Neutral Citation Number: [2019] EWHC 3382 (Admin)

Case No: CO/711/2019

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

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 13 December 2019

Before :

MRS JUSTICE COCKERILL

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Between :

THE QUEEN

(ON THE APPLICATION OF

(1) **CARTREF CARE HOME LIMITED**

(2) **GWYN TUDUR WILLIAMS** **Claimants**

(3) **BRIAN DAWSON ENGINEERING SERVICES LIMITED**

(4) **BRIAN DAWSON**

(5) **COBBLED CLOSE LLP)**

- and -

(6) THE COMMISSIONERS FOR **Defendants**
HER MAJESTY'S REVENUE AND CUSTOMS

\- -

Mr David Southern QC and Mr Michael Avient (instructed by **Greenwoods GRM LLP**) for the **Claimants**

Sir James Eadie QC and Ms Sadiya Choudhury (instructed by **General Counsel and Solicitor to HMRC**) for the **Defendants**

Hearing dates: 29th 30th 31st October 2019

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Approved Judgment

Cockerill J:

Introduction

1.

This case, which comes before me as a “rolled up” hearing for permission and substantive application is one which raises (inter alia) a question of Human Rights Act law in the context of a taxation issue. As such it is, admittedly, unusual.

2.

The particular factual background to the claim has a lot of complex detail, set out below, but in essence it concerns arrangements entered into by the Second and Fourth Claimants, Mr Gwyn Tudur Williams (“Mr Williams”) and Mr Brian Dawson (“Mr Dawson”) and companies of which they were directors: Cartref Care Home Limited

(“Cartref”), Brindewen Care Home Ltd (“Brindewen”), and Brian Dawson Engineering Services Ltd (“DES”). As their names suggest, Cartref’s and Brindewen's business is residential care activities for the elderly and disabled and that of DES is commercial building construction services.

3.

Each of Cartref/Brindewen and DES, through their directors, took the decision to participate in a Sovereign Corporate and Business Opportunity. The opportunity in which they participated was to become a member of an LLP which was to acquire distribution rights for films. The LLP with which Mr Dawson and DES did business was the Fifth Claimant, Cobbled Close LLP (“Cobbled Close”). That with which Mr Williams and Cartref did business was Southdown Road LLP (“Southdown”), which has since been dissolved and therefore plays no part in this litigation.

4.

The opportunity was structured so that the directors would loan the money for the acquisition of the rights to the company on a fully repayable basis, having themselves acquired the necessary funds via loans from a company called GBF Capital Limited, which had been loaned the money itself by the seller of the film rights. The loans to the directors were on the basis that they would be repayable from income received by the Company. In fact, the loans though notionally to the directors, were directed straight to the LLP.

5.

Each Company had an accounting loss as a result of this transaction, which loss it utilised as a trading loss against its other income for the relevant year (that ending 2011 for Cartref, that ending 2013 for DES). Each of Messrs Williams and Dawson received payments from the companies on which they did not pay tax or NI contributions. For Mr Williams the relevant application was in December 2010 and payment came at the end of 2010; for Mr Dawson the application was in December 2013 and payment came at the end of 2015. Those loans remain in whole or in part outstanding.

6.

The nature of these transactions is to some extent contentious. HMRC characterise these arrangements as tax avoidance; indeed, as aggressive tax avoidance. There is no formal denial by the Claimants that this was the case, though it was noted that tax avoidance is an ill-defined concept and certainly issue was taken with the broad characterisation of all schemes caught by this legislation as tax avoidance. What was accepted however, was that each of these specific arrangements was entered into because it was “perceived as a business opportunity”.

7.

In 2018, HMRC sent letters dated 16 November 2018 to the Claimants indicating that it considered that such payments to Messrs Williams and Dawson fell within the ambit

of what is known as "Disguised Remuneration" and would be liable to a tax charge from 5 April 2019 unless a settlement was agreed in advance of that date. Then in January 2019 two further letters were sent to the representative partner of the Cobbled Close LLP indicating that Partnership Follower Notices would be issued in relation to the accounting loss in the company's accounts – as indeed they were four days later.

8.
It is the contention of the Claimants in this claim that that correspondence embodied a number of decisions which were incompatible with the Human Rights Act 1998 ("HRA 1998"), and specifically that they breach Article 1 Protocol 1 ("A1P1") and Article 6. Accordingly, they seek declarations to that effect and consequent orders quashing the decisions.

9.
I should deal briefly with "the other Claimants". The heading to the Claimants' Grounds referred to 241 other Claimants. The claim form referred to a Schedule of Claimants. In formal terms I know nothing about those other Claimants. There has been no pleaded case relating to them. Unlike Messrs Williams and Dawson, they have submitted no witness statements in these proceedings. Informally I have been told that they were users of a variety of other schemes and that some of these Claimants entered into arrangements solely because they were a condition of a job which they took and that some did so as a tax planning measure. However again, and although a marker was put down on this point by HMRC, this has not been dealt with in any conventional evidence. The nearest I have to any evidence of impact on individuals beyond the Claimants is a document to which I shall return later, the All Party Parliamentary Group's Final Report on the Loan Charge. I shall consider its status and significance later in this judgment.

The Alleged Decisions

10.
The focus of the challenge is what are said to be five decisions as follows:

i)
Decision 1. The decision contained in the letters of 16 November 2018 to impose the "2019 Loan Charge" on Cartref or in the alternative on Mr Williams in respect of the loan to Mr Williams from GBF Capital Ltd.

ii)
Decision 2. The decision contained in the letters of 16 November 2018 to impose the "2019 Loan Charge" on Brindewen or in the alternative on Mr Williams in respect of the loan to Mr Williams from GBF Capital Ltd. by reason of his participation in Premiere Sovereign Corporate.

iii)
Decision 3. The decision contained in the letters of 16 November 2018 to impose the "2019 Loan Charge" on DES or in the alternative on Mr Dawson in respect of the loan to Mr Dawson from GBF Capital Ltd. by reason of his participation in Premiere Sovereign Corporate.

iv)

Decision 4. The decision of 21 January 2019 to issue, and the issuing on 25 January 2019 of, a Partnership Follower Notice to Premiere Sovereign Business Services Ltd as representative member of the Cobbled Close in respect of the tax year 2013/2014.

v)
Decision 5. The decision of 21 January 2019 to issue, and the issuing on 25

January 2019, of a Partnership Follower Notice to Premiere Sovereign Business Services Ltd as representative member of the Cobbled Close in respect of the tax years 2015/2016 and 2016/2017 respectively.

11.
Those decisions embody two types of communication:

i)
Communications of an intention to treat the corporate Claimants alternatively, the individual Claimants, as being from 5 April 2019 liable for a payment known as “the Loan Charge” representing the PAYE and NICs which would be chargeable on the equivalent payments made by way of salary, unless a settlement was reached before that date;

ii)
Communications of an intention to treat as disallowable a tax deduction in the amount of the loans made by the companies to the individual Claimants.

These reflect two strands in the HMRC approach to what it sees as “disguised remuneration” arrangements.

12.
There is a certain amount of overlap in the wording of the documents relied on. Specifically:

i)
The November decisions were sent under cover of a letter dated 16 November which said:

“Please find enclosed a copy of the correspondence that I have sent to your client today. If your client would like to express an interest in settling (and avoiding the 2019 Loan Charge) this should be done by no later than 16 December 2018…”

ii)
The substantive letter then said:

“I understand that the company has used the Premiere Sovereign Corporate tax avoidance scheme. As part of this scheme employees received remuneration from the company through a third party by way of loans that were made to them. The company did not deduct tax or national insurance from these amounts. This is known as “disguised remuneration”.

The 2016 Budget announced a loan charge to deal with disguised remuneration. This means that on 5 April 2019 there will be a tax charge on all disguised remuneration loans still outstanding on that date (unless I have already agreed a settlement in respect of that loan).

If the company does not take action now to pay the tax and national insurance contributions due, it will have to pay this loan charge.

What You Need to Do Now

Settle you company’s tax affairs

The first step is for the company to express an interest in settling…”

iii)
In respect of the Fifth Claimant there was a covering letter date 21 January 2019 enclosing a copy of the substantive letter referring to “factsheet CC/FS25b, ‘Tax avoidance schemes – partnership follower notices and accelerated partner payments’”. The letter enclosed said:

“About the tax avoidance scheme that the partnership has used

…we’ll soon be sending you a partnership follower notice which will tell you about taking corrective action. This involves you counteracting the advantage (known as “the denied advantage”) gained from the partnership’s use of the tax avoidance scheme… What to do when you receive the partnership follower notice:

The partnership follower notice will tell you that each of the relevant partners will be liable to pay a penalty if you don’t take the necessary corrective action …”

iv)
There was then a letter dated 25 January 2019 which embodied the Partnership Follower Notice:

“**Notice issued under Part 4, Chapter 2 of and Schedule 31 to the Finance Act 2014** …

We are giving you this partnership follower notice …

The judicial ruling relevant to the chosen arrangements

On 15 February 2018 the Supreme Court refused permission to appeal against the decision of the Court of Appeal in Degorce v Revenue and Customs [2017] EWCA Civ 1427…

Taking corrective action

If you do not take the necessary corrective action by 30 April

2019, the relevant partners will be liable to pay a penalty …”

The Issues

13.
There was not much between the parties as to the issue which I have to consider. The overarching issue is whether an incompatibility declaration on human rights grounds is available in respect of the Loan Charge, introduced by Finance (No 2) Act 2017, Schedule 11.

14.
I should deal briefly here with the suggestion raised by the Claimants in argument that Decisions 1-3 were not compatible with Decisions 4-5. Although the decisions are separate and relate to different amounts, and Decisions 4-5 might be said to be predicated on Decisions 1-3 being genuine loans, that does not make them incompatible. The arrangements involved had two separate aspects. These different

groups of decisions target these two separate aspects, and in effect target what is seen by HMRC as two different forms of tax avoidance (one relating to income tax and one to do with corporation tax) that just happen to be combined (or “bolted together”) into the same arrangement. In essence the loan which is at the heart of the loan charge arrangement has been structured so as to give rise to a separate corporation tax advantage. There is therefore no question of double taxation, or incompatibility of the decisions.

15.
The subsidiary questions which arise in this case have been identified by the Claimants as follows.

16.
In relation to the permission application:

i)
Do the matters of which review is sought constitute reviewable decisions?

ii)
If so, do the Claimants have standing to seek judicial review?

iii)
If so, were the claims brought in time?

iv)
Is the European Convention of Human Rights ("ECHR") engaged - in particular, do the Claimants have a "possession"?

17.
If permission is granted:

i)
On what grounds is the legislation said to be disproportionate?

ii)
Is the legislation retrospective? iii) Were parliamentary conventions relating to retrospective legislation observed? iv) Does the purpose of the Loan Charge also apply to close company schemes?

v)
Does such interference with A1P1 rights as may be established constitute a reasonable and proportionate interference ("fair balance principle")?

vi)
Does the legislation create a liability where none existed?

vii)
Does the legislation, in association with Follower Notices/Accelerated Payment Notices, breach normative expectations of procedural justice (Article 6 ECHR)? **The Legal Framework and Timeline**

18.
The legal framework is somewhat complex, and there is also an issue about how it developed over the relevant period. In addition, the Claimants place stress on the interrelation of different provisions as giving rise to particular objectionable results. It is said, too, that the use of earlier legislation has increased its scope and effect in a way which cannot have been envisioned.

19.

It is thus necessary to set out a considerable amount of detail. This is largely taken from the parties' skeletons, supplemented by the findings of Sir Ross Cranston in the case of R (oao Haworth) v HMRC [2018] EWHC 1271 (Admin), to which my attention was directed and those of Simler J in Rowe v HMRC [2015] EWHC 2293.

Origins – the emergence of Disguised Remuneration and first legislative steps

20.
The evidence is that initially HMRC was principally concerned with the corporation tax element of Employee Benefit Schemes. This was the subject of litigation in the early noughties.

21.
However far more "Disguised Remuneration" Schemes began to emerge in around 2004, involving the feature of avoiding the payment of PAYE and NICs; though they were not initially in anything like the form of the schemes in issue here. In broad terms such schemes are used by (i) employers in respect of their employees, (ii) employees who would normally consider themselves as contractors but who have entered into an employment relationship for the purposes of the scheme and (iii) self-employed individuals.

22.
The schemes which were primarily in use prior to 2011 were:

i)
"Contractor Schemes", whereby A was paid a low salary either by B or P; B paid P an additional amount, which was loaned to A; there was no expectation that the loan would ever have to be repaid.

ii)
"Senior Employee Schemes", whereby A was a senior employee of B; B paid sums to an Employee Benefit Trust (EBT) held by P, which P lent on or made available to A.

23.
Under these schemes, users would typically seek to avoid income tax and NICs by receiving monies in some other form, including the form of "loans", which HMRC believe are unlikely to ever be repaid, and a small salary (if employed) or fee (if selfemployed). HMRC's objection is based on the belief that the users of such schemes sought to have most of their remuneration paid by way of the "loans" which they claim are not subject to income tax or NICs.

24.
HMRC began to consider how best to deal with them. There was apparently an issue whether to disallow the deduction for the employer, until actual payment was made, or to treat the payment into the EBT as a payment of remuneration, thereby allowing the deduction to the employer.

25.
The first significant step was the Disguised Remuneration Rules ("DRR"), which were introduced via the Finance Act 2011 with effect from 6 April 2011. They are to be found in Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). The introduction of these rules was preceded by some consultation from about late 2010.

26.
The DRR applied to Contractor Schemes and Senior Employee Schemes entered into after 6 April 2011.

27.
The DRR apply to tripartite arrangements, where an employee (A) and an employer (B) enter into an arrangement, which is a means of providing remuneration to the employee, and a third party (P) takes a “relevant step” in pursuance of the arrangements. They thus have always applied to schemes involving remuneration provided through third parties.

28.
“Relevant steps” are defined in section 554B, 554C and 554D, and include a loan provided by P. The charging provision is section 554Z2. The tax charge falls on the employer or alternatively on the employee.

29.
The legislative policy is to define “disguised remuneration” very widely, and then have a series of exemptions in section 554E-554Y to remove “innocent” arrangements entered into without a tax avoidance motive.

30.
The arrangement will be within section 554A if “it is reasonable to assume that … the relevant arrangement … is (wholly or partly) a means of providing, or is otherwise connected (wholly or partly) with the provision of … loans in connection with A’s employment with B”: section 554A(1)(c).

31.
Section 554B applies where a sum of money is “earmarked” for an employee with a view to a later relevant step being taken.

32.
Section 554C says that the making of a loan by P to A will be a relevant step. Amendments made in 2017 extend the scope of making a loan by P to P’s acquiring a right to a payment of a sum of money or to a transfer of assets where there is a connection between the acquisition of that right and a payment by way of loan or otherwise to A. So even if a loan is repaid there is still a relevant step. The release or write off of the loan will also be deemed a relevant step, assuming that the loan was not itself a relevant step.

33.
Section 554D says that if an asset is made available to an employee without a transfer of ownership, that is a relevant step.

34.
What are known as “Close Company Schemes” were brought into the DRR rules by the insertion of sections 554AA-554AF into ITEPA with effect from 6 April 2018. These are dealt with separately below.

Follower Notice provisions

35.
The Follower Notice provisions were first consulted on in HMRC's Consultation document, “Raising the Stakes on Tax Avoidance” dated 12 August 2013. This followed a July 2012 consultation entitled “Lifting the Lid on Tax Avoidance”.

36.

“Raising the Stakes” described the purpose of the follower notice proposals as being an encouragement to people who had used an avoidance scheme to settle their tax affairs once the scheme was defeated in the courts. The proposal was that where taxpayers had used an avoidance scheme that had been shown to fail (via another party's litigation), they should be asked to confirm that they accepted that the judgment applied to them too and amend their return accordingly. If not, they should tell HMRC why not, but should be subject to a penalty if they did not have a reasonable basis for their conclusion. This would encourage taxpayers to settle their case and pay the tax they owed much sooner, without HMRC having to expend resources needlessly pursuing cases with the same material facts.

37.
In his Autumn Statement on 5 December 2013, the Chancellor announced that legislation would act on the proposals and introduce a requirement for taxpayers to settle their dispute on receipt of a “Follower Notice”, and require payment of the tax in

dispute where a taxpayer who had received a “Follower Notice” chose not to settle the dispute on receipt of the notice.

38.
The Summary of Responses to “Raising the Stakes” was published in January 2014.

39.
There was a further consultation document on 24 January 2014, “Tackling Marketed Tax Avoidance”. It contained the government's responses to comments on the proposed legislation for “Follower Notices”. It stated that at the heart of the follower notice system was the proposition that the likelihood of the taxpayer's scheme succeeding was remote, given that a tribunal or court had made a decision on the same or similar arrangements. In the Government's view, the document said, the delivery of a related judicial decision fundamentally changed the presumption of where the tax should sit during this period. The consultation document also set out the Government's proposed extensions of the accelerated payments measure.

40.
A summary of responses document followed in March 2014. That document commenced by stating: “The Government has made clear that it will take a robust approach to tackling tax avoidance…. To this end the Government has taken a number of major steps … to tackle “disguised remuneration”….”

41.
The Explanatory Notes to the Finance Bill 2014 were published in March 2014. The “Follower Notice” was for where tax arrangements had been shown in a relevant judicial ruling not to give the asserted tax advantage. The clause setting out the conditions in which a judicial ruling was to be treated as “relevant” provided, it said, that a judicial ruling in another party's litigation was relevant to a person “if the ruling relates to tax arrangements; the principles or reasoning behind the ruling would, if applied to those arrangements, deny the advantage claimed or part of it…”.

42.
Chapter 2 of Part 4 of the Finance Act 2014 then contained the legislation arrived at. It introduced four types of notice:

i)
Accelerated Payment Notices (APNs) [sections 219-229].

ii)
Partner Payment Notices (PPNs) [Schedule 32]. iii) Follower Notices (FNs) [sections 202-218].

iv) Partnership Follower Notices (PFNs) [Schedule 31].

43.
This case is concerned only with FNs and PFNs. However, APNs and PPNs have been referred to as being relevant to the normal trajectory for a claim.

44.
The Act sets out the four conditions HMRC must satisfy if it is to issue a “Follower Notice”. The relevant condition for the purposes of the present case is Condition C:

“Section 204 - Circumstances in which a “Follower Notice” may be given.

(1) HMRC may give a notice (a “Follower Notice”) to a person

(“P”) if Conditions A to D are met…

(4) Condition C is that HMRC is of the opinion that there is a judicial ruling which is relevant to the chosen arrangements…”

45.
Section 205 defines the term “relevant” for the purposes of Condition C:

“Section 205 – “Judicial ruling” and circumstances in which a ruling is “relevant”…

(3) A judicial ruling is “relevant” to the chosen arrangements if—

(a)
it relates to tax arrangements,

(b)
the principles laid down, or reasoning given, in the ruling would, if applied to the chosen arrangements, deny the asserted advantage or a part of that advantage, and

(c)
it is a final ruling.”

46.
Section 206 provides that HMRC must explain why it considers the judicial ruling meets the requirement of section 205(3).

47.
Under section 207, the taxpayer has 90 days to make representations objecting to a “Follower Notice” on specific grounds, including that Condition A, B or D in section 204 is not met, or that the judicial ruling specified in the notice is not one which is relevant to the chosen arrangements. HMRC must then confirm or withdraw the notice.

48.
Under sections 208-209 if the recipients of a “Follower Notice” do not take the specified corrective action by amending their return or conceding their tax appeal within a period of the later of 90 days of the notice, or 30 days following the determination of representations, they are liable to a penalty of up to 50 percent of the denied advantage.

49.
Under section 214 an individual can appeal against a “Follower Notice” penalty, in particular on the basis that the judicial ruling specified by HMRC is not one which is relevant to the taxpayer's arrangements, or that it was otherwise reasonable in all the circumstances for the individual not to have taken the necessary corrective action. The penalty is not payable until the appeal against it is determined and if successful there will be no penalty to pay. The amount of a penalty may be reduced by the individual's cooperation with HMRC, and the individual may appeal against HMRC's determination of the amount of the penalty.

50.
Accelerated Payment is dealt with in Chapter 3 of Part 4 of the Finance Act 2014. Under section 219(1) an accelerated payment notice may be given where Conditions A to C in the section are met. Section 219(1)(4) deals with Condition C and reads, in part:

“(4) Condition C is that one or more of the following requirements are met—

(a) HMRC has given (or, at the same time as giving the accelerated payment notice, gives) P a “Follower Notice” under Chapter 2—

(i)
in relation to the same return or claim or, as the case may be, appeal, and

(ii)
by reason of the same tax advantage and the chosen arrangements;

(b) the chosen arrangements are Disclosure of Tax Avoidance Schemes arrangements…”.

51.
Under section 220 where an accelerated payment notice is issued during the course of a tax enquiry, it must specify, inter alia, “the payment (if any) required to be made under section 223 and the requirements of that section”. The payment required to be made under section 223 is:

“an amount equal to the amount which a designated HMRC officer determines, to the best of that officer's information and belief, as the understated tax…”

52.
Where the Accelerated Payment Notice ("APN") is reliant on a Follower Notice ("FN"), the understated tax by section 220(4)(a) is the additional amount that would be due and payable in respect of tax if:

“(i) it were assumed that the explanation given in the follower notice in question under section 206(b) is correct, and

(ii) the necessary corrective action were taken under section 208 in respect of what the designated HMRC officer determines, to the best of that officer's information and belief, as the denied advantage”.

53.
No appeal is possible against FNs or APNs, but representations on limited grounds may be made within 90 days, in which case the penalty is suspended.

54.

Schedule 31, Finance Act 2014 applies the provisions regarding FNs to partners and partnerships. A Partnership Follower Notice ("PFN") is defined in paragraph 2(1), Schedule 31 as including an FN given by reason of a tax enquiry being in progress into a partnership return. Paragraph 4, Schedule 31 provides that each relevant partner is liable to a penalty under section 208 Finance Act 2014 if the representative partner fails to take corrective action where a PFN is not withdrawn.

55.
The corrective action required under section 208 where the return or claim in question is the subject of an enquiry is that the recipient must first amend the return or claim to counteract the denied advantage; and secondly notify HMRC that it has done so and also notify the denied advantage. The total amount of such penalties is specified in paragraph 5, Schedule 31, as 20% of the value of the denied advantage, with each partner liable to a penalty in an amount that is a share of that 20% that is proportionate to the share in which any profits or loss for the period to which the return relates would be apportioned to that partner.

56.
Schedule 32, Finance Act 2014 makes provision for APNs to be issued to partners ("Partner Payment Notices" or "PPNs").

57.
The power to issue a FN is not dependent in any way on an APN being subsequently issued. It is a free-standing power designed to encourage settlement and/or discourage re-litigation.

Finance (No 2) Act 2017: the Loan Charge

58.
The Loan Charge came into existence in 2017 following an announcement of intention in November 2016 and consultation through much of 2016 and 2017.

59.
The Finance (No 2) Act 2017 and in particular Schedule 11, which became law on 16 November 2017, imposed the Loan Charge in relation to arrangements to which the DRR apply "or would have applied if the DRR had been in force at the time in question" from 6 April 1999. It does so by reference to the DRR Rules within ITEPA. The effect is to create a tax charge, whether or not one previously existed.

60.
Under its provisions, if a person ("P") has made a loan or a quasi-loan to a "relevant person" [the employee] on or after 6 April 1999, and that loan or quasi-loan remains "outstanding" on 5 April 2019, then P is treated as taking a "relevant step" within the DRR on 5 April 2019.

61.
A "quasi-loan" is right to a payment or transfer of assets, which is connected with a loan or transfer of assets to A and "any form of credit and a payment purported to be by way of loan". A loan is "outstanding" if the principal amount exceeds the repayment amount.

62.
The amount of the loan outstanding is then deemed to be a payment of employment earnings on 5 April 2019, being the amount of the outstanding loan. To be outstanding on 5 April 2019 a loan does not have to be subsisting.

63.

If an APN or PPN has been issued in respect of a payment which falls within Schedule 11, paragraph 1, and a person pays pursuant to that APN or PPN and before 5 April 2019 an amount equal to or exceeding the outstanding amount of the loan, the person can apply to HMRC to have the Loan Charge suspended.

PAYE and NICs implications

64.
The PAYE system is set out in ITEPA, sections 682-712 and the Income Tax (Pay As You Earn) Regulations, SI 2003/2682 ("the PAYE Regulations"). If a person is an "employer" he is obliged to operate PAYE in relation to wages and salaries paid to employees, and to pay secondary NICs. The employer must account for the sums so deducted and the liabilities incurred within either (a) 14 days of the end of the "income tax month"; (b) or within 17 days if the payment is made electronically.

65.
Regulation 72 enables HMRC in specified circumstances to recover PAYE from the employee. Where the employer fails to account for PAYE and NICs, HMRC may make a determination of liability under Regulation 80. The amount of the liability is deemed to be an amount of tax for which the employer is liable to account. Where HMRC are

of the opinion that the employee knew that the employer had wilfully failed to deduct PAYE, the liability may be transferred to the employee: Regulation 81.

66.
The NICs system is set out in Social Security and Benefits Act 1992. Section 1(1) says that sums payable under the Act are payable to HMRC. Under section 6 employed earners have to pay primary Class I contributions on their earnings up to the upper earnings limits and their employers ("secondary contributors"), as well as being under a legal duty to deduct these sums at source, must also pay secondary Class I contributions on the employee's earnings, and for this purpose no upper earnings limits apply. These are collected and enforced in the same way as PAYE income tax.

67.
If both the Loan Charge and the underlying liability on which the APN/PPN is based are outstanding, and the underlying liability is to income tax or PAYE on the employment income arising from the relevant scheme (and not from the Loan Charge), payment of one of the charges is treated as being a payment on account of the other charge if the APN/PPN has not been withdrawn or the appeal has not been determined (sections 554Z11B to 554Z11F ITEPA). This treatment does not require that the loan must be equal to or less than the accelerated payment amount.

Finance Act 2018: Close Companies

68.
Following an announcement in November 2017, the Finance Act 2018 introduced sections 554AA to 554AF ITEPA, which is referred to as the "Close Companies Gateway". A "Close Company" is defined in section 439 Corporation Tax Act ("CTA") 2010 as a company with five or fewer participators or participators who are directors.

A "participator" is defined in section 454 CTA 2010 as a person having a share or interest in the capital or income of the company and thus includes a shareholder. The directors and shareholders of a close company will often be the same individuals who view the company's funds as "their" money arising from "their" work.

69.
Under Finance (No 2) Act 2018, Schedule 1, paragraph 2, if (i) an individual (A) enters into a "relevant arrangement", (ii) the relevant arrangement includes the making of "A- linked" payments or benefits or loans by a third person to A, (iii) a close company (B) enters into a "relevant transaction" in pursuance of the relevant arrangement, and (iv) a relevant step is taken by a relevant third person, then the relevant step falls within the

DRR.

70.
The purpose of the Close Companies' Gateway is to put beyond doubt that office holders participating in EBT schemes should be regarded as employees, were within DRR and so within the Loan Charge.

71.
The contractor schemes, senior employee schemes and close company schemes all also rested on a loan which was intended to serve as a tax shelter, i.e. the amount of the loan would represent income or profits which would or might otherwise be taxable.

72.
The distinction between these schemes and the EBT scheme was that they involved a payment by a third party (typically a loan or the advance of funds to trustees) to an employee which derived from the individual's employment with the employer. Further, in the close company schemes the director/ shareholder was not lent money by an EBT but rather lent money to his company. Thus, the particular type of scheme in focus in

this case is in many ways a combination of two separate schemes, a profit extraction scheme and a sideways loss scheme.

73.
Section 554AA provides that a charge to tax and NICs arises under Part 7A where:

i)
There is a "relevant arrangement", that is an arrangement which it is reasonable to suppose is a means of providing payments, benefits or loans linked to an individual or is otherwise concerned with their provision. A payment, benefit or loan provided to A is linked to A for this purpose (section 554A(3));

ii)
A close company (B) enters into a "relevant transaction" within the meaning of section 554AB. This includes the situation where B acquires a right to a payment of a sum of money where there is a connection between the acquisition of that right and a payment made, by way of loan or otherwise, to a relevant third person (section. 554AB(2)(b));

iii)
It is reasonable to suppose that the relevant transaction is entered into in pursuance of the arrangement; or there is some other connection between them;

iv)
At the time B enters into the relevant transaction, or in the previous three years ending on that date, A is a director or employee of B or has a material interest in B (or both);

v)

A relevant step within the meaning of sections 554B-D ITEPA is taken by a third party on or after 6 April 2018;

vi)
It is reasonable to suppose that the sum of money or asset which is the subject of the relevant step represents, or has arisen or derives from, the sum of money or asset which is the subject of the relevant transaction, or vice versa; and

vii)
There is a time between the relevant transaction and that of the relevant step or around each of those two times when a main purpose of the arrangement is the avoidance of income tax, national insurance contributions, corporation tax or a charge to tax under the rules relating to loans to close company participators under section 455 CTA 2010.

74.
The Close Companies Gateway applies where a relevant step is taken on or after 6 April 2018 regardless of when the arrangement or the transaction by the close company were entered into.

The background noise: Spotlights, mailings and Rangers

75.
Over this period HMRC were publishing its views on disguised remuneration via “Spotlights” – online publications providing information about tax avoidance schemes HMRC consider are being used to avoid paying tax due. These made clear HMRC’s intention to challenge arrangements where monies which are a reward for the labour of the individual have been diverted through some other form without payment of PAYE and NICs.

76.
So, in November 2009 in Spotlights 5 and 6 HMRC set out a clear statement that they were aware of companies seeking to reward employees without paying PAYE and NICs and that they considered that the funds in question were earnings on which PAYE and

NICs were due. There was also a statement that claiming a corporation tax deduction from contributions to EFRBS schemes was considered to be ineffective.

77.
On 9 December 2010 there was a written ministerial statement indicating the government’s intention to legislate to ensure that DR avoidance schemes did not work. That effectively flagged up the changes later brought in by Finance Act 2011.

78.
Direct mailings were then sent out to known users of such schemes.

79.
In August 2011, Spotlight 11 highlighted the fact that it was considered that schemes which relied on credit for loan repayments made before 6 April 2012 were not valid.

80.
In September 2012 answers to FAQs were published on www.gov.uk stating that the “new disguised remuneration legislation [Part 7A ITEPA 2003] puts beyond doubt that such arrangements or schemes do not work.”

81.
In November 2012 Spotlight 12 reported HMRC’s view that schemes avoiding NICS and PAYE which were designed to get around disguised remuneration rules were likewise not effective.

82.
In November 2015 the Inner House of the Court of Session gave its decision in the case of Murray Group Holdings v Revenue and Customs Commissioners [2015] CSIH 77

(“the Rangers case”). This focussed on a trust structure but considered full square the position as regards PAYE and NICs. It concluded that the sums paid were earnings and the company should have accounted for PAYE and NICs.

83.
This was regarded as a highly significant decision and was widely commented on in the press and wider media.

84.
That decision was endorsed, and still further publicity was generated when the decision of the Supreme Court emerged in July 2017.

85.
Spotlight 33 in July 2016 gave a clear warning that HMRC does not approve tax avoidance schemes and the consequences in terms of additional taxes, penalties and interest if a scheme failed.

86.
Three Spotlights in early 2017 reported on different variants of disguised remuneration schemes, warning that they were considered ineffective. In September 2017 Spotlight 41 reported on the Rangers decision and warned that payments to third parties could therefore be regarded as employment income. Further Spotlights followed in 2018 and 2019.

Responses to the legislation

87.
Following the implementation of this legislation concerns were expressed about the results of the legislation.

88.
The Claimants pointed in particular to the All Party Parliamentary Group ("APPG") Report published in April 2019, which is critical of HMRC’s conduct in relation to the Loan Charge, describing it as “an organisation out of control” and also of the legislation: “The Loan Charge legislation rides roughshod over the entire tax system, undermining basic and fundamental tax payer protection”.

89.
A sample of the conclusions to which the Claimants referred were:

i)
“There is a clear risk to the mental welfare of people facing the Loan Charge, including a known suicide risk and there have already been cases of suicide by people facing the Loan Charge, including one case now acknowledged by HMRC.”

ii)
“There will be many bankruptcies as a result of the Loan Charge.”

iii)
“The original impact assessment published by the Treasury was flawed and inadequate, to the point of being negligent.”

iv)
“These arrangements were not entered into as “aggressive tax avoidance” and were often a condition of employment, especially in the public sector.”

v)
“The Loan Charge is retrospective, overrides taxpayer protections and undermines the rule of law.”

vi)
“The real reason for the introduction of the Loan Charge was to bypass the normal legal processes and to allow HMRC to collect tax where they were “out of time” under existing legislation.”

vii)
“There has been a cynical campaign of misleading information from HMRC and the Treasury.”

90.
The Claimants also placed reliance on the later unanimous motion of the House of Commons passed on 4 April 2019 (“HCDeb 4 April 2019, vol 657, 1287”):

“this House expresses its serious concern at the 2019 Loan Charge which applies from 5 April 2019; expresses deep

concern and regret about the effect of the mental and emotional impact on people facing the Loan Charge; is further concerned about suicides of people facing the Loan Charge and the identified suicide risk, which was reported to HMRC; believes that the Loan Charge is fundamentally unfair and undermines the principle of the rule of law by overriding statutory taxpayer protections; expresses disappointment at the lack of notice served by HMRC and the delays in communication with those now facing the Loan Charge, which has further increased anxiety of individuals and families; is concerned about the nature and accuracy of the information circulated by HMRC with regard to the Loan Charge; further regrets the inadequate impact assessment originally conducted; understands that many individuals have received miscalculated settlement information; calls for an immediate suspension of the Loan Charge for a period of six months and for all related settlements to be put on hold; and further calls for an independent inquiry into the Loan Charge to be conducted by a party that is not connected with either the Government or HMRC”.

91.
An independent inquiry into the Loan Charge has now been ordered. It is expected to report in the near future.

The Claimants' case in essence

92.
The Claimants' case in essence was that while taxation measures are in broad measure an exception to the fundamental human rights, even taxation matters are still subject to a level of supervision by the courts under the ECHR. I should therefore consider the issues with that jurisdiction in mind.

93.
The objection to the legislation originated in the fact that the Loan Charge was imposed by making provisions of DRR applicable to a state of affairs prevailing in 2019 without consideration of historic

tax circumstances and where they might otherwise not have applied. Adding to that, the effect of the provisions of ITEPA enacted in 2018 in combination with Finance (No 2) Act 2017 means that the Loan Charge can arise at any time, all the way back to 6 April 1999.

94.
The legislation by which this was achieved was retrospective – and concerns about ethics of retrospectivity may give rise to scrutiny on the part of the courts. This is the more so where the combined effect of ITEPA, Finance (No 2) Act and Finance Act 2018 are to deprive the citizen of the right to argue that HMRC is out of time to recover tax on prior years' earnings.

95.
Still further, the effect of the Loan Charge in Finance Act 2017 coupled with ITEPA section 554A is to deprive the citizen of the right to a fair determination contrary to Article 6; and this is a fortiori the case where the Loan Charge is given effect to by an FN and APN. The result is said to be an absolute breach of Article 6(1).

96.
So far as proportionality is concerned, the effect of the Loan Charge is a disproportionate interference because (a) as a result of the Loan Charge, the tax payable can be greater than the current and ongoing benefit of the loan outstanding and (b) it is applied for an illegitimate purpose (a penal levy against perceived earlier tax avoidance and/or to make good for defaults of HMRC in collecting tax). Because of the way the various parts of the legislation interact they can effect expropriation in a manner which is inconsistent with the right to enjoy property, and this is seen in the conclusions of the APPG report which should be seen as compelling.

Stage 1: Permission Issues

Reviewable decisions – or not?

97.
The position of HMRC, as encapsulated in their response to the pre-action protocol letter and amplified in submissions, is that Decisions 1-3 are not reviewable decisions at all because there are no consequences from the letter prejudicial to the Claimants, and the Loan Charge only takes effect on 5 April 2019.

98.
HMRC points to the wording of the letters, which say that their purpose is "to invite [the Claimants] to enter into a dialogue with a view to settling their tax liabilities' or 'to try to generate a dialogue between HMRC and the recipients of those letters which would hopefully result in settlements".

99.
The Claimants' position is that this analysis is unrealistic. They say that the evidence shows that Mr Dunne formed the view that these arrangements were within scope of the Loan Charge on July 2018 with the submission to seek settlement approved in early November, and the final form of letters to be sent out approved shortly thereafter.

100.
They submit that to say that the letters required no action, was only half the story, because at the same time HMRC were following a process with a view to PFN and FNs. In reality, HMRC took the view that there was now a relevant judicial ruling and that all of the steps involved were part of the same process. The letters therefore were pressing a button which had already been predetermined.

101.
They refer (by reference to somewhat colourful analogies) to the letters displaying “a distinct air of menace”. This is, they say, a “suggestion” to which there is only one realistic answer; as such it should properly be viewed as a decision. The Claimants submit that Decisions 1 – 3 were the start of a process and that if the “suggestions” were not taken up the Loan Charge would be incurred.

102.
So far as the PFNs are concerned they submit that in those circumstances, and given the overlapping nature of the different pieces of legislation, it is unrealistic to separate Decisions 1 – 3 from Decisions 4 and 5.

103.
In the end while I entirely understand the position taken on this issue by HMRC, I do not find their line of argument persuasive as regards the Loan Charge letters. If one goes back to the letter one finds neither the language nor the practical reality of suggestion or engagement. As to the former, the letter is explicitly couched in the language of determination and warning: “…on 5 April 2019 there will be a tax charge on all loans outstanding at that date”, “if the company does not take action now...it will have to pay this Loan Charge”. In essence it may be a “shot across the bows” - but it is a shot across the bows with no real possibility of an alternative and an indication that, if the loans remain outstanding, the Loan Charge will apply once it commences on 5 April 2019.

104.
This is then reflected in the wording of “What You Need to Do” – a wording about as far from advice and engagement as can be imagined. The purpose of the letters was to inform individuals and companies who HMRC were aware had used the Premiere Sovereign Corporate arrangement not of the potential for the Loan Charge to apply to them from 5 April 2019, but of the determined fact that the Loan Charge would apply to them. No opportunity for debate was offered; the only offer was to settle with HMRC in advance of that date. While the letters were not assessments, they were the next best thing to assessments.

105.
The language of the letters also reflects the narrative of the HMRC witnesses, who made it clear that an essential decision had been arrived at. Against this background I conclude that while the formal assessment would follow later, and there was some scope for representations as regards the PFNs the letters relied upon in relation to Decisions 1-3 were decisions sufficient to engage the jurisdiction of this court.

106.
However as regards the PFNs I do accept HMRC's argument. The Claimants assert a link between the PFNs and the Loan Charge, which is not sustainable. It is clear that HMRC took the view that the Premiere Sovereign Corporate arrangement gave rise to issues under two distinct statutory regimes (as it does). There is no evidence and no basis for an inference that consideration of the relevance of Degorce (which prompted the issuance of the PFNs) was linked to the possible application of the Loan Charge; Degorce was an entirely distinct case, as can be seen from the fact that it has not been cited in argument as relevant to the Loan Charge. The reality is that by happenstance two separate schemes were present under this one umbrella; but they gave rise to different tax liabilities and different structures for decision making.

107.

This is seen clearly when one looks at how FNs operate - which is separately to the Loan Charge. There is a structure for the making of representations which is absent as regards the Loan Charge. In fact, in this case such representations have been made and are still being considered. Absent the Loan Charge issue, it would be clear that no decision had been taken on the PFNs. The fact that a PFN has been issued in respect of the same arrangement under which liability to the Loan Charge may arise is not a reason for holding these letters in respect of Decisions 4 and 5 are reviewable “decisions”.

The standing of the Second and Fourth Claimants

108.
HMRC’s next line of attack is that the Second and Fourth Claimants (Mr Williams and Mr Dawson) currently lack standing to bring the claim.

109.
The point arises out of the fact that under section 7(3) and (7) HRA 1998, if a person brings a judicial review claim on the basis that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) HRA 1998, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a “victim” of that act within the meaning of Article 34 of the ECHR.

110.
HMRC relies on the fact that in principle, it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the ECHR; it is necessary that the law should have been applied to his detriment: Klass v Federal Republic of Germany (1979/80) 2 EHRR 214 – that he or she should have been “actually affected”.

111.
HMRC submits that the Second and Fourth Claimants are not “victims” for the purposes of section 7 HRA 1998 because they have not (as yet) been affected by the Loan Charge. The primary obligation to account for tax due on the Loan Charge is on the First and Third Claimants.

112.
The Claimants’ riposte is that the nature of the Loan Charge makes matters pertaining to the company inseparable from matters pertaining to the owner/director. Decisions 4 and 5 and Decisions 1 – 3 form a package – in particular where, as here, the legislation giving rise to the Loan Charge is itself challenged. They also contend that Messrs Williams and Dawson do have an economic interest via the secondary liability to the PAYE and NICs charges both personally and as the major shareholders in the companies. In those circumstances the Claimants say that there is nothing hypothetical about the Second and Fourth Claimants' liability to the Loan Charge.

113.
The Claimants submit that the Klass case actually supports their position making it clear that the effect need not be significant; and that the effect on the companies should satisfy that requirement, particularly where the reason the legislation was brought in was to affect schemes like this one, and hence the Claimants including the Second and Fourth Claimants.

114.
I conclude that on this issue HMRC is correct. As the Claimants acknowledge the PFNs only relate to the companies as members in the LLP. Further there is nothing in the Loan Charge which makes good

the submission that it renders matters pertaining to the company inseparable from matters pertaining to the owner/director.

115.
As for the argument based on the economic cost falling on Messrs Williams and Dawson, this involves either impermissibly eliding the position of a director with that of the company or elevating a contingency to a certainty. As always, the starting point is that a company is distinct in legal terms from its shareholders and its directors. No ground has been suggested for considering this case an exception to that rule.

116.
Aside from this, the only economic impact on the directors is very much a secondary one. In other words, Mr Williams and Mr Dawson might have a liability for these sums, for example under Regulation 81 of the PAYE Regulations – but only if Cartref and DES fail to pay the Loan Charge under PAYE. In addition, if the directors were subject of a determination on this basis they would have a right of appeal to the Tribunal. In those circumstances even if it might be said that the words “is (or would be) a victim of the unlawful act” in section 7(1) might be wide enough to include persons whose victimhood has not yet arisen, but which is subject to a future contingency (which was not specifically argued), those words are not, in my judgment, wide enough to catch what is in effect a double contingency.

117.
I should also note that there was an issue between the parties as to whether there is potentially any liability at all on the part of Messrs Williams and Dawson in relation to NICs under Regulation 81 or an equivalent regulation. Following an exchange of written submissions it appears that it is now agreed that (i) there are no provisions under which they could be made liable for the employer’s NICs and (ii) the circumstances under which they could be made liable for employee NICs are more limited than those under which they could be made liable for unpaid PAYE. In the light of my view on the logically prior point I do not ultimately need to consider whether this is significant or not; but it certainly appears to be somewhat supportive of the view which I had already reached.

118.
I conclude that the claim as pleaded in respect of the Second and Fourth Claimants is therefore hypothetical – and even if the hypothesis were to arise, premature.

Are the Claims premature?

119.
HMRC also submits that the claims brought in respect of those decisions are premature given that (i) no liability to the Loan Charge had arisen when those letters were issued

(ii) the Second and Fourth Claimants’ claims remain premature as no liability has arisen for them in respect of the Loan Charge and (iii) as regards the PFNs HMRC have not yet responded to the representations received.

120.
This point can be taken briefly. So far as concerns the Loan Charge Decisions the argument that the challenge as regards the companies is premature is unattractive given (i) the fact that I have ex hypothesi concluded that the letters are decisions and (ii) by now the Loan Charge liability has now arisen.

121.
As regards the PFN issue, this does not arise. Had it done so, the authority of R (oao

Archer & anor) v HMRC [2019] EWCA Civ 1021, (where the Court of Appeal held the primary means of challenging would be representations and a judicial review would be premature until there had been a response to representations) indicates that the PFN claim would fail the test for permission on this basis.

122.
Similarly as regards the Second and Fourth Claimants, this point does not arise. In one way it is another way of making the point as to standing. Since I have found in favour of HMRC on this point it does not arise. Had it done so I would (as indicated above) have found it to be premature for the same reasons as apply to the PFNs.

Are the claims late?

123.
HMRC's position formally was that that the claims are brought too late, submitting that either:

i)
The grounds for making such a claim first arose when Finance (No. 2) Act 2017 received Royal Assent on 16 November 2017. If so, since the claim was filed over sixteen months after that date, it was therefore not filed "promptly" as required by CPR rule 54.5(1)(a).

ii)
Or, section 7(5)(a) HRA 1998 provides that any claim asserting a breach of section 6(1) HRA 1998 has to be brought within one year of the act complained of. As the Claimants are challenging HMRC's actions in respect of the Loan Charge, the "act complained of" for the purposes of section 7(5)(a) is the coming into force of Schedule 11 following Royal Assent on 16 November 2017. Therefore, for the purposes of section 7(5)(a), the claims are out of time as they were brought more than twelve months after that date.

124.
The Claimants argue that, where official actions are taken based on and giving effect to the contested legislation, that provides an alternative starting date for the running of the three-month period. Indeed, because the full impact of legislation can only become apparent when it is put into practice, any earlier challenge risks being academic and abstract.

125.
On this issue I prefer the arguments of the Claimants – short though they are. Indeed the argument advanced by HMRC largely seemed to be directed to pointing up why the Claimants' claims are in some respects premature; it is true that this argument draws focus on to the question of when a question ceases to be academic or abstract – and the "official actions" which are needed to start the clock running.

126.
These were claims lodged within three months of the contested decisions and were in time.

Is ECHR engaged?: interference with possessions

127.

The essence of this issue is that the Claimants argue that the Loan Charge legislation is incompatible with the HRA 1998, because it constitutes a disproportionate interference with the freedom to enjoy possessions, as protected by A1P1, which of course provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties.”

128.
It follows that there is a threshold issue for permission purposes as to whether the Claimants have a “possession”.

129.
On this point the Claimants essentially made two submissions. One was that this question was simply a facet of the main argument on fair balance and proportionality. In short, the submission was that having regard to A1P1 a claim to potential tax is, if disproportionate, an interference with possession. This argument can be swiftly dismissed. This is plain both from the wording of the Article, which deals specifically with possessions, the fact that the two subjectivities are provided for by the relevant provision discretely, and also from the authorities, which in turn treat the two questions as separate.

130.
The second argument is more complex. It centred on (i) what the Claimants said was a faultline between R (on the application of Rowe) v R & C Comrs [2018] STC 462 ("Rowe") and R (on the application of St Matthews (West) Ltd v R & C Comrs [2015] STC 2272 ("St Matthews") and (ii) HMRC's argument that there could be no possession here, because what was in issue was tax avoidance and the case was in essence on all fours with St Matthews.

131.
The starting point for both sides of the argument were the principles in Kopecký v Slovakia (2005) 41 EHRR 43 at [42] to [52] where the ECtHR held that a possession can be an existing asset or a claim and that a claim could only give rise to a possession within A1P1 if it had a sufficient basis in national law.

132.
The Claimants submitted on that basis that a potential claim under the ECHR is therefore sufficient to engage A1P1, provided that it has sufficient substance. This approach however appeared to do insufficient justice to what was actually said in Kopecký. In that case the Strasbourg Court held that its case-law did not contemplate the existence of a “genuine dispute” or an “arguable claim” as a criterion for determining whether there is a “legitimate expectation” protected by A1P1 but rather, “where the proprietary interest is in the nature of a claim it may be regarded as an “asset” only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it”.

133.
The Claimants then pointed to Rowe as authority for the propositions that:

i)

The partners’ own funds are a possession within A1P1.

ii)
A “mere demand” by the state for money does not deprive it of that character.

134.
It was submitted that the question of whether there is a possession is wide and flexible – and interplays with the use of the possession. Further it was said that whether a claim to possession was sufficiently established, has to be applied on a case by case basis, not on a “tick the box” approach.

135.
On this basis the Claimants' position was that arguability of a claim for tax in a tax avoidance case is enough; and that here that arguability was established because it was not common ground or accepted that what was in play was tax avoidance.

136.
The problem for both parties was the intersection of Rowe with the decision in St Matthews. The latter case concerned an SDLT scheme that gave rise to a tax saving at the time it was entered into, but was then subsequently closed down by retrospective legislation. Thus, the claimants in that case had a scheme which they thought worked, but in fact retrospective legislation meant it indubitably ceased to work.

137.
In considering whether the legislation had infringed the claimants' A1P1 rights, the Court considered the meaning of “possession” for the purpose of A1P1. There are two issues arising from this case. The first is that it is fair to say that in doing so the Court of Appeal did not speak entirely with one voice, leading to a question mark being raised later in Rowe over where it leaves this issue. The second is the degree of factual analogy between that case and this.

138.
Taking the first issue first, HMRC relied on Vos LJ's judgment. He rejected the arguability argument at [45], saying that;

“if it were an answer in a tax case to say that legislation closing a tax avoidance loophole was an interference with the money that the taxpayer would in due course use to pay the tax, that would be applicable in many, if not most, cases, since taxpayers rarely pay tax first and dispute their liability later”.

139.
He then went on to say at [46] that;

“the money available to pay the SDLT must, in my judgment, be affected by the argument as to whether it is payable to HMRC. Of course, the money is a possession in one sense, but it is a possession impressed with an arguable claim by HMRC, which prevents it being properly regarded as a possession for A1P1 purposes”.

140.
At [47], he noted that the legislative changes meant that the appellants’ schemes did not work, and in consequence they would have to pay SDLT. He then concluded:

“48. The question is whether the second consequence identified by the appellants can, by itself, be regarded as the deprivation of a possession when it is caused entirely by the first consequence of the legislative changes. In my judgment it cannot. In every case, where there is an argument as to whether tax is payable, and legislation is changed to make clear that it is, the potential taxpayer can say that he has been deprived of the tax. Effectively, he seeks to divide the alleged deprivation into two parts when it can only properly be regarded as a single step. The appellants have been deprived, as the judge said, of an argument that they were not liable to pay the tax. That is the primary effect of the legislative changes.

49. It would be different if the appellants had been challenging the imposition of SDLT itself. The basis of the rule about claims is that a disputed amount is not in the taxpayer’s possession if there is an arguable claim by HMRC to it, or if the taxpayer has an arguable claim to it ... The prior question of whether the taxpayer has a right to the money must be decided before the taxpayer can claim to have been deprived by the legislative changes of a possession under A1P1. That makes sense from a practical point of view. If the taxpayer can show his scheme works, e.g. by obtaining a declaration to that effect, then he clearly has a possession. But if he does not, his claim that he has had a possession interfered with is premature, and begs the anterior question. Nobody knows whether the taxpayer has a possession for A1P1 purposes at that stage.”

141.
The complicating fact here is that this was not the judgment of the Court; as McCombe LJ noted in Rowe, Floyd LJ focused on whether, assuming the money was properly classed as a possession, the appellants were deprived of it, and concludes that this point was not established. Black LJ agreed with both Floyd LJ and Vos LJ. Coming to reconsider the matter in slightly different circumstances in Rowe (which concerned APNs) McCombe LJ was dubitante as to whether the principle would have extended to the facts in Rowe:

“in St Matthews (West) Ltd the taxpayers argument that the money was not payable had been entirely removed by statute with the result that the tax was payable and the money in the taxpayers hands had to fund it. HMRCs claim to the money was not only arguable, it was unimpeachable. That is not the case where a sum may be required to be paid upfront, whether or not there is a liability and whether or not there is even a claim to the money as tax. This seems to me to be a rather different situation.”

142.
On that basis he declined to endorse paragraph 125 of the judgment of Simler J at first instance where she said:

“… the decision in R (St Matthews (West) Ltd) v HM Treasury is binding, clear authority that legislation can remove without any interference with possessions, a taxpayers argument that had existed previously (that HMRC was not entitled to the money) with the result that tax is payable and the money in the taxpayers hands must fund it. In those circumstances it is difficult to see why a different result should follow from the lesser step of legislation requiring the disputed sum to be paid on account of the tax (but without finally determining liability) pending resolution of the dispute.”

143.
The difficulty and delicacy of the point seems to have encouraged the Court of Appeal to take the view that its best course was not to decide the issue, but to conclude that since the A1P1 argument failed, the conclusion on this issue could be left for another day.

144.

This is an important point, because although on the factual analogy issue the position is not entirely clear, what is clear is that the present case cannot be said to be on all fours with St Matthews. The question is rather whether it is materially so.

145.
To take the simple point first: it was alleged that there was a distinction in that in this case there is a challenge to the legality of the tax charge; but that was also the form of the challenge in St Matthews. However, it seems that there are some other factual distinctions between the cases:

i)
In St Matthews it was agreed or known in advance of the legislation that the claim existed and was arguable. This can be seen both in Simler J's reference to “a taxpayer's argument which had existed previously” and in Vos LJ's statement at [4]: “It is common ground that the challenged legislative changes put beyond doubt what it is also common ground was previously not beyond doubt, namely that the appellants’ schemes did not work.” Here in the end the analogy with St Matthews was said to arise not necessarily because there was an extant argument as such but because this was tax avoidance and therefore, even if not formally challenged, participators should assume that challenge lurked.

ii)
In St Matthews the effect of the legislation was unquestionably to render the arguable claim unarguable from the claimants' perspective. Here there is an issue as to the claim even after the legislation, at least as regards the close companies.

iii)
In St Matthews the claim related to open years. Here the liability to tax of some of those who had taken part in loan related remuneration arrangements would have been unimpeachable because period for enquiries had expired (though most of the years in respect of the central Claimants here were open).

iv)
It was also contended for the Claimants that the interest here was wider, in that in St Matthews the claim was confined to one particular taxpayer and confined to one particular scheme for evading SDLT, whereas in this case the issue affects between 50-100,000 people.

146.
Sir James Eadie QC tacitly encouraged me to follow the lead of the Court of Appeal in Rowe and decide that this is a point which I need not decide. Given the obvious scope for this point to matter, however, I have considered it right to give a view, even if in the final analysis it would indeed make no difference to the outcome.

147.
Ultimately, I have found myself able to travel much of the way with the submissions advanced for HMRC, but unable to reach the exact conclusion for which it contended.

148.
I agree that the starting point based on Kopecký is that the Claimants are wrong to say that the authorities indicate a wide and flexible approach to possession. If this case is to be treated as one of a contested claim the Claimants are in difficulty, in that what is in issue is something which is plainly

capable of argument and Kopecký tells us that sufficient basis in national law requires something more than this – something akin to settled case-law of the domestic courts confirming it.

149.
It is in the arguments which go to whether the case is one of a contested claim or a fund that the difficulty lies.

150.
I accept the arguments advanced for HMRC that there is no magic in the fact of closed years. If it is the case that the position was, as HMRC contends, clear throughout, that these schemes' effectiveness was disputed, then the fact that years were closed does not make a difference.

151.
I also accept HMRC’s arguments that the fact that the effect of the legislation in St Matthews was to create a clear undisputed situation is not a salient difference to the position here, where the argument as to close companies remains live. Nor do I see how the fact that this is a case which (I am told) affects far greater numbers than the St Matthews decision can make a difference as to whether there was a possession or not. What matters on the authorities is whether there is an asset/fund on the one hand or a claim on the part of HMRC on the other.

152.
The real issue is whether there was a claim. Here the Claimants may be in a different and better position to those in St Matthews. This is not a case of the tax imposed arising out of a specific known contentious issue, as appears to have been the case in St Matthews, where there was a very clear and longstanding attempt to extirpate stamp duty avoidance. The first instance judgment in that case traces the legislative history from 2003; the transactions in question were entered into in 2012. That is one thing. But there is something deeply unattractive in saying that any amount of tax saved by what, at the time it is entered into, appears to be prudent tax mitigation is deemed impressed with a trust lest the HMRC later decide to bring legislation into existence to close a particular loophole. This is the more so when, as Mr Southern QC pointed out, the concept of tax avoidance, and the line between that and tax mitigation, is ill-defined and appears to have shifted somewhat over the years.

153.
I can quite see that if it were the case on the evidence that this particular type of arrangement was, even if not formally put in issue, well known to be a subject of interest to the HMRC, that might be equivalent to the position in St Matthews, such that the trust posited by Vos LJ would arise.

154.
The critical part of the argument so far as HMRC is concerned focuses on whether here we are looking at a claim or funds. What is said for HMRC is that the services provided create the remuneration right, but do not of themselves result in the payment of money; the money only comes via the loan. In those circumstances while there is a fund, it should effectively be treated as a fortiori a fund or income over which there is a disputed claim, because that whole structure is “as the taxpayer is well aware a mechanism for not having to pay income tax which would ordinarily be payable”.

155.
This argument is ingenious, but is effectively a bootstraps argument. Either the sum is subject to a claim, or it is not; its source cannot per se make the difference. In my judgment all depends on

whether the factual matrix puts the taxpayer on a similar enough footing to the taxpayer in St Matthews.

156.
The answer to this question depends on what was known to be of interest to HMRC at the time of the arrangements in question. In the light of the issues considered above, I conclude that the position was certainly different by the end of 2013 compared to the position in 2010; by the end of 2013 the position was not materially dissimilar to that which pertained in St Matthews. Accordingly, I would conclude that DES did not have a possession.

157.
So far as Cartref is concerned I would be inclined to say that the position is different. Although Spotlights 5 and 6 were issued, the DRR were not yet in existence; even as they were being consulted upon, the way in which they were being approached was very different to the scheme which Cartref was entering into. To say that there was a claim, when there was no legislation yet in existence which even covered distantly related schemes, would seem to stray too close to an analysis whereby any arrangement is impressed with a potential claim by HMRC.

158.
As regards Decisions 4 and 5 I concur with the decision of Sir Ross Cranston in Haworth which states in terms that PFNs do not in principle interfere with any possessions.

Permission - conclusion

159.
It follows that the First Claimant should be granted permission to judicially review the decision which pertains to it. All other challenges fail at the permission stage.

160.
Nonetheless, given the complexity of the permission decision, and the full argument which has been addressed, I will nonetheless consider the substantive application “as if” permission had been granted on all challenges.

Stage 2: The Substantive Application

161.
If permission is granted the Claimants invoked a number of issues, all of which were said to feed into either the question of disproportion under A1P1, or breach of Article 6. While they were all deployed as separate issues, a number of them are effectively questions as to what factors and what evidence inform the main consideration of the “fair balance” principle. I will deal with these first.

Reliance on the APPG Report and the Motion of the House

162.
The Claimants drew very much on the conclusions of the APPG Report. In particular they lent on two grounds within the “Summary of Key Recommendations”:

i)
“The Loan Charge is retrospective, overrides taxpayer protections and undermines the rule of law.”

ii)

“The real reason for the introduction of the Loan Charge was to bypass the normal legal processes and to allow HMRC to collect tax where they were “out of time” under existing legislation.”

163.
While Mr Southern QC for the Claimants indicated initially in submissions that the reliance placed on the Report was as “the considered opinions of 188 concerned parliamentarians” and as such valuable and not just irrelevant opinion, later in his submissions he appeared also to rely on the report for the truth of facts contained within it. I must therefore consider its admissibility and (if admissible) its weight both as to opinion evidence and factual evidence.

164.
This effectively broad reliance on the Report was met by HMRC with a dual response. Firstly, it was suggested by reference to Office of Government Commerce v Information Commissioner [2008] EWHC 774 (Admin); [2010] Q.B. 98 ("OGC") that the opinions of parliamentary committees were inadmissible, as to do so would effectively breach Article 9 of the Bill of Rights. Secondly it was argued that even if this report did not fall foul of the Bill of Rights, the material in it was inadmissible for irrelevance.

165.
So far as the first argument was concerned it was a clever and interesting one, but as Sir James Eadie QC tacitly conceded, it was not really on point. In the OGC case what was in issue was a full select committee report of the Select Committee on Work and Pensions, such that the question of breach of parliamentary privilege could arise if one party tried to impugn the findings of the report. Here I am considering a report of a more informal cross party group, albeit one set up at the instance of the House. That is a rather different thing, from the perspective of Parliamentary privilege.

166.
It seemed to me that in reality this limb of the argument was perhaps best regarded as a flag to remember the nature of proceedings and debate in Parliament; privilege is an aspect of the freedom which Parliament invokes in order to protect robustness of debate. The result is that documents produced by Parliamentarians may be untrammelled by some of the notes of caution which hedge proceedings outside Parliament and they thus cannot readily be regarded as evidence in the same way as original documents or documents prepared specifically for litigation.

167.
What is then more to the point is the question of relevance and admissibility beyond this question, but bearing in mind the nature of the document. On this the Claimants submitted that this court is positively required to look at Parliamentary materials, as placing it in a better position to understand and evaluate legislation which is subject to review. They referred me to Wilson v County First Trust [2004] 1 AC 816 where Lord Nicholls said of such matters as White Papers and Explanatory Notes:

“By having regard to such material, the court would not be “questioning” proceedings in Parliament or intruding improperly into the legislative process or ascribing to Parliament the views expressed by a minister. The court would merely be placing itself in a better position to understand the legislation.”

168.
This is a valid point, but it is one which arises in an entirely different situation. There is no issue that the Court is entitled to (in appropriate circumstances) look at the Parliamentary materials which underpin a piece of legislation. It was put as follows by Stanley Burnton J in the OGC case:

“62. …it seems to me that there can be no objection to a reference to the conclusions of a report that leads to legislation, since in such a case the purpose of the reference is either historical or made with a view to ascertaining the mischief at which the legislation was aimed; the reference is not made with a view to questioning the views expressed as to the law as at the date of the report.

…

64. My conclusion does not lead to the exclusion from consideration by the commissioner or the tribunal of the opportunity for scrutiny of the acts of public authorities afforded by the work of parliamentary select committees. They may take into account the terms of reference of committees and the scope and nature of their work as shown by their reports. If the evidence given to a committee is uncontentious, i e, the parties to the appeal before the tribunal agree that it is true and accurate, I see no objection to its being taken into account. What the tribunal must not do is refer to evidence given to a parliamentary committee that is contentious (and it must be treated as such if the parties have not had an opportunity to address it) or to the opinion or finding of the committee on an issue that the tribunal has to determine.”

169.
The position here however is that the material sought to be relied on does not underpin the legislation in question at all; it is pure ex post facto commentary. Nor is it a question of relying on terms of reference or the scope and nature of the report, or of agreed or uncontentious reference.

170.
I conclude therefore that while I am not barred from looking at such material by reason of any issue as to breach of Parliamentary privilege, I do need to ask myself serious questions about the nature of the evidence, and its admissibility as relevant factual or opinion evidence.

171.
As for the APPG Report I conclude that, following the authorities set out above, I cannot properly regard it as providing me with admissible factual evidence. It does not fall within any of the recognised categories where the contents of such documents can be adduced. It is not a witness statement, provided under the safeguards of the witness statement process. It was not written for the purpose of being relied on as a statement of facts; it is plainly written, although carefully and I am sure with much consideration, as a call to action. The sources for the factual statements are not given and are not capable of being checked. The process was not one where HMRC gave a response to the factual assertions; and it was apparent from the submissions made on the main conclusions that HMRC does indeed take issue with significant parts of what is said in the report.

172.
So far as the opinions relied on are concerned I may properly take into account the fact that concerned Parliamentarians expressed these views based on the material available to them; however, those opinions again must be taken with a rider as to the purposes for which they were given and the absence of the safeguards which would be expected of opinion evidence admitted in court in the usual way. I do not therefore regard the opinions expressed as admissible opinion evidence.

173.
As for the motion of the House, I do not see that any of the above precludes me from taking it into consideration. However, this tells me only that the House has expressed concerns in very strong terms

as to the aspects which are enumerated in the motion. A number of those aspects are not relevant to the issue which I have to decide. The key point for my consideration is that the House of Commons motion indicates that it was the view (that is the opinion) of the House that: “the Loan Charge is fundamentally unfair and undermines the principle of the rule of law by overriding statutory taxpayer protections.”

174.
The weight which I can give to the Parliamentary evidence relied on by the Claimants is therefore extremely limited.

175.
I should perhaps add that it was submitted that it was not open to HMRC to take issue with the reliance on the APPG report because HMRC relied on a Treasury Report. This "sauce for the goose" argument was however misconceived; HMRC did not point me to this report as evidence of any facts, or as containing opinion to which I should give weight in the fair balance calculation. Rather that document was referred to simply to make plain that HMRC took the view that schemes such as the one under consideration were tax avoidance.

Is the legislation retrospective?

176.
This was effectively a non-issue. The Claimants placed much stress on the fact that in many cases the arrangements in question will have come into existence at a time when they did not have the legal consequence which is now attached to them and the legislation was thus retrospective.

177.
While there was a debate as to the correctness of the terminology – as to whether “retrospective” or “retroactive” was the correct label - the thrust of this point was not disputed. HMRC does not dispute any of the above, but says the legislation is not retrospective in the sense that it does not alter something in the past such as the time limits for assessment, the procedure for assessment, or indeed the tax treatment of any historic transaction or the tax position of any previous year.

178.
However what HMRC also says (which was in turn not disputed by the Claimants) is that there is no problem per se with tax legislation being retrospective/retroactive. ECtHR has held that retrospective taxation is not prohibited under the ECHR, provided it strikes a fair balance between the public and private interests involved and does not impose an unreasonable burden on the taxpayer: MA & others v Finland [2003] 37 EHRR CD210.

179.
In the end the two points which needed to be taken away from this passage of arms were that (i) retrospective legislation requires close consideration in the “fair balance” process and (ii) I should bear in mind the extent of the retrospectivity in this case. The Claimants pointed out that the reach of the legislation was back to 1999, that is 20 years back from today. The Claimants pointed out that in general terms one would expect to find that kind of period or “tail” of retrospectivity being sanctioned only in cases of criminality – which of course is not suggested here.

Were parliamentary conventions relating to retrospective legislation observed?

180.

This point was conceded to be of only marginal relevance, but the Claimants do say that I should bear in mind, as part of the exercise, that the warnings given were not compliant with the Rees Rules (set out by Peter Rees MP in the Standing Committee Debate on Finance Bill 1978):

“first, the warning must be precise in form. A mere general suggestion that there are vague schemes of tax avoidance that must be counted should not suffice. Secondly, the problem at which the warning has been directed should immediately be referred to a committee... to devise the precise legislative measures which should then be introduced. Thirdly, if the committee can hit on an appropriate legislative provision, the draft clause ... should immediately be published in advance of the Finance Bill so that those who are likely to be in the field of fire will have a second clear intimation of what to expect. Fourthly, such a clause must, without fail, be introduced in the following Finance Bill.”

181.
In particular they say that this legislation was not compliant in that it goes back beyond the date when notice was originally given – at earliest this was 2004.

182.
HMRC plays a fairly dead bat to this point, arguing that while HMRC considers that the conventions in question were observed, this question will not assist the court in determining whether the Loan Charge, or the Loan Charge and PFNs together, is/are incompatible with the Claimants’ ECHR rights. That is a question of proportionality which turns on the effect of the legislation, not the processes which led to it.

183.
HMRC also submitted that, quite apart from the fact that this issue was relevant to none of the main claimants in this case, it is a matter for Parliament whether it chooses to pass primary legislation, and this is primary legislation which Parliament plainly scrutinised.

Does the purpose of the Loan Charge also apply to close company schemes?

184.
On this the Claimants contended that the purpose of the Loan Charge does not apply to the close company schemes and they should be regarded as being outside the purpose of the legislation. On this issue I entirely agree with the submissions made by HMRC that this issue properly falls outside the scope of the judicial review and ought rather, as a question of statutory interpretation and substantive tax law, be determined by the Specialist Tax Tribunal.

185.
However, I do note the points made in this regard. Those points appear to me to be substantially points which are relevant to the question of the timeline and development of the legislation. As such they are principally relevant to the question of possession, but I do also have them in mind as part of the backdrop to the “fair balance” exercise.

Does such interference with A1P1 rights as may be established constitute a reasonable and proportionate interference (“fair balance principle”)?

186.
The central question however was agreed to be whether the interference was reasonable and proportionate. The legal background against which I should approach this question was not much in issue.

187.
The exercise is about the question of fair balance; and in looking at that it was accepted that a state has a wide margin of appreciation.

188.
On one level the Claimants' case was primarily based on the following two conclusions in the APPG report:

i)
The Loan Charge is retrospective, overrides taxpayer protections and undermines the rule of law; and

ii)
The real reason for the introduction of the Loan Charge was to bypass the normal legal processes and to allow HMRC to collect tax where they were “out of time” under existing legislation.

189.
Unless one were to take the APPG Report as evidence of the truth of the facts stated in it, this iteration of the argument was problematic for the Claimants.

190.
More realistically the Claimants rested on a combination of factors. One was retrospectivity. Another was the extensive temporal reach of the legislation – the effective reopening of closed years and the fact that the reach was akin to that normally justified by criminal activity. A third was hardship. On this the Claimants gave a number of examples from different areas. These were nothing to do with the Claimants but were said (albeit accepted to be “painted with a broad brush”) to illustrate the excessive and disproportionate nature of the legislation's operation. These examples were:

i)
Example 1: In 1999/2000 - 2005/2006 Ms V was a New Zealand lawyer working for a UK company (W). Her services were provided by an Isle of Man Co (X). W paid £50,000 to X. X paid £10,000 salary to V, and paid £35,000 to a trust for her benefit. The Trust lent her £35,000 each year. At the end of her assignment with W the loan stood at £210,000. The Trust released the loan. In 2005/2006 Ms V was run down when using a pedestrian crossing. Her loss of earnings damages were computed by reference to a salary of £10,000. As a result of this accident, she decided to remain in the UK, but only had limited earnings. On 5 April 2019 the “outstanding” loan is £210,000 of £81,100. She is liable to income tax by reference to that sum in 2018/2019. Though the debt has been released in 2006 it is still “outstanding”.

ii)
Example 2: As in (i). In December 2018 Ms V is issued with an APN charging income tax on £210,000 of £81,100. She pays this from savings. Her liability on the 2019 Loan Charge remains outstanding, because the amount outstanding is less than the amount of the accelerated payment.

iii)
Example 3: Some 200 agency nurses are employed through an umbrella company from 2005/2006 to 2015/2016. They receive a limited salary and the balance of the sums paid by the health authority in respect of their work is paid to an EBT. The trustee establishes a sub-trust for each nurse. After 10 years a periodic charge to inheritance tax is incurred. Nurse’s sub-trust is £100,000. Her income tax liability is (assuming other income of £11,850) £35,500. Her IHT liability is £20,000, on the assumption that all persons who benefitted from the EBT settle with HMRC. If one or more of persons

fail to meet their liability then she will continue to be liable for any unsettled tax up to the value of her limited liability (£100,000). She is also liable for income tax on £100,000 outstanding on 5 April 2019.

191.
These were said to illustrate the following propositions:

i)
Payments received as remuneration over several years are taxed in a single year.

ii)
The fact that a loan has been released does not prevent its remaining "outstanding" for tax purposes.

iii)
Tax paid on an APN will not in general displace the Loan Charge on one and the same receipt, so doubling the tax charge.

iv)
The addition of inheritance tax can raise the tax charge to 100% +.

v)
Persons may become liable, long after the events in question, to summary charges which impose a double charge to tax on one and the same transaction.

vi)
The amount charged under the Loan Charge differs from any credible assessment of historic liability.

vii)
The Loan Charge is not motivated by the desire that the taxpayer should pay the 'correct' amount of tax.

192.
So far as these examples were concerned there was no detailed response to them in HMRC's skeleton, or orally, though a brief response was included in the skeleton. Just before the close of the hearing (during the Claimants' Reply) a note was handed up which did raise some detailed issues on these examples. These are matters which should have been raised in time to be dealt with orally and I do not consider it appropriate for such matters to be dealt with in exchanges of detailed written submissions after the event. I will therefore proceed on the basis that while I understand these points to be to some extent in issue no detailed points on them were taken at the hearing. I therefore accept for present purposes that while such effects are not relevant to the Claimants, it appears to be conceptually possible that they might (in some circumstances) arise.

193.
The response of HMRC at the hearing placed much stress on the "tax avoidance" aspect. Reliance was placed on the fact that, as regards these Claimants, there was no denial that having regard to basic nature of the scheme the purpose is for tax avoidance. What is more HMRC characterised it as "aggressive tax avoidance".

194.
I was reminded of the words of Lord Goff in Ensign Tankers v Stokes [1992] 1 A.C. 655 at 681:

"...there is a fundamental difference between tax mitigation and unacceptable tax avoidance. .... Unacceptable tax avoidance typically involves the creation of complex artificial structures by which, as though by the wave of a magic wand, the taxpayer conjures out of the air a loss, or a gain, or expenditure, or whatever it may be, which otherwise would never have existed. These structures are designed to achieve an adventitious tax benefit for the taxpayer, and in truth are no more than raids on the public funds at the expense of the general body of taxpayers, and as such are unacceptable."

195.
Against this background and bearing in mind the caution which the courts have expressed as to interference with taxation measures, HMRC says that I should find that the balance falls on the right side.

Discussion

196.
In order to be compatible with A1P1 an interference must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised.

197.
In considering the arguments I bear in mind the fact that in essence this exercise has to be approached bearing in mind the cautions noted in [20] of the Supreme Court's judgment in Bank Mellat v HM Treasury [2013] UKSC 39; [2014] AC 700 per Lord Sumption JSC:

"…the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them".

198.
Similarly in NKM v Hungary [2013] STC 1104, the ECtHR also referred to the requirements that any interference with A1P1 rights by a domestic law provision is justified if the provision is sufficiently accessible, precise and foreseeable, that it must carry out a legitimate aim in the public interest and it must be proportionate.

199.
Nonetheless the ECtHR has stated on more than one occasion that legislation will only be regarded as infringing A1P1 rights if it can be shown to be "manifestly without reasonable foundation": James v UK (Application no. 8793/79) (1986) 8 EHRR 123.

200.
Likewise, in Huitson v UK (Decision 50131/12 of 15 January 2015), the Court said as follows:

"in determining whether this requirement has been met, it is recognised that a Contracting State, not least when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation and the Court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation (see Althoff and Others v. Germany, no. 5631/05, § 60, 8 December 2011). Nor does the fact that the legislation applied retroactively in the applicant's case constitute per se a violation of Article 1 of Protocol No. 1, as retrospective tax legislation is not as such prohibited by that provision (M.A. and others v. Finland, no. 27793/95, 10 June 2003; and Di Belmonte v. Italy, no. 72665/01, 3 June 2004)."

201.
There is similar wording in other decisions of that court, for example in Bulves v Bulgaria [2009] STC 1193 at [63].

202.
This approach is then echoed in the approach taken by the Court of Appeal in:

i)
Rowe at [197]: “in such matters the public authority is better placed than the courts to determine how community interests and those of the individual are to be balanced.”; and

ii)
St Matthews at [66]: “the balance between the general interests of the community and the protection of the individual's fundamental rights falls heavily on the side of the public interest.”

203.
This is not of course to say that this margin of appreciation cannot be exceeded. In R Sz v Hungary [2013] ECHR 41838/11 the margin of appreciation was held to be exceeded. However, that was a case involving a tax charge which was not just retrospective but also un-signalled and discriminatory. The other case to which reference was made as being an example of the margin of appreciation being exceeded involved a discriminatory expropriation which had no mechanism of challenge.

204.
Looking then at the elements in issue in this case, the question of lawfulness was not seriously in issue. As primary legislation this was perhaps not surprising. Those elements which were questioned - the vagueness of some elements of the wording, for example as to the determination of purpose and the question of whose determination that is - go more to the proportionality arguments than to lawfulness, because the essence of the complaint is that they tilt the balance too far in favour of the state. Nor indeed was the question of legitimate aim or objective; it was accepted as part of the acceptance of the principles above and necessarily from the wording of A1P1 that the State has a right “to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.” All thus comes down to the question of fair balance.

205.
On the question of the backdrop and rationale which is so critical to the fair balance determination I do not entirely concur with the reliance placed by HMRC on the Ensign case. As the Claimants submitted, a mere assertion that something is tax avoidance does not make it tax avoidance; nor does it justify means which are disproportionate to the end.

206.
However, while I accept that there is force in the submission that tax avoidance appears on the material before me to be an ill-defined concept, there appears to be sufficient material in this case to find an assertion of tax avoidance as regards these Claimants, even if the categorisation as “aggressive” may be over-egging it.

207.
But more generally, looking at the purpose of the legislation, while there have been some changes in approach on the part of HMRC – for example as to the deduction for corporation tax - that is a question of detail. I was provided with detailed evidence from Mr Gilbert and Ms McGeehan which

was consistent with what HMRC had already said was its case and its concerns in the Rule 95 paper. What I take from that material is that HMRC is clear that it has and has had for some time a real concern that loans of the kind covered by Schedule 11 have been used with increasing sophistication to avoid paying income tax. The general message from HMRC that rewards for services will be taxable has been consistently stated – for example this was the point which underpinned the case of Brumby v Milner as long ago as 1975 – and is seen again in cases such as Rowe more recently as the focus has come closer to schemes of this type.

208.
This kind of concern is classically a matter for the executive, not for the courts, particularly where it involves discerning the line where action is needed to avoid measures which cut across the fair burden borne by those paying tax. Here, as McCombe LJ in Rowe noted, the second paragraph of A1P1, with its specific invocation of the control of property to secure the payment of taxes, is relevant.

209.
The legislation moreover was not unsignalled, but followed a consultation process, which itself emerged against a background of both the broad concerns as to taxing remuneration, and specifically concerns as to disguised remuneration schemes.

210.
Perhaps the greatest concern in this case is the question of retrospectivity. It is not retrospectivity per se which is the concern, because it is quite clear from the authorities that this is not an issue; retrospective legislation is both acceptable and commonplace in trying to deal with tax avoidance schemes.

211.
For example, in a Commission Decision dated 10 March 1981 A,B,C and D v UK (No. 8531/79) (which the ECtHR has subsequently cited with approval for example in Lay Lay Company Limited v Malta (No. 30633/1)), the Commission ruled that UK tax legislation which had a retrospective/retroactive effect did not infringe A1P1 and was justified. According to page 209:

“The applicants have complained that the general interest did not require Section 31 to have a retrospective effect. However, the Commission notes that Section 31 was enacted to counteract a specific form of tax avoidance, the effectiveness of which was already in doubt. It also notes that the applicants' tax liabilities for the relevant year had not been settled before Section 31 was applied to them and especially that the applicants' claim relates to their entitlement to have an artificial loss, incurred in a noncommercial venture, taken into account in reducing their existing tax liabilities which in themselves they did not dispute.

Taking these factors into account, together with the explanation which the United Kingdom Government provided when Section 31 was enacted to the effect that retrospection was necessary if this form of avoidance was to be effectively prevented, the Commission concludes that the application of Section 31 to the applicants was not excessive having regard to the provisions of Article 1 of the First Protocol of the Convention.”

212.
On the nature of the retrospectivity, again there is no particular concern; the position is not dissimilar to that noted by Simler J in Rowe at first instance – and no material distinction as regards the nature of the retrospectivity was suggested by the Claimants.

213.
The position is also somewhat akin to that in Walapu v HMRC [2016] EWHC 658 (Admin) where Green J said:

"In my judgment the change in the Finance Act 2014 is retroactive only in the very limited sense that there are new payment rules being applied which alter the position that taxpayers hitherto were subject to. It is doubtful whether this is properly to be categorised in law as retroactivity since it merely changed the consequences of acts and/or omissions from those which would have been expected at the time .... But even if it is retrospective it operates at the very lowest point of severity. In the context of tax avoidance it is a change justified by a legitimate policy and it is fair and reasonable in all the circumstances."

214.
Therefore, as I have indicated, retrospectivity per se is not the issue. The only aspect which has given me pause in this case is the extent of the retrospectivity; and this of course was also the focus of the concerns expressed by the Claimants about parliamentary process.

215.
On the one hand HMRC argues that the balance remains fair even with this extent of retrospectivity, when the purpose is to ensure tax is paid and put beyond any real doubt the position as to what it regards as contrived schemes. On the other hand, the Claimants urge me to recall not just the fact of the retrospectivity but that resonance of process, and the analogy in terms of extent with criminal conduct. Although as Sir James Eadie QC points out, the particular loans in focus here are ones made in 2010 and 2013, that is not a simple answer because I do here have to bear in mind the fact that the challenge being made is to the legislation generally, not simply to its operation vis a vis these Claimants.

216.
Focusing first on the particular schemes, the schemes which I am particularly looking at in this case, as I have indicated, harmonise (clearly in the case of DES and more faintly as regards Cartref) with the evidence relied on by HMRC as to the use of disguised remuneration as a measure of contrived tax avoidance.

217.
Mr Williams' decision was shortly after Spotlights 5 and 6, which flagged both schemes to avoid NICs and PAYE and corporation tax deductions via loan schemes; and by the time Mr Dawson took his decision the issue was very much in the open. HMRC may have commenced their campaign focussing on the corporation tax aspects, but PAYE

and NICs have been in the frame for many years now; and since before either of these schemes was entered into, HMRC were making it clear beyond peradventure that they regarded the overall approach (if not the precise iteration) as invalid. Where this is the case the taxpayer is to some extent on risk even if it may be the case (as I have indicated is the case for Cartref) that the money in question is not actually impressed with a trust. The evidence suggests that a moderately well-informed taxpayer would know himself to be on risk, distantly in the case of Cartref and much more immediately by the time of the DES decision.

218.
It is true that this legislation does reach back a long way – and to a time before such overt warnings were given. This is really the nub of the issue here – it seems at least possible that a less temporally

extravagant measure could have been used – though I note what McCombe LJ says in the context of PPNs in Rowe, about the wider ambit of the purpose: “to decide that the economics of marketed tax avoidance be altered” and the legitimacy of that purpose.

219.
For the present assuming (for the sake of argument) that the time period might therefore be seen to be open to challenge, I would then have to balance the factors weighing in favour of the legislation with the severity of the consequences. In this connection it would of course be open in this sort of challenge to look beyond these Claimants to those who did enter into arrangements before the warnings began to emerge and take account of the hardship caused generally. However, the only real evidence I have is from the active Claimants and the active Claimants are not from the early years. Further on the evidence before me the material as to hardship which would be a necessary component in the balancing exercise to conclude that vis a vis them, the measure failed the fair balance test, is simply lacking. There is simply no evidence of hardship to Mr Williams and Mr Dawson.

220.
Am I therefore in a position where I can say that based on the material I have as regards others, the balance would be sufficiently tilted? As to this I have no proper evidence as regards other Claimants. I also have no proper evidence as regards other individuals affected by the charge.

221.
As I have already indicated, the APPG Report cannot be taken as evidence of facts. Nor can the motion of the House of Commons be so taken; indeed, it does not purport to express the kinds of facts which would be needed to conduct a balancing exercise of the kind before me now. It is an expression of opinion from which facts are notably lacking; that is not a criticism of it – that is the nature of the beast. But it renders it without value for my purposes.

222.
At the end of the day, I cannot properly balance unverified assertions against verified facts. This is the more so where the narrative as to prejudice which emerges from the APPG Report does not engage with the evidence as to the measures taken by HMG to ameliorate hardship. These include measures such as the exclusion of double taxation and commercial loans and the kinds of bespoke steps taken to deal with issues in individual cases.

223.
What I am left with are the examples put forward by the Claimants in their skeleton argument. These are hypothetical examples accepted to be painted with a broad brush. They are not matched with factual scenarios. I have no evidence that if (which I assume, but HMRC disputes) those scenarios are accurate they apply to any actual person at all.

This, it seems to me, is no basis upon which to proceed to a declaration of incompatibility, given the need to balance the severity of consequences against a plainly significant weight - in terms of the valid objective of the legislation and the margin of appreciation.

224.
Accordingly, despite Mr Southern QC's careful exposition of the issues I am not, on the evidence before me, persuaded that this legislation exceeds the margin of appreciation. As he accepted, despite the formulation in Bank Mellat, the Claimants' argument required them to surmount a high hurdle. In the event this was not achieved.

225.
It cannot be said that this approach to tax is illegitimate or lacked a reasonable foundation. The purpose of the legislation is not one which can be sensibly impugned; it is to deprive tax avoidance schemes of oxygen, and to ensure that people and companies bear their fair burden of tax, rather than throwing unfair weight on others – in particular those who do not have the opportunity to use such schemes. The legislation is rationally connected to its objective. Whether or not a less intrusive measure could have been used (which I do not need to decide), there is an insufficient proper evidential basis to form a counterweight to these factors.

Is there a Breach of Article 6?

226.
It was the Claimants' position that the legislation, in association with FNs/APNs, breaches normative expectations of procedural justice and hence Article 6.

227.
The starting point for this argument was the Claimants' characterisation of the measure as not a tax, but a hypothetical tax. They contend that where FNs/APNs are issued in respect of Loan Charge liabilities, and the payments demanded are not tax but hypothetical tax, then Article 6(1) applies.

228.
They also argue that for the purposes of Article 6 the penalties of 20% imposed for nonpayment are criminal in nature. Hence Article 6 is double engaged, because there is no right to a fair trial in a criminal matter. It is also contended that the "corrective action" required in the case of FNs, the absence of appeal rights in relation to FNs and APNs, and the choice which Follower Notices impose of incurring 20% (or up to 50%) penalties or relinquishing any legal redress, added to the retrospective nature of the legislation, give rise to a breach of Article 6(1) ECHR, because it has the practical effect, if not the intention of depriving persons of access to justice (reference was made to R (on the application of Unison) v Lord Chancellor [2017] UKSC 51).

229.
HMRC argues that this challenge to the FNs and APNs is misconceived on two bases. First, FNs and PFNs do not give rise to any charge to tax themselves. Secondly as matters stand, no FNs or APNs have been or can be issued in respect of Loan Charge liabilities.

230.
HMRC also relies upon the case law in which the APN/PPN provisions have been considered by the High Court – and held to fall outside of the scope of Article 6, either in accordance with the principle in Ferrazzini v Italy [2001] STC 1314 or because of the availability of judicial review.

231.
I need only consider this last argument, which is in my judgment compelling. Thus, in Rowe [2015] EWHC 2293 (Admin) at [151-4] Simler J addressed an essentially identical argument thus:

"The suggestion that the approach in Ferrazzini is inapplicable because the money due under a PPN is not "tax" is unsustainable. The question is not a question of classification, but one of substance. The rationale for the approach in Ferrazzini is that 'tax matters still form part of the hard core of public authority prerogatives, with the public nature of the relationship between the taxpayer and the tax authority remaining predominant'. That is why tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects they produce for taxpayers. ... That rationale applies equally to a PPN....

In any event, even if Article 6 did apply to the issuing of a PPN, the claimants have had access to an independent and impartial tribunal on judicial review. This avenue offers “full jurisdiction” to deal with their complaints…”.

232.
And Green J in R (oao Walapu v HMRC) [2016] EWHC 658 (Admin) at [108], noting the contentious nature of the Ferrazzini debate:

“The Claimant is not denied rights of access to a Court either at all or within a reasonable period of time. First, the remedy of judicial review is available. The issuance of an APN involves the taking of an administrative decision by HMRC. This decision is taken following a staged process of evidence collection and evaluation. There is therefore undoubtedly a “decision” in the administrative law sense which in principle is capable of being subjected to judicial review, just as it has been in the present case. Judicial review is, it is now trite to observe, context specific and it will also take account of the existence of other remedies. This might mean that judicial review will be refused until a person has exhausted other remedies, such as an appeal procedure; or it might limit the scope and intensity of review taking into account the existence of other remedies. The important point is that judicial review will provide whatever level of judicial protection is needed to ensure that an individual's Article 6 rights are protected.”

233.
In the Court of Appeal in Rowe, Arden LJ agreed with the reasoning of Simler and Green JJ; McCombe LJ did not agree; and Thirlwall LJ declined to express a view. However, all the members of the Court of Appeal agreed that judicial review provided recipients of notices with sufficient protection in accordance with Article 6.

234.
However, in St Matthews it was held by Vos LJ (with apparent agreement by Floyd and Black LJJ):

“In my judgment, the judge was right to place primary reliance on the ECtHR’s decision in Ferrazzini v. Italy [2001] STC 1314, where it was made clear at paragraphs 20-29 that the concept of ‘civil rights and obligations’ in article 6 is an autonomous one, and that the ECtHR considered “that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer...

The autonomous definition adopted by the ECtHR then requires other factors to be addressed. There is no equivalent approach to the question of whether a right or obligation is “civil”. It is simply established autonomously that tax disputes are not “civil” for the purposes of Article 6. It is true, of course, that in some jurisdictions, tax cases are regarded as purely administrative and that, in the UK, they are regarded in most situations as civil, as opposed to criminal, claims. But that does not inform the decision as to whether the dispute in this case as to whether SDLT was payable before the legislative changes was civil for the purposes of article 6. In my judgment, on the clear authority of the ECtHR, it was not. Article 6 was not engaged”.

235.
On this basis I accept the submission that on the balance of authority tax matters (including APNs and PPNs) do not involve determination of civil rights and that in any event, even if that were to be wrong

the provision for the making of representations plus the availability of judicial review provides sufficient Article 6 protection.

Conclusion

236. It follows from the above that the substantive challenges either fail (in the case of Cartref) or would fail (in the case of the remaining Claimants), and the claim is dismissed.