loss relief claims (and so the process of appealing to the Tribunal could never occur) and sought

both declarations to that effect by Part 7 claim, and alternatively, declarations by the process of judicial review under Part 54. The Revenue contended that these matters were for the Tax Tribunal. The Court of Appeal dealt with these questions from paragraph 17 onwards of the judgment. Paragraphs 17 to 25 read:

> "It is well established that if Parliament has laid down a statutory appeal process against a decision of HMRC, a person aggrieved by the decision and wishing to challenge it must use the statutory process. It is an abuse of the court's process to seek to do so through proceedings in the High Court or the County Court. In *Autologic Holdings plc v Inland Revenue Commissioners* [2005] UKHL 54, [2006] 1 AC 118, Lord Nicholls of Birkenhead, giving the majority judgment, said:
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> > '11. In resolving this question of jurisdiction the starting point is to note two basic principles. The first concerns the exclusive nature of the appeal commissioners' jurisdiction to decide certain types of disputes arising in the administration of this country's tax system. The present disputes concern claims for group relief. The way a taxpayer claims group relief depends on whether the claim relates to an accounting period before or after 1 July 1999. Before that date the corporation tax (pay and file) system was in force. This has now been replaced by the corporation tax (self-assessment) system. For present purposes this difference is immaterial. What matters is that, whichever system is applicable, an assessment which disallows a group relief claim cannot be altered except in accordance with the express provisions of the tax legislation. Statute so provides: see, in respect of the pay and file system, section 30A of the Taxes Management Act 1970 and, in respect of the self-assessment system, paragraphs 47(2) and 97 of Schedule 18 to the Finance Act 1998. Further, the statutory code makes its own provision for appeals. Under both the 'pay and file' system and the self-assessment system a taxpayer has a right of appeal to the appeal commissioners against assessments of tax, including amendments made by the revenue to a taxpayer's tax return. The appeal commissioners' findings of fact are final. In appropriate cases a further appeal lies to the High Court by way of case stated on a point of law. Where the appeal commissioners reduce the amount of an assessment, any overpaid tax must be repaid to the taxpayer, with a repayment

> supplement by way of interest as provided in section 825 of the ICTA.
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> 12. Clearly the purpose intended to be achieved by this elaborate, long established statutory scheme would be defeated if it were open to a taxpayer to leave undisturbed an assessment with which he is dissatisfied and adopt the expedient of applying to the High Court for a declaration of how much tax he owes and, if he has already paid the tax, an order for repayment of the amount he claims was wrongly assessed. In substance, although not in form, that would be an appeal against an assessment. In such a case the effect of the relief sought in the High Court, if granted, would be to negative an assessment otherwise than in accordance with the statutory code. Thus in such a case the High Court proceedings will be struck out as an abuse of the court's process. The proceedings would be an abuse because the dispute presented to the court for decision would be a dispute Parliament has assigned for resolution exclusively to a specialist tribunal. The dissatisfied taxpayer should have recourse to the appeal procedure provided by Parliament. He should follow the statutory route.
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> 13. I question whether in this straightforward type of case the court has any real discretion to exercise. Rather, the conclusion that the proceedings are an abuse follows automatically once the court is satisfied the taxpayer's court claim is an indirect way of seeking to achieve the same result as it would be open to the taxpayer to achieve directly by appealing to the appeal commissioners. The taxpayer must use the remedies provided by the tax legislation. This approach accords with the views expressed in authorities such as Argosam Finance Co Ltd v Oxby (Inspector of Taxes) [1965] Ch 390, In re Vandervell's Trusts [1971] AC 912 and, more widely, Barraclough v Brown [1897] AC 615.'

18. In those cases where HMRC had opened an enquiry, the approach re-affirmed in *Autologic* requires the claimants to pursue appeals to the FTT and renders any attempt to litigate their liability to tax or their right to a repayment in Part 7 or 8 civil proceedings an abuse of the court's process.

19. Mr Ewart QC on behalf of the claimants submits that there exist special circumstances in this case that mean that such proceedings are not an abuse of process.

20. First, Mr Ewart points out that in some cases the claimants are now out of time to appeal the conclusions stated in or amendments made by closure notices issued by HMRC. We cannot see that this can justify a challenge by civil proceedings. Parliament has laid down an exclusive appeal process and time limits for invoking it. If those time limits have expired, and are not or cannot be extended, the clear legislative intention is that it is too late to make any challenge. There is no sensible basis for reading the statutory provisions as permitting an alternative route of challenge once the time limits for an appeal to the FTT have expired. In *Autologic*, the House of Lords were prepared to countenance the possibility of civil proceedings once a statutory appeal was no longer possible only because it was a means of vindicating the taxpayer's EU law rights. There is no parallel with the present case.

21. Second, Mr Ewart submitted that, if HMRC are not entitled to open an enquiry under sections 9A and 12AC, a closure notice is a nullity and its conclusions or amendments cannot be the subject of an appeal to the FTT. It seems to us that the FTT is competent on an appeal to decide whether HMRC had the statutory power to invoke the procedure which led to the closure notice under appeal. A lack of power to issue a closure notice is as much a ground of appeal against its conclusions or amendments as any other ground of challenge. Even if that were wrong, civil proceedings issued to determine this issue would remain an abuse, because for the same reasons as given below as regards a notice under section 28B, the appropriate mode of challenge would be by way of judicial review.

22. Third, Mr Ewart submitted that it was necessary for those claimants seeking repayments of tax to issue proceedings so as to prevent their claims becoming time-barred under the Limitation Acts. Mr Ewart was suggesting that if a claimant successfully appealed against the conclusions in or amendments made by a closure notice, HMRC might refuse to make any repayment on account of a potential limitation defence. We found startling the idea that, having lost on an appeal against the effects of a closure notice, HMRC would decline to give effect to the FTT's decision and refuse to repay the tax that HMRC had no right to retain. If, contrary to all principles of public administration, HMRC did seek to adopt this position, we do not consider that their stance would be well-founded in law. Paragraph 4 of schedule 1A to TMA requires HMRC to give effect to a claim "as soon as practicable after a claim…is made". Time for limitation purposes would not start to run until it became practicable to give effect to the claim. While an appeal to the FTT is pending, and the entitlement of the taxpayer to the claim has yet to be

determined, it cannot be said to be "practicable" to give effect to the claim.

23. As earlier noted, many of the claimants participated in the tax schemes through partnerships. In those cases, HMRC have opened or intend to open enquiries into the partnership returns under section 12AC. Giving notice of enquiry is deemed to include the giving of notice of enquiry under section 9A to each partner who has made a return: section 12AC(6). Upon completion of the enquiry, HMRC issue a closure notice to the partnership and, if the partnership return is amended by the closure notice, HMRC must give each partner a notice amending the partner's return: section 28B(4). The partnership can appeal against the conclusions in or amendments made by the closure notice, but the individual partners have neither that right nor a right to appeal the notice given to them under section 28B(4).

24. Mr Ewart accepts that individual partners are entitled to seek to challenge the notices given to them by way of judicial review, but he submits that it is not an abuse of process for claimants to seek to do so in ordinary civil proceedings. There have been many cases since *O'Reilly v Mackman* [1983] 2 AC 237 in which the circumstances in which a claimant may raise public law issues in ordinary civil proceedings, rather than by way of judicial review, have been considered, although none of them has been in the context of tax. For the purposes of this appeal, we do not consider it necessary to review those authorities.

25. We are satisfied that, in the present case, the correct procedure for individual partners to challenge the amendments made to their returns was by judicial review, and not by ordinary civil proceedings. There are a number of reasons for this. First, there are no private law rights involved. This is not, for example, a case where a claimant is seeking to enforce a contractual right. Second, the time limits are a strong factor in favour of judicial review being the correct procedure. Both appeals to the FTT and applications for permission to pursue judicial review are subject to short time limits. It makes no sense at all that an individual taxpayer or a partnership has a period of 30 days in which to appeal to the FTT against a closure notice, but an individual partner should have six years in which to make what is, in effect, the same challenge to a notice given under section 28B(4). Third, the challenges in these cases affect a large number of people and raise no issues of fact that might be unsuitable for determination in judicial review proceedings. Fourth, the requirement for permission to pursue judicial review does not

> make it an unsuitable procedure in the circumstances of this case, any more than in the many other cases (tax and non-tax) to which it applies. It is no more than a filter to weed out groundless cases."

58. In paragraph 17, they cited the essential portions of *Autologic* regarding the exclusivity principle. In paragraph 18 they stated that, in those cases where HMRC had opened an inquiry, the approach, affirmed in the *Autologic* case, was that the taxpayer was required to pursue appeals to the Tribunal so that to pursue by litigation and the courts would be an abuse of process. In paragraph 19 they refer to the taxpayer's argument that there were special circumstances and they then considered those various asserted special circumstances.

59. Paragraph 20 dealt with the question of the first asserted special circumstance that relevant claimants were out of time for appealing to the Tribunal. There the Court of Appeal said that to proceed to the courts would be an abuse (presumably because the tax management provisions required there, if there was to be a challenge to the Revenue at all, to be an int-time challenge in the Tribunal) but that *Autologic* had permitted recourse to the courts in that circumstance because the challenge was based on European law (and thus, it seems to me implicit, because the principle of effectiveness then applied).

60. In paragraph 21 the second asserted special circumstance was that the Revenue were unable to open any inquiry and therefore there could not be a closure notice and could not be an appeal to the Tribunal. Thirdly, in paragraph 22 it was asserted that the claimants had to issue proceedings in order to protect their limitation positions, an argument which was rejected by the Court of Appeal on both public and construction of the Limitation Act grounds.

61. In paragraph 23, it was noted by the Court of Appeal that it was possible for HMRC to, and they had in fact opened inquiries into various subject partnerships, but that the relevant process, while it would enable the partnership to appeal against the conclusions in an eventual closure notice, would not give the individual partners any right to appeal any notice given to them, with the result that the individual partners would not be able to go to the Tribunal. In paragraph 24 it was then recorded the taxpayers' counsel's submission that although they would accept that they could proceed by way of judicial

review in such circumstances, they were content that the matter was sufficiently a matter of private law as far as they were concerned for them to be able to challenge by ordinary civil claim rather than by judicial review. It seems from the Court of Appeal's subsequent (and also its previous in paragraph 21) analysis that they accepted that where it was simply impossible for the taxpayer ever to have brought the matter to the Tribunal then court proceedings would not be an abuse, the question being rather as to which was the correct court procedure to be adopted.

62. In paragraph 25 (and also paragraph 21), the Court of Appeal gave their conclusion that the correct procedure for the individual partners to challenge whatever happened to their returns, was by judicial review and not by ordinary civil proceedings. A number of reasons were given for that. Firstly, that it did not involve private law or contractual rights; secondly that the short judicial review time limit to which I will return appeared to be appropriate in circumstances where, if there had been any possible appeal to the First-Tier Tribunal, there would also have been a short time limit (albeit 30 days rather than 3 months). Thirdly, that the challenges affected a large number of people and did not raise issues of fact and therefore were potentially suitable and certainly not unsuitable for judicial review, and fourthly, that the requirement for permission to pursue judicial review did not make it unsuitable but, if anything, was rather a useful filter. In paragraph 26, it was therefore decided that as far as the Part 7 proceedings were concerned, they were an abuse of the process of the court because the appropriate procedure was the judicial review procedure. I will return to the judicial review procedure in due course, since at this point I am mainly concerned with the tax exclusivity aspect.

63. However, I do bear in mind that in *Knibbs* in circumstances where certain taxpayers were unable to go to the Tribunal, although as a result of a procedure which simply did not provide for a relevant jurisdiction to exist, the court was prepared not to apply the tax exclusivity principle but instead to proceed by a civil claim, albeit a judicial review Part 54 claim.

64. I was then taken to *HMRC v MCX* [2021] STC 474, another decision of the Court of Appeal. This related to a question as to whether HMRC was bound to pay interest on refunds of petroleum revenue tax and where a Part 8 claim was made for a declaration. The question as to whether or not this claim needed to be brought in the tribunal was dealt with at paragraphs 50 onwards of the judgment. At paragraph 50, the exclusivity principle was cited with reference to *Knibbs*, and in paragraph 51 the relevant passages in *Autologic* were cited. Paragraph 52 recorded the Revenue's contention to the effect that it was perfectly possible for there to be an appeal to the tribunal. In paragraph 53, the taxpayer's answer that it would not have been possible for there to be an appeal to the tribunal. In paragraph 55, it was held, albeit only on balance, that relevant taxpayers could have appealed to the tribunal. In paragraph 56, it was held that in those circumstances there was an abuse of process because the statutory appeal process had been laid down by Parliament but had not been adopted.

65. It does not seem at first sight that questions of European Union law applied to that particular decision, and it is another decision in what seems to be a line of decisions that, if an appeal process to the tribunal is available, then in principle that is the process which must be adopted; but there may be reasons as to why that is not the appropriate process, certainly where the appeal to the Tribunal avenue simply does not exist at all, although others may exist. I do, of course, bear in mind also that in *Knibbs*, where it was held that such a process did not exist, that the Revenue were there able (where they chose to) to insist on the matter being dealt with by a judicial review application.

66. At the end of her submissions, Ms Choudhury also took me to the decision of *Crown (the application of Clamp) v HMRC* [2021] EWHC 2360. This was a loan charge case where the taxpayer had repaid loans and then the law had changed with the 2020 Finance Act amendments; and so that the taxpayer, felt that there had been no need for the relevant repayments, wished to reverse the situation, and asked the Revenue to agree in advance that, if the taxpayer did so, then the loan charge legislation would no longer apply. The

Revenue refused to make such an agreement and the taxpayer brought a judicial review claim.

67. That claim was rejected on various grounds, one of which was that the Revenue had argued (which argument was accepted) that the court should not decide the matter in advance, at least where the Revenue did not have a settled view as to what the answer would be and they were simply refusing to make an agreement; and that what should happen would be that the taxpayer should do the relevant act and then see if the Revenue asserted the tax charge and, if the Revenue said there was a tax charge, in those circumstances the taxpayer should then go to the tribunal.

68. Paragraphs 47 to 51 of that decision read:

> "47. In my judgment, at least in a case where HMRC have formed a "settled view" that tax is payable under the legislation, and that view cannot be seen to be irrational or formed for improper purposes, they do not have that power. I consider that this is in keeping with paragraph [90] of Heathrow Airport. I also consider that it is in keeping with the proper limits of the collection and management discretion in this area. That discretion is, as Lord Hoffmann put it in Wilkinson in the passage I have quoted, one which enables HMRC to formulate policy in the interstices of the tax legislation and to deal with minor or transitory anomalies. It is not one which allows them to "untax" matters which they consider are unequivocally taxed on the basis that another view of the legislation is arguable – a situation which, of course, might arise in relation to numerous taxation provisions.
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> 48. It also appears to me that a recognition of this limitation on HMRC's collection and management powers is consonant with the statutory regime by which tax assessments may be challenged. If a taxpayer in cases such as the present disputes HMRC's view of the effect of the tax legislation, it is open to her to proceed with the proposed transaction, and to appeal to the tax tribunal against any assessment to tax which might be made. The tax tribunal is ordinarily the exclusive, and appropriate, forum for challenging HMRC's view of the law, as emphasised in Autologic Holdings Plc v IRC [2006] 1 AC 118. In any such appeal in the tax tribunal it is open to the taxpayer to argue, for example, that the relevant legislation should be

accorded a purposive construction under which no tax is payable.

49. An acceptance of Mr Clamp's argument as to the subsistence and width of a managerial discretion on the part of HMRC not to seek to levy tax, even when they have formed the view that the legislation imposes a charge, would be likely to mean more challenges by way of judicial review to HMRC decisions refusing to agree proposals whereby no tax is to be levied, disrupting the ordinary process of appeals to the tax tribunal against assessments made. In this context what Sales LJ said in R (oao Glencore Energy UK Ltd) v Revenue and Customs Commissioners [2017] EWCA Civ 1716 at paragraph 57 (cited in the context of challenges to the Loan Charge in Finucane v Commissioners for HMRC [2021] CSOH 38) is significant:

> ' … The basic object of the tax regime is to ensure that tax is properly collected when it is due and the taxpayer is not otherwise obliged to pay sums to the state. The regime for appeals on the merits in tax cases is directed to securing that basic objective and is more effective than judicial review to do so: it ensures that a taxpayer is only ultimately liable to pay tax if the law says so, not because HMRC consider that it should. To allow judicial review to intrude alongside the appeal regime risks disrupting the smooth collection of tax and the efficient functioning of the appeal procedures in a way which is not warranted by the need to protect the fundamental interests of the taxpayer. Those interests are ordinarily sufficiently and appropriately protected by the appeal regime. Since the basic objective of the tax regime is the proper collection of tax which is due, which is directly served by application of the law to the facts on an appeal once the tax collection process has been initiated, the lawfulness of the approach adopted by HMRC when taking the decision to initiate the process is not of central concern. Moreover, by legislating for a full right of appeal on fact and law, Parliament contemplated that there will be cases where there might have been some error of law by HMRC at the initiation stage but also contemplates that the appropriate way to deal with that problem will be by way of appeal.'

50. I recognise, of course, that the possibility of judicial review is not of itself a reason for confining the managerial discretion of HMRC. It is, however, of importance, as emphasised in what Sales LJ said in Glencore, that the taxpayer's interests are

> ordinarily and appropriately protected by the regime of an appeal against an assessment to tax. There is no need, in order to provide proper protection to the taxpayer, to recognise a managerial discretion on the part of HMRC to agree not to seek to collect tax as subsisting even when they have formed the clear view that tax is or will be payable. Such proper protections are, instead, provided by way of the statutory appeal process.
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> 51. In the present case, on the evidence and material before me I consider it to be clear that HMRC are of a settled view as to the construction of Part 7A ITEPA 2003, namely that tax would be payable on the reinstatement of Mr Clamp's loans. This is apparent from Mr Durnin's witness statement, to which I have referred and from which I have quoted above, and from the stance of HMRC throughout this application. Furthermore, no case has been made on this application that the view formed by HMRC is irrational or improperly motivated. Any such suggestion would, I consider, be very unlikely to succeed."

69. I bear in mind, though, firstly, that the decision is quite possibly distinguishable simply as set out in paragraph 47 of the judgment and it may have depended on the Revenue not having any settled view with regards to the matter. Secondly, this case is in the context that the taxpayer was trying to deal in advance of possibly taking a course of the taxpayer's own conduct with the possible ramifications of that conduct in tax law. Thus, this was a case of the taxpayer seeking a determination of tax law in thoroughly hypothetical circumstances. Thirdly, that European law does not appear to have been mentioned.

70. It seems to me that *Clamp* is an unusual case, which more generally proceeds on the basis that the court is refusing to proceed down the declaration route in order to deal with a purely hypothetical question and also is not a decision which concerns European law matters; both of which points render the decision distinguishable from the matter before me.

71. Ms Choudhury also took me to the decision in *Finucane v HMRC* [2021] SLT 665. That is a decision of the Scottish Court of Session and, therefore, at most is only persuasive. It was, however, an attempt by taxpayers to seek to challenge the loan charge provisions

under European Union law, and they did this by a Scottish judicial review procedure seeking a declaration rather than seeking to have an assessment and then proceeding to the tax tribunal. In paragraphs 20 to 28, it is said:

> "[20] It was submitted on behalf of HMRC that the application should be refused as incompetent, because the petitioner had a statutory remedy that he had failed to exhaust. The petitioner had available to him the usual procedure for challenging an assessment to tax, namely an appeal to the specialist tax tribunals under s.31 of the Taxes Management Act 1970. It was accepted that no assessment in relation to the petitioner's liability to pay the loan charge had yet been made: that might simply be because the charge had only recently fallen due. If, however, an assessment was made, the petitioner could appeal against it and present all of the arguments made in this petition to the First-tier Tribunal and in any subsequent appeal from that tribunal's decision. Reference was made to *Autologic Holdings Plc v Inland Revenue Commissioners* and *R (on the application of Glencore Energy UK Ltd) v Revenue and Customs Commissioners*. It would additionally be open to the petitioner in such proceedings to present arguments based upon his personal circumstances which were not being presented in the application for judicial review.
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> *Argument for the petitioner*
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> [21] On behalf of the petitioner, it was submitted that there was no substance to HMRC's contention. As was recognised, there was no assessment or closure notice currently extant that the petitioner could challenge by appeal under the Taxes Management Act 1970, and therefore no alternative remedy for him to exhaust before coming to this court. More fundamentally, HMRC's argument failed to recognise that the present application was a constitutional law judicial review rather than an administrative law judicial review, raising questions of whether the enactment by the legislature of the loan charge legislation, and its operation by HMRC, was or was not compatible with EU law. These were clearly matters of and for constitutional judicial review: cf. *R v Secretary of State for Transport Ex p Factortame Ltd (No.2)* and *R v Secretary of State for Transport Ex p Factortame Ltd (No.3)*. Constitutional judicial review fell within the experience and expertise of judges of this court acting as a constitutional court. They were not matters which fell within the experience or expertise of an administrative tribunal with no inherent jurisdiction, such as the Tax Chamber of the First-tier Tribunal. The issue was one of appropriateness, not competency. It

would not be appropriate to delay resolution of the matters raised by requiring them to be argued again in a tax appeal which might not be heard until years from now.

Decision

[22] In my opinion, HMRC's argument is well founded. Although the nature of the petitioner's challenge could be described as constitutional, in so far as it seeks a declaration that certain provisions of UK tax legislation are unlawful because they breach principles of EU law, the critical fact that gives him standing is that he is resisting a charge to income tax that he expects to be made upon him. That, in my view, is a matter whose resolution has been allocated by Parliament to the specialist tax tribunals. The relationship in England and Wales between judicial review and the tax tribunals was recently considered by the Court of Appeal in the *Glencore* case (above), in which Sales LJ (with whom the other members of the court agreed) observed ([2017] 4 W.L.R., pp.12–13):

> '[54] …The [alternative remedy] principle does not apply as the result of any statutory provision to oust the jurisdiction of the High Court on judicial review. In this case the High Court (and hence this court) has full jurisdiction to review the lawfulness of action by the designated officer and by HMRC. The question is whether the court should exercise its discretion to refuse to proceed to judicial review (as the judge did at the permission stage) or to grant relief under judicial review at a substantive hearing according to the established principle governing the exercise of its discretion where there is a suitable alternative remedy.
>
> [55] In my view, the principle is based on the fact that judicial review in the High Court is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective. However, since it is a matter of discretion for the court, where it is clear that a public authority is acting in defiance of the rule of law the High Court will be prepared to exercise its jurisdiction then and there without waiting for some other remedial process to take its course. Also, in considering what should be taken to qualify as a suitable alternative remedy, the court should have regard to the provision which Parliament has made to cater for the usual sort of case in terms of the procedures and remedies which have been established to deal with it. If Parliament has made it clear by its legislation that a particular sort of procedure

or remedy is in its view appropriate to deal with a standard case, the court should be slow to conclude in its discretion that the public interest is so pressing that it ought to intervene to exercise its judicial review function along with or instead of that statutory procedure. But of course it is possible that instances of unlawfulness will arise which are not of that standard description, in which case the availability of such a statutory procedure will be less significant as a factor.

[56] Treating judicial review in ordinary circumstances as a remedy of last resort fulfils a number of objectives. It ensures the courts give priority to statutory procedures as laid down by Parliament, respecting Parliament's judgment about what procedures are appropriate for particular contexts. It avoids expensive duplication of the effort which may be required if two sets of procedures are followed in relation to the same underlying subject matter. It minimises the potential for judicial review to be used to disrupt the smooth operation of statutory procedures which may be adequate to meet the justice of the case. It promotes proportionate allocation of judicial resources for dispute resolution and saves the High Court from undue pressure of work so that it remains available to provide speedy relief in other judicial review cases in fulfilment of its role as protector of the rule of law, where its intervention really is required.

[57] In my judgment the principle is applicable in the present tax context. The basic object of the tax regime is to ensure that tax is properly collected when it is due and the taxpayer is not otherwise obliged to pay sums to the state. The regime for appeals on the merits in tax cases is directed to securing that basic objective and is more effective than judicial review to do so: it ensures that a taxpayer is only ultimately liable to pay tax if the law says so, not because HMRC consider that it should. To allow judicial review to intrude alongside the appeal regime risks disrupting the smooth collection of tax and the efficient functioning of the appeal procedures in a way which is not warranted by the need to protect the fundamental interests of the taxpayer. Those interests are ordinarily sufficiently and appropriately protected by the appeal regime. Since the basic objective of the tax regime is the proper collection of tax which is due, which is directly served by application of the law to the facts on an appeal once the

> tax collection process has been initiated, the lawfulness of the approach adopted by HMRC when taking the decision to initiate the process is not of central concern. Moreover, by legislating for a full right of appeal on fact and law, Parliament contemplated that there will be cases where there might have been some error of law by HMRC at the initiation stage but also contemplates that the appropriate way to deal with that sort of problem will be by way of appeal.'

I have set out these observations at length because they appear to me to be equally applicable to the supervisory role of the Court of Session, and also to be particularly apposite to the facts of the present case. They acknowledge that the issue is not one of jurisdiction but of discretion, and explain the reasons why the court should, in exercise of its discretion, decline to exercise its supervisory function in relation to a matter that has clearly been directed by Parliament to be dealt with by a different statutory process.

[23] Sales LJ went on in *Glencore* to contrast the circumstances of that case with those of *In re Preston*. In that case a taxpayer sought judicial review of a decision of the Inland Revenue Commissioners to inquire into his tax affairs, on the ground that he had previously reached an agreement with an inspector of taxes that no further inquiries would be made, provided that he withdrew certain claims for relief. The House of Lords held that the issue was amenable for judicial review because it amounted to an allegation of abuse of power that would not have fallen within the jurisdiction of the tax appeal tribunal. I respectfully agree that the contrast is helpful in illustrating circumstances in which recourse is properly made to the supervisory jurisdiction: a similar contrast may be made between *Preston* and the present case.

[24] There was a suggestion in the petitioner's written note of argument, not pursued in oral argument, that consideration of the EU law issues raised in the petition would be beyond the jurisdiction of the First-tier Tribunal. It was also contended that these were matters beyond the experience and expertise of such a tribunal. I reject both of these contentions. As regards jurisdiction, it is beyond any doubt that the tax tribunals can, and indeed must, make findings in relation to EU law issues raised by parties (and could until the UK's departure from the European Union have made references to the Court of Justice for preliminary rulings). This was made clear by Lord Nicholls of Birkenhead, delivering one of the majority judgments in *Autologic Holdings Plc v Inland Revenue Commissioners* (above) at [2006] 1 A.C., pp.126–127, paras 16 and 17:

> '[16] The second basic principle concerns the interpretation and application of a provision of United Kingdom legislation which is inconsistent with a directly applicable provision of Community law. Where such an inconsistency exists the statutory provision is to be read and take effect as though the statute had enacted that the offending provision was to be without prejudice to the directly enforceable Community rights of persons having the benefit of such rights. That is the effect of section 2 of the European Communities Act 1972, as explained by your Lordships' House in *R v Secretary of State for Transport, Ex p Factortame Ltd* [1990] 2 AC 85, 140, and *Imperial Chemical Industries plc v Colmer (No 2)* [1999] 1 WLR 2035, 2041. [17] Thus, when deciding an appeal from a refusal by an inspector to allow group relief the appeal commissioners are obliged to give effect to all directly enforceable Community rights notwithstanding the terms of sections 402(3A) and (3B) and 413(5) of ICTA. In this regard the commissioners' position is analogous to that of the Pretore di Susa in *Amministrazione delle Finanze dello Stato v Simmenthal SpA (Case 106/77)* [1978] ECR 629. Accordingly, if an inconsistency with directly enforceable Community law exists, formal statutory requirements must where necessary be disapplied or moulded to the extent needed to enable those requirements to be applied in a manner consistent with Community law… .'

[25] As regards experience and expertise, it is not in my view for this court to decide, where Parliament has directed that appeals against tax assessments are to be heard by the specialist tax tribunals, that some of these are unsuitable for those tribunals because they raise questions of the supremacy of EU law. Even though the facility of reference for a preliminary ruling is no longer available, there is no basis whatever for treating a dispute as inappropriate for hearing by the First-tier Tribunal (with the usual rights of further appeal) simply because an issue characterised by the taxpayer as "constitutional" has been raised.

[26] In relation to arguments based on expediency, it would be unrealistic for me not to recognise that there are broader interests in these proceedings than the tax affairs of the present petitioner. As is noted in HMRC's answers, the petitioner appears to have the support of a group entitled "Loan Charge Judicial Review European Union". That group's website refers to one, and possibly two, "lead cases" in Scotland: it is

> reasonable to infer that this petition is one of them, and that there are therefore other taxpayers with potential liability to pay the loan charge to whom the outcome of the present challenge is of considerable interest. (Reference is also made on the website to judicial review proceedings raised in England.) The question is whether I should regard this wider interest as a reason to allow this application to proceed, thereby providing a decision now rather than requiring all concerned to await the outcome of an appeal (perhaps not yet even commenced) to the First-tier Tribunal. I am not persuaded that the fact that there are other taxpayers with similar interests affects the rationale set out in the observations of Sales LJ in *Glencore* for refusing to entertain an application. In my view the present application amounts to an attempt to preempt consideration of the issues raised by the tribunals appointed by Parliament to hear such issues. I see no reason in principle why a particular group of aggrieved taxpayers should be accorded favourable treatment in this way. It may be that those co-ordinating the challenge to the loan charge see advantage in obtaining a court declarator in general terms, as opposed to hoping for a favourable decision capable of general application in an appeal to a tribunal by a particular taxpayer. The difference may however be more apparent than real. Any declarator by this court would be pronounced against the factual circumstances of the petitioner, and it seems to me that the relevance of such a declarator to the affairs of other taxpayers would be no less uncertain than the relevance of the reasoning of an appeal tribunal.
>
> [27] On behalf of the petitioner, reference was made to *dicta* pronounced in various cases including *Ruddy v Chief Constable, Strathclyde Police, Taylor v Scottish Ministers*, and *Keatings v Advocate General for Scotland*, to support an assertion that HMRC's alternative remedy argument was "vexatious" and "an abuse of process". It suffices to say that all of the *dicta* referred to were pronounced in very different contexts and afford no support for this assertion.
>
> [28] For these reasons I hold that it is not appropriate for this court to entertain the petitioner's application for judicial review and that it falls to be dismissed. However, as I was fully addressed on the substantive issues, and in case the matter goes further, I will express my opinion on them."

72. The judge dealt with what was termed in Scottish law, "The competency of the application for judicial review." In paragraph 20, the judge recorded HMRC's submission that this was all a matter for the tax tribunal. In paragraph 21, the taxpayers' counter-submission

was that there was no assessment or closure notice extant which the taxpayer could challenge, although there was also said to be a more fundamental point, that this was a constitutional (that is to say European Union) challenge rather than a domestic law matter. In paragraph 22, the judge considered that HMRC's argument was well founded, citing the *Glencore* case, being an England and Wales Court of Appeal case dealing with tax exclusivity. In paragraph 23, the judge recorded that there was a potential exception if HMRC were said to be engaging in some sort of abuse of power. In paragraph 23, the judge recorded that it was effectively accepted by the taxpayer that the tribunal should deal with the matters of European Union law. In paragraph 25, the judge held that these matters were appropriate for the tribunal to deal with. In paragraph 26, the judge held the fact that there were numerous other cases of taxpayers wishing to challenge the loan charge did not affect the judge's conclusion. In paragraph 27, the judge rejected the abuse of power or abuse of process argument. And in paragraph 28, the judge held that it was not appropriate for the court to entertain what was termed to be an application for judicial review.

73. Thereafter the judge examined and went on to reject the various European law challenges on a number of substantive grounds, in case the judge had gone wrong on the procedural aspect.

74. While I have borne this decision fully in mind and will return to it, I do find the reasoning somewhat unclear with regards to the taxpayers' contention that they should be able to obtain an immediate decision by a judicial review process rather than having to wait for the Revenue to take steps, which the Revenue would have to take, before they were able to appeal to the first tier tribunal. Although it is recorded in the judgment that the taxpayer had advanced that contention, I find it difficult to find in the judgment where the judge actually deals with that particular contention, apart from the general assertion and holding as a matter of law that tax matters are for the tribunal and not for the court.

Authorities (domestic law) cited by the Taxpayers

75. Mr Kamal, for the claimants, responded to the exclusivity arguments with various cases, both from this jurisdiction and Europe. He took me to *FSA v Rourke* [2001] EWHC 704. Here, the Financial Services Authority sought a declaration regarding an alleged contravention of section 3 of the Banking Act 1987 in a civil claim, notwithstanding that the contravention would give rise to a criminal offence. Referring to the general provision regarding the grant of declarations in Civil Procedure Rule 40.20, being that the court can grant declarations even if they are freestanding without other relief being sought, Neuberger J considered the general principles for the grant of declarations. At page 11 of the report he set out the general principle that:

> "In deciding whether to grant a declaration or not, the court should take into account justice to the parties, whether the declaration will serve a useful purpose and whether there are any other special reasons as to why a declaration should or should not be granted."

76. At page 18 of the report he decided that on the facts before him that a declaration would be beneficial to the public, even though that might overlap with matters which could be considered in a possible prosecution. I do not find that authority particularly helpful on the questions of what is appropriate by way of proceeding in this particular tax scenario where the questions are rather different from those in *FSA v Rourke* and where it is contended by the Revenue, with the support of the case law that I have already identified, that the existence of the tax tribunal system is itself very much a special circumstance and which is against the civil courts granting declarations. On the other hand, I do note that it makes clear that the jurisdiction to grant declarations is a very wide one.

77. Mr Kamal next took me to the decision of *Arrow Generics Limited v Merck* [2007] EWHC 1900. This was a patents dispute. The European Patent Office was processing an application for the grant of a patent in favour of the defendant which patent, if granted, might affect the marketability of the claimant's product. The claimant, rather than waiting

for the application to be determined, sought to seek a declaration that the marketing by the claimant of its own product was, in any event, lawful on the basis of obviousness within patents law. Section 74 of the Patents Act 1977 said that, if someone was to challenge the validity of a patent in certain circumstances, then they would need to engage in a particular patent court procedure. The claimant contended that it did not need to go down that particular procedure but could challenge by way of ordinary civil proceeding, where all it was seeking was a declaration as to the lawfulness of marketing its own product. In paragraph 47, the judge emphasised the width and the jurisdiction to grant declarations and that whether or not to grant a declaration was a matter of discretion. In paragraphs 53 onwards, the judge dealt with the defendant's contention that this was really a challenge to the defendant's patent and that section 74 mandated the procedure which should be utilized for such purpose. In paragraph 55, the judge noted that section 74 did not in terms exclude what the claimant was trying to do in relation to their own product. In paragraph 57, the judge identified that the claimant was not actually able at that point in time to bring a claim to challenge what the defendant was doing but would have to wait for the relevant application to be determined in the defendant's favour before the claimant could seek to challenge the outcome. The judge held that, in those circumstances, the claims were not barred by section 74.

78. The judge then returned to these matters when considering further questions of discretion, in paragraphs 60 and 61, and the potential for the claimant to wait for the applications to be determined and then, if they were determined in the defendant's favour, with the registration of a patent, to then proceed down the section 74 route. The judge identified certain problems with this but said that what was not being sought was to resolve those applications in any way. The judge was just simply granting a declaration that the claimant's product and its marketing was not an infringement of anything. At the end of paragraph 61, though, the judge did conclude that:

> "In my judgment, this [that is the contentions of the defendant] does not affect the jurisdiction of the court to deal with the claim as matters presently stand."

79. Thus, as far as this decision is concerned, it says in principle that particular section 74 of the Patents Act related to something else, in that case, the defendant's patent, than the matter which was before the court, which related to the claimant's product. That does not seem to me to be analogous with this situation, where the question of the lawfulness of the loan charge statutory provisions is the issue, whether this is being seen in the context of a damages claim being made by the claimant, or an attempt to achieve a declaration, or a challenge to any assessment by the Revenue. But, on the other hand, it is some support for Mr Kamal's contention that, if somebody is seeking a declaration as to the present legal situation, or a determination of what is the present legal position, then there is some principle to the effect that they should not have to wait for events which are outside their control (in that case the resolution by the European Patent Office of the defendant's application for a patent) in order to create a jurisdiction in another body or tribunal, but that they can instead come to the court for a declaration.

80. Mr Kamal then took me to various lines of cases with regards to taxpayers seeking to obtain declarations or otherwise have the court review Revenue conduct and matters, certain of which predate the modern law of judicial review.

81. He took me first to *Barraclough v Brown* [1897] AC 615, where the courts laid down the general provision that, if Parliament had provided for a procedure by which to challenge a Revenue determination in a relevant type of matter, then in principle that was exclusive and the courts did not have jurisdiction. That case was in terms of jurisdiction rather than discretion, but the subsequent cases would seem to establish that it does not make much difference; the outcome is the same.

82. Mr Kamal then took me to *Dyson v Attorney General* [1911] 1 KB 410, where the Commissioners, who were effectively being represented by the Attorney General, had

issued various notices to the claimants, and with the Commissioners being able to levy penalties within the tax system if the notices were not complied with. The taxpayer sought an immediate declaration to the effect that the notices were invalid, saying that it would be highly unfortunate if they were simply left in a state of uncertainty and were only able to challenge an attempt to impose penalties, thus putting them at the risk of having to come to their own conclusion as to what the law was and whether they needed to and should comply with the notices but at risk of a penalty if they got the answer wrong.

83. The taxpayers were, therefore, contending that they ought to be able to get an answer in advance. That submission seemed to find favour with the court, and at page 421, Farwell LJ said:

> "It would be a blot on our system of law and procedure if there was no way by which a decision on the true limit of the powers of inquisition vested in the Commissioners can be obtained by any member of the public aggrieved without putting himself in the invidious position of being sued for a penalty."

84. It was then decided that at that point the jurisdiction of the Chancery Division was a wide one and that it would be exercised, even though there was an overlap with the penalty which could arise from what would, in effect, be a criminal offence matter. It seems to me that this case is of some limited support for a contention that someone in the position of the claimants should actually be able to get an answer to what is the legal position, at least if they are in a situation where they have to choose whether or not to take a course of action which would cause them expense or real prejudice, at the risk that, if they do not take it because they have, in effect, got the law wrong, they will then find themselves exposed to a penalty.

85. Mr Kamal then took me to the decision of *Argosam v Oxby* [1965] 1 Ch 390. Here, the taxpayer was seeking a declaration as to an assumed set of facts, being that, if the taxpayer deferred certain dividends, or if certain matters which the taxpayer had done were said to have certain consequences on the taxation of dividends in law, then as to what the relevant

consequences would be, including as to whether or not various tax could be repaid. At page 423 C to F of the report the Court of Appeal noted that the judge below had considered that what was being sought was something which fell within the Commissioner's exclusive jurisdiction. However, at letter F, the Court of Appeal also held that there was a simple way of determining the matter: that the summons was simply an abuse of the process of the court because it was asking a hypothetical question and, moreover, a hypothetical question which was a similar point to matters which were being raised in other extant proceedings. It seems to me that this case was generally distinguishable but, in any event, is something, but only something, of an authority to the effect that the court is reluctant to decide hypothetical questions, at least where there is a probability that the underlying question is going to be decided in the context of a real actual set of facts elsewhere within the short to medium-term future.

86. Mr Kamal then took me to the decision in *Vandervell v White* [1971] AC 912, a decision which itself was cited and relied upon in *Autologic*. At pages 938 F to 939 H, the House of Lords set out the basic *Barraclough v Brown* jurisdictional point that, where, in tax law, Parliament had laid down a procedure for the determination of tax questions, then that procedure was exclusive and the courts should not interfere by granting declarations or otherwise. However, at H on page 939 onwards, Lord Wilberforce considered the situation which was actually before the House of Lords and that the actual issue was an issue between parties in a trust proprietary dispute and not an issue actually involving the Revenue themselves, and held that it was open to the courts to decide a tax issue within that particular context because the decision would simply be between the parties themselves in so far as how the tax decision effected their civil rights, which were the true matter in issue in the civil claim, and was not actually a determination of a liability to tax. That aspect, however, does not seem to be relevant to the matter before me.

87. Mr Kamal then took me to *Howard v Boardman (No. 2)* [1975] STC 327. There, the taxpayer challenged whether what was said to be a determination of a tax tribunal was

actually, " ... of the tribunal", that is to say, whether it was in law a determination at all? The court was prepared to and did decide what was the answer to that question. I do not see this case as being relevant to the matter before me, as; firstly, because no jurisdictional point was taken; secondly, the challenge was a challenge as to whether something was a decision of the tribunal, not a challenge to the substance of the decision; thirdly, the decision predated the modern procedural law of judicial review.

88. Mr Kamal then took me to *Baden v IRC* [1977] STC 148. There, the taxpayer sought a declaration that the particular notice served under a statute by the Revenue was invalid. At page 154 B onwards, the judge dealt with the Crown's points, that they asserted that the court did not have jurisdiction to adjudicate on this and that, if it did, that it should not exercise any discretion to do so; the matter should simply be dealt with by appeal to the Commissioners. The judge set out the basic tax exclusivity principle, but at letter 154 H said that while on its face it might appear to be conclusive, the judge was not sure that this was so because, in the speeches in *Vandervell*, their Lordships were addressing their minds as to the position when an assessment had actually been made, and the judge then cited the relevant paragraphs from *Vandervell*. At page 155 F onwards, the judge recorded various submissions from the claimant and said that the claimant, therefore, contended that this was not such a case as where statute provided a mandatory procedure so as to oust the jurisdiction of the court. The judge considered various arguments from each side in the context of the taxpayer's attack on the relevant notices and how an appeal procedure would work and as to whether or not an effective appeal existed. The judge concluded, at page 157 D and E to say that:

> "I have not found this jurisdictional question an easy one but I am at the end of the day driven to the conclusion that, certainly in a case where a question is raised as to the propriety of a determination by the tribunal, which the tribunal may be concerned to answer, that this court is a proper forum for the resolution of the question."

89. The judge then, having decided that the court had jurisdiction, went on to consider as a further question as to whether or not the court should exercise the discretion to grant a declaration, analysed the substantive situation of what had actually gone on and came to the conclusion that, in any event, the taxpayer had not made out their case and, therefore, no declaration should be granted.

90. Again, it seems to me that this case is some support for the contention that, if no alternative procedure exists to obtain a resolution of the dispute, so that the taxpayer cannot actually apply to a tribunal to properly decide it, then it may be that the court will deal with the matter on a civil or a judicial review claim basis rather than simply saying that it is a tribunal that has exclusive jurisdiction.

91. Mr Kamal next took me to the decision in *Beecham v IRC* [1992] STC 935. This was another attempt by a taxpayer to seek a declaration that they should not have to comply with a requirement, in this case, for a provision of information, where, to fail to comply with the requirement, would expose them to penalties. In this particular situation, as recorded at 939 J, there were in fact existing assessments and appeals but they had been generally adjourned, and the relevant point does not seem to have been thought to be a matter which would arise within them.

92. Mervyn Davies J considered the question of jurisdiction at page 942 E to J and he held that, as far as jurisdiction was concerned, the attack was on the relevant tax procedure rather than on a matter of tax law substance and held, therefore, that the court had jurisdiction. He then dealt with the Revenue's alternative argument that, as a matter of discretion, that the court should not consider granting any declaration, and rejected that on the bases that (1) the fact that the Revenue said that they could use other powers to achieve their objective was irrelevant and, more importantly for the purposes of this case (2) that there was a potential considerable advantage as a matter of general justice in the taxpayer

being able to find out what was the answer as to whether or not they did or did not have to provide the information sought at an early stage. At page 943 B and C he said:

> "It is plainly convenient and economic that the court should decide the point at issue at this stage rather than leave the matter to be considered by the Special Commissioners after the amassing of information which at the end of the day may be shown to have been unnecessary."

93. That was, of course, in the context of the particular challenge which there existed, but, again, it affords some support for the contention that the exclusivity of the tax procedure and tribunal system may be somewhat circumscribed in circumstances where it is not actually possible to apply to the tribunal at the particular present stage for it to make the determination sought.

94. Mr Kamal then took me to *Glaxo v IRC* [1995] SPC 105. There, the taxpayer sought to challenge the validity of a Revenue direction which would affect liabilities under certain open assessments. The Revenue did not press for their contentions that the court had no jurisdiction, as recorded at page 1080 J, and, therefore, this decision is at first sight distinguishable from the matters before me in any event. At page 1080 F, the court, nonetheless, considered the exclusive jurisdiction principle and considered *Vandervell*, *Beecham* and *Barlow*. At 1083 H, Robert Walker J said that:

> "An issue as to information gathering powers arising in the context of an existing or anticipated assessment of tax is a good example of the sort of issue that can conveniently and usefully be heard by the High Court, possibly, but not necessarily, by way of judicial review, subject to the court's discretion to decline jurisdiction or decline to grant relief. Quite apart from the exclusive jurisdiction principle, the court may refuse relief because it will not grant declarations on hypothetical questions ..."

Robert Walker J cited *Argosam* as support for that latterproposition.

95. Robert Walker J then went on at pages 1083 F to 1084 A to say:

> "From these authorities I conclude that the general principle which I have termed the exclusive jurisdiction principle is not open to doubt, subject perhaps to some erosion under the impact of judicial review. Moreover the exclusive jurisdiction principle cannot be circumvented simply by dressing up proceedings in the High Court as an application for a declaration, if the substantial effect of a declaration would be to determine a liability which ought to be determined by the commissioners. But the principle is not to be pushed too far so as to exclude any proceedings which might conveniently and usefully be heard in the High Court, 'just because those questions arise between taxpayer and Crown and form a basis, even a necessary basis, for an income tax assessment' (as Lord Wilberforce said in *Vandervell Trustees v White* [1971] AC 912 at 939, 46 TC 341 at 370). An issue as to information-gathering powers arising in the context of an existing or anticipated assessment to tax is a good example of the sort of issue that can conveniently and usefully be heard by the High Court, possibly but not necessarily by way of judicial review (RSC Ord 53, r 1(2)), subject to the court's discretion to decline jurisdiction or to decline to grant relief. Quite apart from the exclusive jurisdiction principle, the court may refuse relief because it will not grant declarations on hypothetical questions (see *Re Barnato* [1949] Ch 258 and *Argosam Finance v Oxby*).
>
> It is not easy to discern any clear dividing-line between High Court proceedings which are, and those which are not, objectionable as attempts to circumvent the exclusive jurisdiction principle. Possibly the correct view is that there is an absolute exclusion of the High Court's jurisdiction only when the proceedings seek relief which is more or less co-extensive with adjudicating on an existing open assessment; but that the more closely the High Court proceedings approximate to that in their substantial effect, the more ready the High Court will be, as a matter of discretion, to decline jurisdiction."

96. Thus the judge had made clear the importance of the tax exclusivity principle and that it should not be evaded simply by seeking a declaration, but that the court should keep the exclusive jurisdiction principle within limits. He made particular reference to the situation of an existing open assessment and that a challenge to it had to be by way of appeal to the Tribunal.

97. That was a passage which was effectively approved in *Autologic* and *Knibbs*. However, on the actual facts of the case, as set out at page 1084 A to C, the judge came to the conclusion that, while the issue of jurisdiction was not an easy one, because of the imminence of the 1995 Budget, there were reasons for the court determining the matter urgently and, therefore, the declaration process would be allowed to proceed.

98. Mr Kamal also referred me to *HMRC v Cotter*, which it seems to me is simply an application of the tax exclusivity principle. That was unfortunate for the taxpayer in that case in having to find an amount of money, notwithstanding a subsisting undetermined claim for loss relief, but this was a consequence of the domestic law and it does not seem to me assists me in any particular way.

Authorities (European law) cited by the Taxpayers

99. Mr Kamal, however, did stress that the attacks on the loan charge legislation are based on European law and took me to a number of European cases. He cited *Belge v SGI* C-311/08 NYAA [2007] ECR 16373 as authority to support his assertions that the loan charge provisions can be said to be contrary to European Union law as being capable of effecting freedom of establishment, whether or not any individual taxpayer is or was actually effected in the sense of taking or not taking an establishment or place of establishment decision as a result of the existence of the loan charge proceedings.
Ms Choudhury did not seek to persuade me that this was unarguable, but rather took the position that this was for another day, notwithstanding that the *Finucane* decision is support for the Revenue's contention that the European law challenge should fail.
Mr Kamal also cited *Saillant v Ministere de l'Economie* [2004] ECR I-2409 to the same effect. However, in the light of Ms Choudhury's position, it does not seem to me that it is necessary for me to go through those cases in any detail.

100. Mr Kamal went on to submit that the existence of loan charge provisions could have all sorts of negative effects to taxpayers now and in advance of any inquiries or assessments

taking place, including such matters as: firstly, statutory obligations to report, with penalties if reports are not made; secondly, pressure from the Revenue to persuade taxpayers that loans should be repaid. Mr Kamal said that that was in fact one of the purposes of the legislation, simply to put pressure on taxpayers, and that the Revenue has published its views as to the effect of the legislation again with that particular desire. Thirdly, Mr Kamal said that, if loans were repaid unnecessarily, that would generate heavy cash flow and funding problems for taxpayers and leave them in positions where they would incur considerable costs and liability to interest in taking steps to protect themselves against a threat, but which threat was based on provisions that are contended in this litigation to be unlawful. Fourthly, he emphasized that the Revenue might also either try, or at least threaten, accelerated payment notices ("APNs"), albeit that they have their own regime of contest by means of representations, and which have draconian effects in terms of the need to make payments, and substantial financial sanctions if payments are not made. Mr Kamal submitted to me that these were all reasons as to why a taxpayer should not have to wait for the Revenue to decide to institute inquiries or raise assessments and for appeals in relation to those.

101. Mr Kamal then referred me to various European Union cases regarding the principle of effectiveness and European Union law requiring domestic law to enable European law rights to be ascertained and vindicated, and in particular three cases. The first of those is the decision of *Aklagaren v Fransson* C-617/10. This relates to the duties of domestic courts to set aside national law which is incompatible with a European Union fundamental right, such as freedom of establishment. Paragraphs 43 to 49 read:

> "43. By its first question, the Haparanda tingsrätt asks the Court, in essence, whether a national judicial practice is compatible with European Union law if it makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the ECHR and by the Charter conditional upon that infringement being clear from the instruments concerned or the case-law relating to them.

44. As regards, first, the conclusions to be drawn by a national court from a conflict between national law and the ECHR, it is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law (see, to this effect, Case C-571/10 *Kamberaj* [2012] ECR, paragraph 62).

45. As regards, next, the conclusions to be drawn by a national court from a conflict between provisions of domestic law and rights guaranteed by the Charter, it is settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means (Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 and 24; Case C-314/08 *Filipiak* [2009] ECR I-11049, paragraph 81; and Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 43).

46. Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of European Union law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent European Union rules from having full force and effect are incompatible with those requirements, which are the very essence of European Union law (*Melki and Abdeli*, paragraph 44 and the case-law cited).

47. Furthermore, in accordance with Article 267 TFEU, a national court hearing a case concerning European Union law the meaning or scope of which is not clear to it may or, in certain circumstances, must refer to the Court questions

> on the interpretation of the provision of European Union law at issue (see, to this effect, Case 283/81 *Cilfit and Others* [1982] ECR 3415).
>
> 48. It follows that European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter.
>
> 49. In the light of the foregoing considerations, the answer to the first question is:
>
> - European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law;
>
> - European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter."

102. Paragraph 45 sets out that it is a national court's duty within the exercise of its discretion to apply the relevant provisions of European Union law. Paragraph 46 states that any provision of a national legal system which might impair the effectiveness of European law:

> "... by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent European rules from having full force and effect, are incompatible with those requirements which are the very essence of European law."

103. The paragraphs of the judgment are mainly directly towards the national courts having jurisdiction to effectively strike down national law because of incompatibility with European Union law. Paragraph 46 does, however, at least suggest that the national court should, immediately the matter is raised, be able to determine the relevant issue. On the other hand, this is subject to the national legislation procedural rules. However, it does seem to me that the general principle or thrust of *Fransson*, is towards an individual, who says that a national law is inconsistent with European Union law, being entitled, as long as they have a sufficient interest, to actually have that matter determined on their application. At first sight, for the individual to have to wait for the government to do something before they can apply might be said to be inconsistent with that.

104. Mr Kamal next took me in European law to the decision of *Unibet* C-432/05. This was a Swedish case in relation to lottery legislation which the claimants wished to say (i) was said to be binding on them, and (ii) placed onerous requirements upon them, but (iii) was contrary to European law. It appeared that, in Swedish law, there was no ordinary domestic method of seeking a pure declaration of incompatibility with European law, and hence a determination of invalidity could only be sought as part of other proceedings. It was, however, possible under the lottery legislation to apply for an exemption from it, and if that application was refused (with the relevant government entity having to either grant or refuse) then the refusal could be challenged and in which challenge points as to underlying incompatibility with European law could be taken.

105. Paragraphs 36 to 41 of the decision read:

> "36. By its first question, the Högsta domstolen asks, in essence, whether the principle of effective judicial protection of an individual's rights under Community law must be interpreted as requiring it to be possible in the legal order of a Member State to bring a free-standing action for an examination as to whether national provisions are compatible with Article 49 EC if other legal remedies permit the question of compatibility to be determined as a preliminary issue.

37. It is to be noted at the outset that, according to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 18 and 19; Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 14; Case C-424/99 *Commission* v *Austria* [2001] ECR I-9285, paragraph 45; Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39; and Case C-467/01 *Eribrand* [2003] ECR I-6471, paragraph 61) and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1).

38. Under the principle of cooperation laid down in Article 10 EC, it is for the Member States to ensure judicial protection of an individual's rights under Community law (see, to that effect, Case 33/76 *Rewe*, [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraph 12; Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 and 22; Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 19; and Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12).

39. It is also to be noted that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law (see, inter alia, *Rewe*, paragraph 5; *Comet*, paragraph 13; *Peterbroeck*, paragraph 12; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 29; and Case C-13/01 *Safalero* [2003] ECR I-8679, paragraph 49).

40. Although the EC Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Community Court, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law (Case 158/80 *Rewe* [1981] ECR 1805, paragraph 44).

41. It would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even

> indirectly, respect for an individual's rights under Community law (see, to that effect, Case 33/76 *Rewe*, paragraph 5; *Comet*, paragraph 16; and *Factortame*, paragraphs 19 to 23)."

106. Paragraph 36 opens by indicating that this section relates to the question of the principle of effectiveness, and paragraph 38 states that member states have to ensure that judicial protection for European Union rights exists within their judicial system, and so that paragraph 41 states that there must be a legal remedy (which could be indirect) available to the individual.

107. Paragraph 39, though, notes that it is for the domestic legal system to lay down the detailed procedural rules which should apply, and that is subject to the following paragraphs, which read:

> "42. Thus, while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection (see, inter alia, Joined Cases C-87/90 to C-89/90 *Verholen and Others* [1991] ECR I-3757, paragraph 24, and *Safalero*, paragraph 50). It is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right (*Unión de Pequeños Agricultores* v *Council*, paragraph 41).
>
> 43. In that regard, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, inter alia, Case 33/76 *Rewe*, paragraph 5; *Comet*, paragraphs 13 to 16; *Peterbroeck*, paragraph 12; *Courage and Crehan*, paragraph 29; *Eribrand*, paragraph 62; and *Safalero*, paragraph 49).
>
> 44. Moreover, it is for the national courts to interpret the procedural rules governing actions brought before them, such as the requirement for there to be a specific legal relationship between the applicant and the State, in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective, referred to at paragraph 37 above, of ensuring

effective judicial protection of an individual's rights under Community law."

108. Paragraph 42 makes clear that those national procedural rules must not undermine the right to effective judicial protection and must not render practically impossible or excessively difficult the exercise of the rights conferred in the principles of equivalence and effectiveness as set out in *Knibbs* and *Autologic*.

109. I next read into this judgment paragraphs 45 to 65 of the judgment:

"45. It is in the light of those considerations that the answer must be given to the first question referred by the Högsta domstolen.

46. According to that court, Swedish law does not provide for a self-standing action which seeks primarily to dispute the compatibility of a national provision with higher-ranking legal rules.

47. In that regard, it is to be noted, as is apparent from the case-law referred to at paragraph 40 above and has been argued by all the governments which have submitted observations to the Court and by the Commission of the European Communities, that the principle of effective judicial protection does not require it to be possible, as such, to bring a free-standing action which seeks primarily to dispute the compatibility of national provisions with Community law, provided that the principles of equivalence and effectiveness are observed in the domestic system of judicial remedies.

48. Firstly, it is apparent from the order for reference that Swedish law does not provide for such a free-standing action, regardless of whether the higher-ranking legal rule to be complied with is a national rule or a Community rule.

49. However, with regard to those two categories of legal rules, Swedish law permits individuals to obtain an examination of that question of compatibility in proceedings before the ordinary courts or before the administrative courts by way of a preliminary issue.

50. It is also apparent from the order for reference that the court which is to determine that question is required to disapply the contested provision if it considers that it conflicts

with a higher-ranking legal rule, regardless of whether it is a national or a Community rule.

51. In that examination, it is only where a provision adopted by the Swedish Parliament or Government is manifestly in conflict with a higher-ranking legal rule that such a provision is to be disapplied. As is apparent from paragraph 3 above, that condition does not apply, on the other hand, where the higher-ranking rule in question is a rule of Community law.

52. Therefore, as was observed by all the governments which submitted observations and by the Commission, it is clear that the detailed procedural rules governing actions brought under Swedish law for safeguarding an individual's rights under Community law are no less favourable than the rules governing actions for safeguarding an individual's rights under national provisions.

53. It is necessary, secondly, to establish whether the effect of the indirect legal remedies provided for by Swedish law for disputing the compatibility of a national provision with Community law is to render practically impossible or excessively difficult the exercise of rights conferred by Community law.

54. In that regard, each case which raises the question whether a national procedural provision renders the application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances (*Peterbroeck*, paragraph 14).

55. It is apparent from the order for reference that Swedish law does not prevent a person, such as Unibet, from disputing the compatibility of national legislation, such as the Law on Lotteries, with Community law but that, on the contrary, there exist various indirect legal remedies for that purpose.

56. Thus, firstly, the Högsta domstolen states that Unibet may obtain an examination of whether the Law on Lotteries is compatible with Community law in the context of a claim for damages before the ordinary courts.

57. It is also clear from the order for reference that Unibet brought such a claim and that the Högsta domstolen found it to be admissible.

58. Consequently, where an examination of the compatibility of the Law on Lotteries with Community law takes place in the context of the determination of a claim for damages, that action constitutes a remedy which enables Unibet to ensure effective protection of the rights conferred on it by Community law.

59. It is for the Högsta domstolen to ensure that the examination of the compatibility of that law with Community law takes place irrespective of the assessment of the merits of the case with regard to the requirements for damage and a causal link in the claim for damages.

60. Secondly, the Högsta domstolen adds that, if Unibet applied to the Swedish Government for an exception to the prohibition on the promotion of its services in Sweden, any decision rejecting that application could be the subject of judicial review proceedings before the Regeringsrätten, in which Unibet would be able to argue that the provisions of the Law on Lotteries are incompatible with Community law. Where appropriate, the competent court would be required to disapply the provisions of that law that were considered to be in conflict with Community law.

61. It is to be noted that such judicial review proceedings, which would enable Unibet to obtain a judicial decision that those provisions are incompatible with Community law, constitute a legal remedy securing effective judicial protection of its rights under Community law (see, to that effect, *Heylens*, paragraph 14, and Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, paragraph 22).

62. Moreover, the Högsta domstolen states that if Unibet disregarded the provisions of the Law on Lotteries and administrative action or criminal proceedings were brought against it by the competent national authorities, it would have the opportunity, in proceedings brought before the administrative court or an ordinary court, to dispute the compatibility of those provisions with Community law. Where appropriate, the competent court would be required to disapply the provisions of that law that were considered to be in conflict with Community law.

63. In addition to the remedies referred to at paragraphs 56 and 60 above, it would therefore be possible for Unibet to claim in court proceedings against the administration or in criminal proceedings that measures taken or required to be taken against it were incompatible with Community law on account of the fact that it had not been permitted by the

> competent national authorities to promote its services in Sweden.
>
> 64. In any event, it is clear from paragraphs 56 to 61 above that Unibet must be regarded as having available to it legal remedies which ensure effective judicial protection of its rights under Community law. If, on the contrary, as mentioned at paragraph 62 above, it was forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with Community law, that would not be sufficient to secure for it such effective judicial protection.
>
> 65. Accordingly, the answer to the first question must be that the principle of effective judicial protection of an individual's rights under Community law must be interpreted as meaning that it does not require the national legal order of a Member State to provide for a free-standing action for an examination of whether national provisions are compatible with Article 49 EC, provided that other effective legal remedies, which are no less favourable than those governing similar domestic actions, make it possible for such a question of compatibility to be determined as a preliminary issue, which is a matter for the national court to establish."

110. In those paragraphs the European Court analysed the ability to challenge the Swedish domestic law within the Swedish domestic system and considered the relevant circumstances as to what would happen to the claimant if various routes were taken. In paragraph 62, the court noted that, if the claimant disregarded the relevant domestic law, then action and criminal proceedings could be brought against it, but that it would be able to seek to defend those proceedings under the domestic law on the basis of incompatibility with Community law.

111. In paragraph 64, the first sentence says that it must be regarded that the claimant did have legal remedies available which would ensure effective judicial protection. However, somewhat confusingly, the second sentence says:

> "If, on the contrary, as mentioned at paragraph 62 above, it was forced to be subject to administrative or criminal proceedings and to any penalties that might result as the sole form of legal remedy

> for disputing compatibility of the national provision, that would not be sufficient to secure for it such an effective judicial protection."

112. At paragraph 65, the European Court stated that:

> "It is, therefore, not necessary for a domestic law to provide for a freestanding action to challenge compatibility ..."

(that is to say declaration of proceedings of the sort brought by the taxpayer here):

> " ... provided that other effective legal remedies which are no less favourable than those governing similar domestic actions make it possible for such a question of compatibility to be determined."

113. I find the wording of paragraph 64 somewhat confusing, but it seems to me that what it is saying is as follows: that, as long as in domestic law and procedure it is possible to obtain an effective determination of the compatibility question, that is sufficient even if the relevant procedure is not as simple as seeking a declaration procedure, but only as long as the claimant is not being exposed to a situation where they may be facing penalties on the basis of having formed their own view that they are likely to succeed on the compatibility point and having not complied with the relevant domestic law provision as a result. If they are subject or potentially subject to such penalties, then they should be protected from that by being able to bring some sort of immediate claim to have the compatibility question determined. If there is a mechanism, whether judicial or otherwise, direct or indirect, under which the question of compatibility could and would be determined - and in that case it was held that it would be sufficient to be able to ask for an exemption and, if that was refused, to be able then to challenge the refusal - then that would do; but that in principle what would not do would be to say to the claimant, "You have to take your own view on compatibility. If you are right, all well and good but, if you are wrong, you are then going to face the following penalty ..." - European law requires the individual not to be put to that invidious choice.

114. The other European case which Mr Kamal relied upon was the decision in *Metallgesellschaft v IRC* [2001] Ch 620. This related to litigation regarding advanced corporation tax and the taxpayer was saying that they potentially faced statutory penalties in relation to matters which were contrary to European law and what they had done was to have decided to pay the tax and then to reclaim it from the Revenue on the basis of unlawful demands having allegedly been made upon them. The government's position was that this should simply have been left to the tax tribunal from the start. The matter was referred to the European Court.

115. At paragraph 99, the government contended that what the taxpayer should actually have done was to have made a particular election in tax law and waited for the Revenue to object to that and then proceeded by way of appeal of the objection to the tax tribunal, and in which forum the question of the compatibility with European Union law would have been decided. In paragraph 102 of the judgment, the European Court confirmed that, in principle, the mechanism of challenge was a matter for the rules of national procedure. In paragraph 103, they noted that, if there had been an election made, then HMRC would have been bound to refuse it, and in paragraph 104, that that would have enabled an appeal to take place. In paragraph 105, they said that, effectively, the circumstance there was that what the government was in practice doing was criticising the claimants for actually having paid the advance corporation tax in accordance with the national legislation.

116. In paragraphs 106 and 107 it was held that:

> "106. The exercise of rights conferred on private persons by directly applicable provisions in Community law would, however, be rendered impossible or excessively difficult if their claims for restitution or compensation based on Community law were rejected or reduced solely because the persons concerned had not applied for a tax advantage which national law denied them with a view to challenging the refusal of the tax authorities by means of the legal remedies provided for that purpose, invoking the primacy and direct effect of Community law.

> 107. "The answer to the fifth question must therefore be that it is contrary to Community law for a national court to refuse or reduce a claim brought before it by a resident subsidiary and its non-resident parent company for reimbursement or reparation of the financial loss which they have suffered as a consequence of the advance payment of corporation tax by the subsidiary, on the sole ground that they did not apply to the tax authorities in order to benefit from the taxation regime which would have exempted the subsidiary from making payments in advance and that they therefore did not make use of the legal remedies available to them to challenge the refusals of the tax authorities, by invoking the primacy and direct effect of the provisions of Community law, where upon any view national law denied resident subsidiaries and their non-resident parent companies the benefit of that taxation regime."

117. Thus, the European Court seemed to be saying that it was not appropriate in Community law for someone to have to go through a procedure laid down by tax law rather than (i) seeking an immediate determination of whether or not UK law was consistent with European law, or, (ii) as happened in that case, paying the relevant tax in accordance with national law and then bringing a civil claim to challenge compatibility and seek for the money, and quite possibly additional damages, to be repaid.

118. Again, it seems to me that this case is some authority in European law that the European approach is to (i) look very closely at the national provisions to see whether the national provisions actually give the individual an effective right and remedy to go and have the point of incompatibility determined, and also, and alternatively, that (ii) the court stands back and asks, realistically, whether or not the relevant national procedure imposes something such as the risk of a penalty or criminal offence or charge or cost on the individual if they were to take their own decision on compatibility and to disregard the allegedly incompatible domestic law; and, in which case, in European law, that may well be a reason as to why that nationally prescribed route is not an effective remedy and in European law the individual should be able to go straight to the court for a declaration.

119. Mr Kamal also reminded me that, in terms of *Francovich*, damages for national legislation incompatible with European law, in tort, potentially has a six year time period rather than

the distinctly shorter time periods which exist either for appeals to the FTT or judicial review.

120. Mr Kamal has also referred me to section 4(2) of the Human Rights Act 1998, saying that it reads into domestic statutes compliance with human rights law, including as to the protection of possessions. That is a complex area and Mr Kamal has spent little time on it, and I do not think that it adds much, if anything, to his other submissions.

121. Mr Kamal has also drawn my attention to the very recent decision of *Lloyd v Google* [2021] UKSC 50, where in representative action litigation, at paragraphs 80 to 83 in the Supreme Court, contemplated that one could have a representative action deciding various general points at a first stage, with a later set of individual damages assessments. In that case, damages were actually being claimed in a representative action context where there was not, it seems to me, any general point arising with regards to exclusivity principles and the like, and I do not see that case as being of any assistance to what I have to decide.

122. In the light of all this, HMRC submits that the taxpayer should wait for an inquiry and then either insist upon a closure notice or wait for an assessment and only then bring a challenge in the FTT. They say that:

    a. that is the route laid down by Parliament,

    b. that it is an effective procedure satisfying European Union law,

    c. it avoids dealing with hypothetical questions which may never arise, and,

    d. with regards to damages, even though the FTT cannot award them, (a) no damages claims are actually made, and (b) even if they were, that could be left to a second stage, as in *Autologic*.

HMRC relies on the case law cited by Ms Choudhury, especially *Autologic* and *Knibbs*, as well as also *Finucane*.

123. The taxpayers submit, through Mr Kamal:

a. firstly, that they should not have to wait for the Revenue to take steps, should it ever get round to doing so, but that the matter should be determined now. They say that is the only way to vindicate their European law rights and that they have no other avenue by which to do so.

b. secondly, that the FTT procedure is not an effective procedure in European law: firstly, because of the delay; secondly, because it would not be able to deal with damages; and, thirdly, because prejudice us being suffered now in terms of the individuals not knowing what they ought to or ought not to do and potentially exposing themselves to penalties and substantial cost.

They say that the matter should proceed to, effectively, a trial determination, at which the court can decide if a declaration is appropriate.

124. It seems to me that I should look at this in terms of a number of stages of the different legal regimes of law. Firstly, that of pure domestic England and Wales law. It seems to me that it is clear that, in general, substantive tax matters are exclusively for the first tier tribunal and that the court, while it may have a jurisdiction to grant a declaration, will stand aside and leave tax matters to the FTT. It seems to me that that is what is said in a series of cases, starting with *Barraclough v Brown*, through *Vandervell*, to *Autologic* and onwards. That is the general rule absent special circumstances.

125. With regards to the question as to whether or not the taxpayer can seek advanced determination of a question from the courts, I accept that some cases raise the issue of whether the court is prepared to exercise a discretion to do that in the absence of the

situation (which, of course, does not exist here) of an existing open appealable assessment, and those cases are dependent on their own particular facts.

126. However, those cases only seem to allow the declaration route to be adopted where there is a specific Revenue notice being challenged or specific penalty which exists which is being sought to be struck down, and I have not had my attention drawn to any here. The taxpayers refer to the potential for HMRC to serve accelerated payment notices, but there are none of those as yet and they have their own representations procedure. It also seems to me that some of the cited cases have very much made clear that the court is against deciding hypothetical questions or hypothetical situations, for example *Argosam* and *Clamp*.

127. With regards to the question of the first tier tribunal not having jurisdiction to award damages, that is common ground, but, as against that, it seems to me that there are various counter considerations. Firstly, *Autologic* says that that jurisdictional fact does not prevent the tribunal having exclusive jurisdiction over open tax issues. Damages can simply be held over to be determined at a later stage. Secondly, in any event, I take the view that there is no damages claim in the factual situation before me, and for the following reasons: (i) firstly, it is not claimed in the claim form. What is claimed in the claim form is a declaration which seeks to reserve the matter to later. That, it does not seem to me, is a damages claim. I am not even sure as to whether or not it is a potential abuse, but I am not being asked to decide that; (ii) secondly, Mr Kamal expressly disavowed any damages claim being made; (iii) thirdly, a damages claim is subject to certain rules of pleading, which do not extend to an assertion that there might be damages; and (iv) fourthly, a damages claim requires payment of a specific fee, and these claims are being brought on the basis that damages fees are not being paid. It does not seem to me that it is open to the claimants to say, "We are not prepared to pay the fee" without more and yet this is a claim for damages. It also does not seem to me that this causes the claimants any particular difficulty. If they wish to assert that they have suffered damages, then they can

plead that and, if they wish to assert that they are unable to provide particulars at this point in time, then they can do that and give reasons. I do also see some force in Ms Choudhury's criticism of the list of heads of damages, but I am not deciding those or giving any judgment on that basis.

128. Considering England and Wales law further, it does seem to me that *Autologic* and *Knibbs* make clear that the exclusivity rule, at least where there is not an open assessment to challenge by way of appeal, is only a general one and is also subject to special circumstances. Those special circumstances, it seems to me, include European law, and I will come back to that. However, it does also seem to me that a potential special circumstance is simply an inability in tax procedural law to go to the FTT and have one's assertion determined there. The case law makes clear that, if it is impossible to go to the FTT because there is an existing time bar, or some other reason why the FTT will not accept the case whatever happens, then that is a special circumstance. That is precisely what both *Autologic* and *Knibbs* say.

129. The more difficult question in pure England and Wales law is the question as to whether the fact that the tax procedure has not yet reached the stage which in ordinary taxes management law would enable the taxpayer to appeal to the first tier tribunal is enough to be such a special circumstance as to open the door to an ordinary civil claim for a declaration or a judicial review. That is a situation which is not directly dealt with in the cases, although some of them suggest that, if the taxpayer has a means of seeking to try to persuade the Revenue to take steps (including by inviting an agreement), then that may be a reason for refusing the declaration process.

130. It does not seem to me that this particular question of whether a taxpayer can bring proceedings for a declaration or whether it is simply, and only, for the Revenue to decide when to institute an inquiry and raise an assessment has actually been the subject matter of any specific England and Wales case. Nonetheless, it seems to me at first sight that the

scenario of the taxpayer having to wait for the Revenue is unlikely to be a sufficient special circumstance justifying the declaration route. I say that because in my view it is a matter which Parliament has effectively stated by the fact that Parliament has laid down in the Taxes Management Act the inquiry and assessment procedure as being the preliminary course before a taxpayer can appeal. That procedure effectively contemplates that it is up to the Revenue to decide when, if ever, to start things. It seems to me that Parliament has laid that down as being a general situation where it is for the Revenue to decide whether to take matters forward or not. At first sight, it seems to me that Parliament has potentially valid public policy objectives in doing that. The position may be different where there is a specific penalty in play, such as **possibly** if accelerated payment notices or similar were being served, but that situation, it seems to me, is not presently this case. In my judgment that outcome is at least consistent with the analysis in such cases as *Autologic*.

131. However, I have to analyse this case, of a European law challenge to the compatibility of domestic law with European law, in the context of European law as interpreted by the England and Wales courts. At first sight, it seems to me that *Fransson* and also the other cases, in establishing the principle of effectiveness, are establishing a principle and policy that any individual effected by national legislation which is said to be incompatible with European legislation is entitled to go to a national court to have that incompatibility ruled upon, albeit that that right in principle is to be exercised by whatever procedures domestic law lays down as long as they satisfy the principle of effectiveness.

132. However, that is subject to the *Unibet* decision which, in my judgment, states that the domestic procedure must be available, although it can be indirect and it can be, as long as there is no extant penalty problem, a procedure which the taxpayer has to trigger by taking a step themselves. However, notwithstanding that, it seems to me that, in principle, in European law, it is not sufficient to satisfy the principle of effectiveness for there merely to be a domestic procedure which involves the individual having to wait for the

state authority (here HMRC) to decide to take a step. This is all the more so where the individual has the potential to be exposed to a penalty or adverse financial consequence if the individual wrongly conducts their affairs on the basis that the domestic law is incompatible with European law; but the mere inability for the individual to compel the state authority to take the steps required for the individual to go to a domestic law body (court or tribunal) is sufficient to infringe the principle of effectiveness. It seems to me that that is what is stated in both *Unibet* and *Metallgesellschaft*. It seems to me also that all of this is entirely consistent with what is said in *Autologic* and *FII* which themselves consider the principle of effectiveness as requiring domestic law to enable the individual to have a route to a determination of the question of compatibility of the domestic law with European law.

133. Flowing on from that, it seems to me, therefore, that the consequence of having analysed those European cases is, (a) that the England and Wales courts will generally treat the exclusivity of the FTT to determine tax matters, including whether domestic tax law is compatible with European Union law, as meaning that the court will not grant declarations and will postpone damages questions to a tribunal determination regarding compatibility, as long as the FTT procedure satisfies the requirements of European Union effectiveness, but (b) and secondly, that European Union effectiveness means that it must be possible for the taxpayer to initiate the course of bringing the compatibility question before the tribunal.

134. As to the main England and Wales case-law:

    a. In *Autologic*, where there was a European law challenge and so the principle of effectiveness applied, certain of the claims could not be brought before the tribunal and that resulted in the split approach (i.e. where a claim could not be brought before the tribunal it could be brought to the court as a civil claim) which the House of Lords decided upon.

b. In *Knibbs*, the challenge was not a European law challenge. However, I do note that in *Knibbs*, at paragraph 20, the Court of Appeal were considering the question of whether the taxpayer should have to go to the tribunal or could use civil proceedings, and one argument put forward by the taxpayer was that the taxpayer was out of time for going to the tribunal. It was held ultimately that that class of taxpayer could not go to the tribunal at all irrespective of timing (and with the result that domestic tax tribunal exclusivity was disapplied) but, when considering the argument, the Court of Appeal stated that, in *Autologic*, the House of Lords had proceeded on the basis that the short time period for going to the tribunal, or the fact that that time period had expired, did not matter in *Knibbs* because, in *Autologic*, (i) what was sought to be done was to vindicate European Union law rights (which was not the case in *Knibbs*), and (ii) for there to be a short time limit which had expired to have the consequence of barring the ability for the individual to have their European law rights vindicated would infringe the principle of effectiveness (which did not apply in *Knibbs* as it was not a European law challenge case). This was picked up to a degree in paragraph 25 in terms of the Court of Appeal's reasoning as to why the taxpayer's challenge should proceed by judicial review rather than by ordinary civil action; their second reason being that the time limits were a strong factor in favour of judicial review being the correct procedure because both appeals to the FTT and applications for permission to pursue judicial review are subject to short time limits, and so that it would make no sense at all that an individual taxpayer or a partnership had a period of 30 days in which to appeal to the FTT against a closure notice but that individual partners should have six years, being an ordinary limitation period, in which to make what is, in effect, the same challenge to a statutory notice. It seems to me that that reasoning is somewhat indicative of saying that the different procedural time limits are relevant in terms of whether or not to exercise a discretion to go down the declaration route; but also, and more importantly at this stage, it supports a contention that their expiry

and also their short length is material, or potentially material, when considering whether the European law principle of effectiveness is satisfied as the court asks itself the question "Does having to go down the FTT route enable the individual to have their European rights effectively vindicated?"

c. In *MCX*, also, the availability of the process was crucial to whether or not there was tax tribunal exclusivity.

135. I therefore come to, analysing all that, the facts of this case against my review of the England and Wales, and European law. My general conclusion in relation to pure England and Wales law is that, in principle, where there is not an open assessment, the court will, nonetheless, consider whether the tax tribunal route is sufficiently available to mean that the taxpayer should have to go down that route, but where the challenge to the tax law is, as here, on a European basis, that the court will ask itself very carefully as to whether or not the principle of effectiveness is satisfied? The facts of this case, of course, are that the Revenue has not yet initiated any inquiry, there is no possibility of a closure notice being obtained at this point, and there is no assessment. And the question is whether to require the taxpayer to wait and then go to the tribunal would result in the absence of an effective remedy? My judgment is that it would, in the light of the above matters, and especially for the following reasons:

a. Firstly, the thrust and policy of decisions such as *Fransson* is that the individual should be able to have the point determined, and determined now.

b. Secondly, it is an important part of the certainty of European law that individuals should be able to have determined the question of whether national law infringes European law, and effectively be able to do so as a matter of right. There is substantial force in Mr Kamal's submissions, firstly, that it is part of the principle of legality of European law that the national courts should be able to declare what the law is in terms of possible domestic law incompatibility; and, secondly,

that it is unfair to individuals not to have that certainty where they are having to take decisions and that they should be able to take decisions on a basis of knowing what the law is in terms of compatibility.

c. Thirdly, that, although *Unibet* says that it is sufficient to be able to challenge national law on grounds of incompatibility with European law by indirect means, including by the taxpayer taking particular steps, there are two important qualifications to this:

    i. Firstly, that the steps need to be able to be taken without cooperation from the other side, or in circumstances where the other side (in this case HMRC) has no choice but to cooperate in a way which will enable a dispute to exist such as can be determined by a judicial or other court or tribunal process. In *Unibet*, that was actually the situation and *Unibet* could have asked for an exemption, which the relevant authority would have been bound either to grant or to refuse, thus enabling a case to be taken to a court or tribunal. However, that is not the situation here. Here, the taxpayer cannot force HMRC to do anything. In those circumstances, it seems to me that the taxpayer is not in a situation of having an effective remedy

    ii. Secondly, although I place little weight on this because, for reasons I have already given, it seems to me to be premature, for there to be an effective remedy, the taxpayer should not be subject or potentially subject to any penalty or significant disadvantage in the meantime. It seems to me that there is some ground for saying that the taxpayer is exposed to this, albeit for the reasons I have already given I place little weight on that.

d. Fourthly, I do not see this conclusion as in any way being contrary to England and Wales case law. *Autologic* and *Knibbs* are not dealing with the situation where a taxpayer is able to go to the tribunal but only in the future when HMRC decides to take steps which enable that to occur. It does in fact seem to me that the situation here is more like *Autologic* type 2 cases and *Knibbs*, where the position is that the taxpayer simply cannot go to the tribunal at this point in time and, therefore, ought to be allowed to go to the court. Although the court refused something like this in the *Clamp* decision, that *Clamp* decision is distinguishable because: (i) it had no European law aspect, and it is the European law principle of effectiveness which is key here, and (ii) the *Clamp* actual situation was all a purely hypothetical situation, where it seems to me that the judge was very much proceeding on the basis that it is not for the courts to deal with hypothetical situations rather than actual situations, into which latter category I conclude that this one falls.

136. I do appreciate that this conclusion is contrary to the *Finucane* decision, which I have taken into account, but, as to that decision:

a. firstly, it is a Scots' decision and not binding on me;

b. secondly, it does not seem to have had the European cases cited;

c. thirdly, I am unclear to the extent, or at all, as to which *Knibbs* was cited in it, and it does not seem to me to deal with all the relevant parts of *Autologic*;

d. fourthly, it seems to me that the reasoning in that case does not seem to be really to be directed to this point that the taxpayer simply cannot go to the tribunal unless and until HMRC allows it to do so, notwithstanding that the taxpayer's contention to that effect was actually recorded within the judgment.

137. In any event, I find, for the reasons which I have given, that the tax exclusivity principle does not mean that the taxpayer has to wait and go to the tribunal but can seek to resolve the matter through the courts. That is the first point.

The Judicial Review Exclusivity Principle

138. The second matter, though, is HMRC's secondary contention that the procedure which should be adopted is Part 54 judicial review to the Administrative Court and not a Part 7 or Part 8 claim to the High Court, whether to the Chancery Division or the Queen's Bench Division.

139. In relation to CPR 54, I note, in general, as follows on a number of matters within the Administrative Court on a judicial review application.

140. Firstly, CPR 54.4 requires the court to consider as the first stage whether to grant permission to proceed on a judicial review. That is a crucial stage of judicial review which has its own process and is an important filter.

141. Secondly, CPR 54.5(i) requires the claim form to be filed within three months after the grounds arose for the judicial review. Under subrule (ii), the parties cannot extend that period by agreement. Civil Procedure Rule 3.1 enables the court to do so. I asked Ms Choudhury as to whether HMRC, on the basis that the taxpayer is seeking to challenge the original statutes, would not oppose an application for an extension, even though it is a matter for the court and not the parties to agree? Ms Choudhury did not say that HMRC would not oppose an extension. Ms Choudhury simply said that the Revenue was reserving its position as to that; i.e. that the Revenue might decide not to oppose but, on the other hand, might decide to oppose and simply say that, "You have to go down the judicial review route, but you are too late."

142. Thirdly, the Administrative Court can transfer a judicial review claim to the Chancery Division for a specialist Chancery judge, or alternatively retain the claim within the Administrative Court and ask the senior judiciary to designate a specialist judge to deal with it within the Administrative Court. Alternatively, the Administrative Court can direct a Part 54 claim to continue as if it was a Part 7 claim. For all this, see: Civil Procedure Rule 54.20, the White Book notes and the general procedural guide to the Administrative Court. In other words, it is perfectly possible for the Administrative Court, if it thinks it appropriate, and particularly if it has granted permission to allow a claim to proceed as if it was a Part 7 or Part 8 claim, to take steps which enable a specialist judge with knowledge and experience of tax law to deal with these particular types of matters.

143. I further bear in mind the definition of what is a judicial review claim and which requires the use of the judicial review procedure in Civil Procedure Rule 54.1(ii). That reads:

> "In this section, (a) a claim for judicial review means a claim to review the lawfulness of, (i) an enactment ..."

which is exactly what it seems to me the claimants are seeking to do here.

144. Fourthly, Civil Procedure Rule 54.3(i)(a) provides that judicial review can be used as a procedure to obtain declarations, and subrule (ii) states that damages claims can be included within such a claim for a declaration, although they cannot be brought as a freestanding damages claim in judicial review.

145. As far as case law is concerned, I have already referred to *Knibbs,* in paragraphs 23 to 26, where the ordinary civil Part 7 claim was struck out in favour of the judicial review claim and where paragraph 25 referred to various matters specifically in support of that course, being:

a. Firstly, that the claim did not involve private law rights but tax law matters, which it seems to me at first sight applies here;

b. Secondly, that time limits are important, including the short time limits of going to the tribunal and the similar, albeit somewhat longer, short time limit of filing a claim form for judicial review. In European law, the time limit, at least for claiming damages, is a six year one. It seems to me at first sight that this case is very different from the *Knibbs* one, where, as I said earlier, European law did not feature, and which itself regarded *Autologic* as a different case because the challenges there (as in this case) were based on European law.

c. Thirdly, was the fact that the claim would effect large numbers of people, with no particular issues of fact, thus not rendering it unsuitable for judicial review, which at first sight seems also to apply here. That may be different in relation to a damages claim where the loss might be unique to the individual taxpayer, but damages claims can always be dealt with at a second stage.

d. Fourthly, *Knibbs* emphasized the importance of the requirement for permission to proceed as a filter to remove claims which are not sufficiently arguable or otherwise inappropriate for judicial review, and it seems to me that that is an important and key element of the judicial review procedure. There are parallel procedures in ordinary civil claims of applications to strike out and for reverse summary judgments, but they have their own particular provisions and procedures and do not necessarily result in the initial matter being dealt with at the initial stage, as in the judicial review procedure. It seems to me that this initial filter is a specific important part of the usual procedure for reviewing statutory provisions.

146. Ms Choudhury drew my attention to the decision in *Trim v North Dorset* [2010] EWCA 1446, where an individual was challenging a planning authority condition notice which had been directed towards them and sought to say that Part 54 should not apply where they said that private rights were involved. Paragraphs 20 to 30 read as follows:

"20. The main issue in the present case turns on the effect of the so-called exclusivity" principle, established in *O'Reilly v Mackman* [1983] 2 AC 237: that is, that in general it is an abuse of process to challenge the validity of public law actions or decisions other than by judicial review. Among the factors leading to this conclusion was the streamlined procedure by then available for judicial review, the requirement for leave, and the short time-limit (normally three months) for commencing proceedings. Lord Diplock said:

> ' The public interest in administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.' (p 281A, see also p 284E)

21. Subsequent experience has shown that a clear division between public and private law is often difficult to maintain, and the rigidity of the rule has had to be relaxed accordingly. *Wade and Forsyth Administrative Law 1*0th Ed p 570-81 gives a valuable description of this evolutionary process, leading to the emergence of "signs of liberality", and to some abatement of the "rigours of exclusivity" under the new Civil Procedure Rules. A particular area of difficulty was in relation to private law disputes involving public authorities, for example employment and contractual relations (*ibid* p572). In *Roy v Kensington and Chelsea FPC* [1992] 1 AC 624, the scope for relaxation of the rule was acknowledged by the House of Lords, when they accepted that private law rights could be enforced by civil action, even though they might involve a challenge to a public law decision or action (*ibid* p578).

22. *De Smith's Judicial Review 6*th Ed para 3-097 contains a similar account, suggesting that a "new approach" is required following the replacement in 2002 of Order 53 by the new CPR 54:

> ' What matters under the CPR regime is not the mode of commencement of proceedings but whether the choice of procedure may have a material effect on the outcome.'

Cases such as *Clark v University of Lincolnshire* [2000] 1 WLR 1988 (a case involving an alleged breach of contractual relationship with a public authority) are cited to support the proposition that the courts should avoid "sterile and

expensive procedural disputes which may be of no practical significance to the outcome of the case" (para 3-103). There is a discussion to similar effect in the White Book (para 54.3.2: "Distinction between public and private law").

23. The problems described in those passages arose principally from cases in which private and public law principles overlapped (see *De Smith* para 3-102). I do not read them as seeking to undermine the principles that purely public acts should be challenged by judicial review, and that it is in the public interest that the legality of the formal acts of a public authority should be established without delay. The latter is confirmed by the retention in CPR 54 of the requirement that an application to bring judicial review proceedings must be made promptly, and in any event within three months. This principle is not undermined by the fact that it is subject to the general power to extend time-limits (CPR3.1(2)(a)), the exercise of which is itself governed by well-established principles (see 2010 White Book para 3.1.2, 54.5.1).

24. Nor do I find in the textbooks support for the suggestion that the existence of factual disputes is a reason for an exception to the exclusivity principle. The need to resolve such disputes does not often arise, because of the nature of most judicial review proceedings. But, when it does arise, it does not create any particular conceptual or procedural problems. The permission stage gives the court full control of the proceedings. It may give any necessary directions for the attendance of witnesses and cross-examination (CPR8.6(2)-(3), not disapplied by CPR54.16: see White Book para 54.16.1-2, *R (G) v Ealing LBC(No 2)* [2002] EWHC 250 (Admin) para 20).

25. It is true that in *Dilieto* Sullivan J referred to the possible shortcomings of judicial review proceedings to resolve factual disputes. However, that was in a different context, in which he was comparing that procedure with the alternative of the magistrate's court. If, which I doubt, he was intending to imply that judicial review cannot effectively cater for such disputes where they arise, I would respectfully disagree.

26. The exclusivity principle is in my view directly applicable in the present case. The service of a breach of condition notice is a purely public law act. There is strong public interest in its validity, if in issue, being established promptly, both because of its significance to the planning of the area, and because it turns what was merely unlawful into criminal conduct. It is an archetypal example of the public action which Lord Diplock would have had in mind. It does not come within any other

categories identified in *Wade and Forsyth* or *De Smith* as requiring a more flexible approach.

27. Mr Findlay QC sought help in the *Pyx Granite v MHLG* [1960] AC 260, in which one can find observations as to the impact of universal planning control under the 1947 Act (then relatively new) on the enjoyment of private property rights. That case of course remains important for the clear statement by Lord Simmonds of the "constitutional right" of access to the court. However, access to the courts is not here in issue; the question is which court, by what procedure, and when. Since that case was decided more than 20 years before *O'Reilly v Mackman*, it is not surprising that it offers no help on the issue of procedural exclusivity, or on the modern division between public and private law. Public action does not lose its "public" character merely because it involves, as most public action does, interference with private rights and freedoms. It is only where there is an overlap with private law *principles* (such as contract or tort), that procedural exclusivity may become difficult to maintain.

28. One well established exception to the exclusivity principle arose shortly after *O'Reilly v Mackman*. In *Wandsworth LBC v Winder* [1985] AC 461, it was held that public law issues could be raised by way of defence to legal proceedings initiated by the public authority itself. Again, the working out of this exception, and its application in more recent House of Lords decisions, is well described by *Wade and Forsyth* (see p 237-9). There is an apparent tension, at least in theory, between this exception and the exclusivity principle, with its leave requirement and strict time-limits. Someone who has failed to challenge a public law act within the normal time allowed for judicial review, or who has even been refused permission to bring such a challenge, may yet be able to raise it by way of defence outside the time-limit if the authority decides to initiate proceedings.

29. *Dilieto* is an illustration of the exception, as applied in the context of a prosecution for a breach of condition notice. That does not in my view assist Mr Findlay's argument on the facts of this case. It is true that, if the authority decide to prosecute, the defendant may be able to raise an issue as to the validity of the notice. In such proceedings, the authority will be able to rely on the breach of condition notice as providing an adequate foundation for the prosecution. The burden will then be on the defendant to raise any invalidity defence, and to establish the facts necessary to make it good.

> 30. On the other hand, the authority are under no duty to bring a prosecution. They may decide to rest on the effect of the breach of condition notice. They may properly take the view that the "blight" so created for the owner is sufficient sanction without the need for a criminal penalty. They may reasonably prefer to avoid the uncertainty of the factual disputes which may arise if the notice is challenged by way of defence to criminal proceedings. There is no obligation on the authority to give the owner a platform on which to challenge the validity of their action. They may rather see it as in the interests of the planning of their area for him to be encouraged towards the route of a section 73 application, which will bring the planning merits into play."

147. I note that in paragraph 20 onwards, the court considered the exclusivity principle in the judicial review context, stating that, in general, it is an abuse of process to challenge the validity of public law actions or decisions, and this also applies to statutes, other than by judicial review. In paragraph 28, a reference is made to the exception of seeking to defend private proceedings by use of public law defences. In previous paragraphs, Carnwath LJ had emphasized the reasons for the exclusivity principle, and in paragraph 20, the importance of both the time limits and of the filter of the requirement to obtain permission. He had then emphasised the flexibility of the judicial review procedure as enabling it to deal with factual disputes should that be appropriate. In paragraph 23 he had identified that there may be difficulties arising from overlap between public and private claims, but stated that that should not generally justify a departure from the exclusivity principle that public law matters are to be dealt with by judicial review procedure.

148. In paragraphs 25 and 29, Carnwarth LJ dealt with *Dilieto* and the fact that, in the *Trim* case before the Court of Appeal, the fact that the planning condition notice gave rise to a potential contravention of criminal law if it was not complied with. The claimant was asserting that the claimant should be able to attack the notice and have a determination as to whether or not it was valid in order to avoid being potentially exposed to criminal proceedings. However, in paragraph 30, Carnwath LJ said that there was no duty on the local authority to bring a prosecution but they were entitled simply to hold back and that,

as far as the claimant was concerned, the claimant simply had to take a decision as to what to do.

149. Ms Choudhury would say that that was analogous to the situation here, where the Revenue are simply holding back from starting any inquiry. However, Mr Kamal counters this by saying that, firstly, there is a European right to have the matter determined; secondly, that this is a position where the European law cases would say that the individuals should not have to guess at the law and potentially suffer a disadvantage as a result, but should have the ability to obtain a declaration. Mr Kamal also seeks to counter this decision by saying that this is a case where the taxpayer faces the three month time limit problem and that the taxpayer's European Union rights are being rendered, or potentially rendered ineffective if they have to go down the judicial review route and then find that, because we are now some years after the original legislation, it is held that it is be simply too late to be able to raise a judicial review challenge. He says that this would infringe the principle of effectiveness.

150. Ms Choudhury has taken me to two recent tax cases, the *Cartref* and *Zeeman* decisions, where loan charge provisions were sought to be challenged by judicial review on human rights grounds. As I say, that was a human rights challenge, not a European law challenge and, in any event, no points were taken as to procedure or appropriate jurisdiction. It does not seem to me that those decisions are really of any assistance.

151. I did, however, during submissions draw the parties' attention to the very recent decision of *R (on the application of Menjou v The Secretary of State for Justice* [2021] EWHC 1231 (QB). In that case the claimant claimed that certain provisions relating to legal aid and funding of private prosecutions were contrary to European law and sought that the Ministry of Justice should pay monies in relation to costs and fees as a result. The claimant brought a Part 8 claim seeking declarations, including that the Ministry of Justice was liable to pay that money. Various grounds were raised to seek to strike out these

proceedings, one of which grounds, but only one of which grounds, were that the proceedings were a public law challenge and should have been brought by judicial review rather than by way of a private law claim.

152. Eady J held that there was no merit in the claims to start with and, thus, the rest of what was said is to an extent obiter, but she did, nonetheless, consider what was the appropriate procedure. Paragraph 64 to 69 read:

> "64. In case I am wrong about that, I have, in any event, gone on to consider the question whether the claim should be struck out as an abuse of process under either of the alternative bases on which the application is put.
>
> 65. First, the defendant argues that the claim amounts to an abuse of process because the claimant is using the incorrect procedure. In this regard, the defendant argues that the claimant is seeking to pursue what is, in substance, a judicial review claim without utilising the specified procedure for such claims under CPR Part 54. The claimant has, instead, utilised the Part 8 procedure, which (the defendant objects) has the practical effect, for instance, that the claimant avoids the requirement to provide a detailed statement of his grounds and a statement of the facts relied on. More specifically, the defendant observes that CPR Part 54.2 provides that the judicial review procedure *must* be used in a claim for judicial review where the claimant is seeking, *inter alia*, **a** mandatory order. The claimant contends that the case law provides a more flexible approach and argues that he is seeking to pursue his claim as a private individual, asserting his rights under the HRA. He says that the defendant is taking an overly-technical objection that is inconsistent with the development of the civil law in this regard.
>
> 66. I acknowledge that the court should avoid adopting an overly-technical approach and agree that the case law has developed, to provide for what might be described as a more nuanced approach to the exclusivity principle arising from the speech of Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237 (HL). That said, it is plain that the present claim comprises a claim for judicial review as defined in CPR Part 54.1(2)(a). That is because it involves both a claim to review the lawfulness of an enactment (that is, both section 18(1) of the SCA and the provisions of LASPO) and a claim to review the lawfulness of what is said to

be a failure to act in relation to the exercise of a public function (the failure to take measures to implement the Directive). In *O'Reilly v Mackman* Lord Diplock stated (see page 285) that this would be:

> '… contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by that means to evade the provisions of [CPR Part 34].'

67. Although the claimant might ultimately derive a private benefit from the declarations he seeks, that does not establish that this is a claim where his private law rights are necessarily in issue. A private right arising from a point of construction does not preclude the question of the meaning and effect of a public decision - here what is said to be failure to transpose the Directive into domestic law - retaining its public law status: see, by analogy, the decision in *T&P Real Estate Limited v Mayor and Burgesses of the London Borough of Sutton* [2020] EWHC 879 (Ch) at paragraphs [37] to [40].

68. In the present case, the claimant has not identified any sufficient private law interest that would justify the use of the Part 8 procedure by way of exception from the general rule in *O'Reilly v Mackman* (i.e. that public law claims should be pursued by way of public law (that is judicial review) proceedings). Moreover, the claim form makes clear that the relief sought by the claimant includes a mandatory order that the defendant pays the claimant his entitlement for legal aid and reimbursement of expenses under the Directive. It is impermissible to use the Part 8 procedure for the purposes of seeking such mandatory relief. That would have to be a claim pursued under CPR Part 54.

69. For those reasons, I agree with the defendant that the pursuit of this claim by way of CPR Part 8 amounts to an abuse of process. That, however, would not be the end of the matter: the next stage would be for me to consider whether some relief should be granted to allow the claim to be pursued by the appropriate alternative means. In this case, however, I am satisfied that that is not a step that should be taken, or indeed could properly be taken. First, because of the view I have already formed on the application to strike out/for summary judgment. Second, because of the view that I have reached as to the second basis for the defendant's complaint of abuse of process; that is, that this is an attempt to re-litigate decided issues. I turn to that point next."

153. In paragraph 65, she considered the defendant's argument that there was an abuse of process because what was being sought was, in effect, a mandatory order that the Ministry of Justice should pay money. In paragraph 66, she said that she acknowledged that the court should avoid adopting an overly technical approach and accepted that the case law had developed something of a nuanced approach to the judicial review exclusivity principle, but that:

> "That said, it is plain that the present claim comprises a claim for judicial review as defined by CPR Part 54.1(ii)(a). That is because it involves both the claim for reviewing the law and thus an enactment and on the lawfulness of the decision of a public authority."

154. Thus, it seems to me that she was making it quite clear that claims challenging the lawfulness of an enactment in European law are in principle matters for judicial review. In paragraph 67, she set out that:

> "The mere fact that the claimant may derive a private benefit does not mean that it is not a public law case."

155. In paragraph 68, she stated that no sufficient private law interests had been identified, and then concluded in paragraph 69, that she, therefore, agreed with the defendant that the use of a Part 8 claim was an abuse of process. She then went on to say, though, that that would not be the end of the matter; the next stage was to consider whether some relief should be granted to allow the claim to be pursued by the appropriate alternative means. She concluded that she should not exercise that discretion, whether, I suspect, under CPR Part 3.10 or otherwise, because she had concluded that the claim was both ill-founded and an abuse of process for other reasons. Ms Choudhury for the Revenue submits that this reasoning simply applies in this case, and that this is a public law matter which relates to a challenge to the lawfulness of an enactment. She submits that the time limit and permission aspects of the procedure are important and she says that the Part 8 claim should simply be struck out and the taxpayer should bring a Part 54 claim.

156. Mr Kamal submits for the taxpayer that, as far as European law is concerned, it says that one should be able to come to the court for a declaration, and he submits that Part 8 is the usual way to do so. He submits that judicial review is inappropriate as a procedure, firstly, because there are particular damages claims not suited to judicial review and which render the matter private law and, secondly, that the three month time period expired a long time ago, and that for the European law to challenge to be effective it should be allowed to proceed; and, therefore, that the Part 8 procedure is appropriate because otherwise the principle of effectiveness will be contravened.

157. My conclusion and judgment is as follows. Firstly, this claim plainly falls within Part 54 and is in principle subject to its exclusivity principle, for the following reasons:

a. Firstly, it is a challenge to the lawfulness of an enactment. It is, therefore, judicial review within CPR 54.1(ii)(a)(i) and the *Menjou* decision.

b. Secondly, it is judicial review as it is seeking a declaration whether or not damages are sought. In fact, I think, there is no damages claim and that damages are therefore an irrelevance, at this stage for the same reasons which I have given earlier in relation to the tax exclusivity principle. However, and in any event, a damages claim can be included within a claim for a declaration within the judicial review procedure. Whether or not it is then determined within the ordinary judicial review mechanisms is another matter, but that is second stage and for the Administrative Court to decide.

c. Thirdly, this is not a private rights case; it affects very many individuals and it is all public law. And it may be a tax matter but, as stated in *Knibbs*, that does not render it private law.

d. Fourthly, the initial permission stage is a crucial part of the judicial review procedure. Although there are some equivalents, as I have said, in Part 7 and

Part 8 claims, judicial review has its own rules and the filter is a crucial part of that. That is a matter which was stressed in *Knibbs*. Having a permission filter does not in any way, it seems to me, to contravene the principle of effectiveness in European law. It is simply a domestic law procedure designed to test whether or not there is sufficient in the claim to start with. It is, at first sight, a legitimate national law procedural mechanism.

158. Therefore, secondly, it seems to me that at first sight the Part 8 claim is an abuse; although there is a solution available of simply transferring to the Administrative Court to proceed as a judicial review claim. However, it does not seem to me that that is appropriate, for two sets of reasons, and within those reasons I consider the point as to whether or not a judicial review will fail and be ineffective because of the existence of the three month time limit.

159. The first reason is that in order to bring a judicial review, the Civil Procedure Rules Part 54 require a set of documents in terms of particular claim forms, statement of grounds, accompanying documents, skeletons and the like. It seems to me that the procedure would be much more efficient and complaint with the rules if a specific judicial review claim was to be brought which would be in the correct format with the correct and appropriate documentation.

160. The second reason is that, if these Part 8 claims were to be turned into a judicial review claim, then there would or might be caused a potential problem with regards to the three month time limit, to which I now come.

161. As far as the three month time limit is concerned, Mr Kamal submits that, because of the existence of the three month time limit, judicial review is not effective as a remedy because it is too late to issue a claim form. However, Civil Procedure Rule 3.1, the court can grant an extension of time for issue of the judicial review claim form, and in many cases it has done so, albeit that in many other cases it has said that

there is a considerable burden on a judicial review claimant to comply with the relevant time limit. Nevertheless, three months is a distinctly short period and there is considerable force in Mr Kamal's submission that, to confine the claimants to the three month time period, particularly in circumstances where, if the Revenue is ever to raise an inquiry or an assessment, then the European law points could be taken anyway within the tax tribunal appeal procedure, is something which would be unfair and contrary to the court's overriding objective, such that the three month time period ought to be extended.

162. However, and especially if that is right, it seems to me that the judicial review mechanism and the Civil Procedure Rules contain their own mechanism to enable judicial review to satisfy the European principle of effectiveness, notwithstanding the initial three month time limit. The court, in considering whether or not to exercise its powers under CPR 3.1, will be considering the justice of the case generally, but will also be considering it in the context of the existence of the principle of effectiveness and will be concerned not to infringe it. It seems to me that all that taken together is quite likely to result in the Administrative Court being prepared to extend the three month time period, although, of course, I am not the Administrative Court and cannot take that particular decision. In fact, Ms Choudhury, when stating that the Revenue has reserved its position in relation to what stance it would take with regards to an application to extend the three month time period, herself accepted that there were substantial reasons for its extension. It, therefore, seems to me that the existence of the three month time period, where the Civil Procedure Rules contain their own self-correcting mechanism, which will take account of all the circumstances, is the answer to Mr Kamal's point of saying that it is not an abuse at first sight to proceed down the Part 8 route rather than the Part 54 route.

163. However, although this leads me to the conclusion that at first sight the claimant should be proceeding by judicial review, thus enabling, in particular, the

important initial step of consideration of whether permission should be granted to proceed to actually take place; and where, if the court refuses to grant permission on the basis that the European law arguments simply do not have sufficient likelihood of success to be allowed to proceed, that would be an end of matters; I do have to bear in mind that the court might take the view that it should insist, at least for judicial review purposes, on the three month time period standing. In those circumstances, it seems to me that it would be unfortunate if the claimants were then to be able to say that, in order to maintain the principle of effectiveness, they should be able to go down the Part 8 route; but where in some way or another they may have been disadvantaged, for example because they would be having to issue new proceedings which would be issued after the Brexit withdrawal date (which might affect their ability to obtain a damages remedy) and where they would have to pay a further fee - although in all of this I bear in mind that they have only paid £528 twice, which in court terms is a relatively low amount.

164. In all those circumstances, it seems to me that, to convert this claim into a Part 54 claim and out of a Part 8 claim would be inappropriate, and to strike it out without knowing what would happen with regards to a judicial review claim and its three month time limit could be unjust. All of that leads me towards a conclusion that it would be better for a judicial review to be initiated from the start (rather than to transfer this case to the Administrative Court), but that it would also be inappropriate to strike out this claim. It seems to me that it is much more appropriate to stay this claim, and in order to see what happens in the Administrative Court, without having prejudiced the position by what might be a premature strike-out.

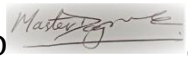
165. I am reinforced in this conclusion by the facts that: (a) it is not guaranteed as to whether the three month period will be extended; (b) it is not even HMRC's position that the three month period will be extended - HMRC wishes to reserve its position and potentially say

that it should not be; and (c) that it seems to me that it would be highly unfortunate and simply give HMRC a technical advantage if it was able to say, "Well, this claim should be struck out, the taxpayer should have to go to the Administrative Court and should lose on the three month basis and should then have to commence new Part 8 or Part 7 proceedings in order to be able to bring a claim to vindicate its European rights, but should be disadvantaged because it is no longer a claim which will have been issued within the Brexit withdrawal time period.

Conclusion (and the Part 7 or Part 8 Claim point)

166. For all those reasons, I am going to decide against the Revenue on the tax exclusivity point but stay the Part 8 claims due to the judicial review exclusivity point. It seems to me that a claim can be brought in the courts, where the Revenue have not instituted any inquiry or raised any assessment, but that the claim, however, is a claim that should be brought by judicial review using the Part 54 procedure, and that the solution in this case is not to strike out the Part 8 claim but to stay it, with permission to restore or other directions (which I will consider at the hearing consequential upon this judgment) designed to enable it to be dealt with depending on what happens on any judicial review claim.

167. Ms Choudhury has also raised her third argument, saying that, if the Part 8 claim was to proceed, then it should not proceed under Part 8 but under Part 7. It seems to me that, in the light of the conclusion to which I have come, it is premature to spend any time deciding that particular question and, in particular, where, as a matter of procedural reality, it is likely to come down to the question as to whether or not there should be statements of case (and which can always be directed in a Part 8 Claim).

APPROVED  30/11/2021