Neutral Citation Number: [2018] EWHC 1271 (Admin)

Case No: CO/4930/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2018

Before:

SIR ROSS CRANSTON

- -

Between:

THE QUEEN (on the application of Geoffrey Richard HAWORTH)	**Claimant**
- and -	
THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS	**Defendant**

- -
- -

GILES GOODFELLOW and QC BEN ELLIOTT (instructed by **Levy & Levy**) for the **Claimant**
TIMOTHY BRENNAN QC and CHRISTOPHER STONE (instructed by **HMRC**) for the **Defendant**

Hearing dates: 24-26 April 2018

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Judgment Approved

Sir Ross Cranston:

INTRODUCTION

1. In this judicial review the claimant, Mr Geoffrey Haworth, challenges the decisions of the Commissioners for HM Revenue and Customs ("HMRC") to issue him in 2016 with a follower notice and an accelerated payment notice in relation to gains arising to the trustees of a settlement from the disposal of assets during the 2000-2001 assessment year. The settlement is the Geoffrey Richard Haworth No 2 Life Interest Settlement, of which the claimant is the settlor and, along with his family, a beneficiary. It is referred to as "the trust" in this judgment. The notices were issued under the anti-tax avoidance provisions of the Finance Act 2014. A follower notice can be given where the principles laid down or reasoning given in a final judicial ruling would, if applied to the taxpayer's chosen arrangements, deny him the claimed tax advantage, and an accelerated payment notice can require him to pay the tax up-front. The notices can be issued at a stage before a tax appeal has been determined.

2. In outline the claimant contends that he is not chargeable in respect of the gains made because they were exempted from the charge to UK capital gains tax by virtue of the UK/Mauritius double tax treaty ("the treaty"). His argument is that the gains were realised when the trustees of the trust were resident in Mauritius, having replaced trustees in Jersey. Since the trustees were resident in Mauritius the "tie-breaker" of the place of effective management ("POEM") in the treaty would resolve the question of residence in favour of Mauritius. The result is that Mauritius was the only jurisdiction with taxing rights over the gains. Mauritius did not impose tax on such gains, so that the intended effect of the scheme was that there was no relevant taxation in Mauritius, and no taxation in the UK either.

3. In this judicial review the claimant challenges the lawfulness and the procedure for the issue to him of the follower notice and the accelerated payment notice. In May last year Holgate J refused permission to apply for judicial review. Following an oral renewal hearing on 6 July 2017, Supperstone J granted permission in respect of grounds 1, 3, 3A, 5 and 6 of the grounds identified in the claimant's amended grounds. Permission was refused on grounds 2 and 4 which were not pursued. The remaining grounds contend that as a matter of interpretation of the relevant statutory provisions, the notices should not have been issued in his case and that, in any event, the notices that were issued are invalid as procedurally flawed.

4. In response HMRC contend that the claimant engaged in a tax avoidance scheme known in the trade as a "Round the World" ("RTW") arrangement. Along with at least 100 others, he was trying to avoid capital gains tax of (in this case) nearly £9,000,000 by routing a disposal of trust assets through Mauritius. Its view is that the claimant's arguments have effectively been disposed of by the Court of Appeal in *Smallwood v Revenue and Customs Commissioners* [2010] EWCA Civ 778, [2010] STC 2045 ("*Smallwood*"). It correctly applied the legislation in issuing the notices to the claimant and it was lawful and appropriate to do so.

BACKGROUND

The evidence

5. The evidence in this case comes importantly from the available documents, but there is also evidence in the form of statements from both sides. There is no statement from the claimant himself, although later in the judgment I refer to a statement he prepared over a decade ago in 2006. There are statements from Christopher Maslen, his tax adviser, and from Jonathan Claypole, his accountant.

6. On HMRC's part there are statements from five officials: Julie Elsey, the senior responsible officer for the implementation of the follower notice regime; John Bentley, the current compliance lead for the RTW compliance project; Kim Tilling, the former compliance lead for the RTW project; John Griffin, the senior officer in the counter-avoidance accelerated payments directorate, who made the decision to issue the accelerated payment notice in the claimant's case; and Lindsay Chalmers, a review officer within the review and litigation team of HMRC's Solicitors Office, who reviewed the representations made by the claimant's representatives in respect of the notices.

7. At the hearing the claimant never made an application for cross-examination on the basis that there was no need to do so due to the nature and quality of HMRC's evidence. If there had been an application it would have had to be considered in light of the practice that oral evidence is unusual in judicial review. In my view, its evidence in this case matches the high standard the courts expect from HMRC: *R (on the application of City Shoes (Wholesale) Ltd) v Revenue and Customs Commissioners* [2018] EWCA Civ 315; [2018] S.T.C. 762, [25], per Henderson LJ, approving Whipple J.

Devising the arrangements

8. The claimant and another taxpayer had worked together in the 1980s, but left their then employer and established their own companies. The other taxpayer formed Workplace Systems Group Ltd. By 2000 the claimant and the other taxpayer were both directors of TeleWare plc. The claimant and the trust had a fifty percent interest in that company, the balance being owned by the other taxpayer and trusts for the benefit of him and his family. The claimant and the other taxpayer decided to merge the two companies and float a new company on the London Stock Exchange, TeleWork Group plc. As part of the flotation shares would be sold by means of placing them with institutional investors.

9. The claimant was advised that he might avoid capital gains tax on the disposal of those shares, if the existing Jersey trustees of the trust resigned in favour of trustees resident in Mauritius, since there was no capital gains tax there. It is convenient to begin with a fax from the claimant's tax advisor, Mr Christopher Maslen, in mid-April 2000 about a draft tax clearance letter regarding proposed corporate transactions known as Project Tango. About a week later, on 20 April 2000, the claimant emailed Mr Maslen: "I am assuming that we will be forming a Trust each in Mauritius."

10. On 24 April 2000, Mr Maslen wrote to Pinsent Curtis, solicitors, regarding a meeting earlier in the month between himself, Lindsay Pentelow of Mazars Neville Russell LLP, and leading counsel:

> "Counsel has suggested that trustees could be appointed resident in a jurisdiction which has a suitable double taxation treaty with the UK. This would be followed by a disposal. UK resident trustees would be appointed before the end of the tax year in which the disposal takes place. The gains arising in the hands of the intermediate trustees could escape taxation."

11. The same day, 24 April 2000, Mr Maslen sent a letter to Mr Pentelow explaining that the claimant and the other taxpayer had decided that Mr Lenagan would concentrate on "the value and prospectus matters" regarding the floatation, whereas he and the claimant "will be responsible for driving forward the shareholder planning issues" for both settlements. The letter continued:

> "As the proposed measures anticipate the repatriation of the settlement after realisation of the gain in Mauritius, I envisage that the present trustees will appoint the shares to be realised on flotation to new trustees, either in Jersey or directly to trustees resident in Mauritius. UK trustees will then be appointed after the disposal in place of the trustees resident in Mauritius, so that the whole of the appointed fund will have been repatriated."

12. The following month, on 12 May 2000, Mr Maslen sent a further letter to Pinsent Curtis, referring to a meeting to be held with tax counsel the following week. Mr Maslen stated that it would be helpful to have prepared drafts of the documents for the retirement and appointment of new trustees in Mauritius, and for the subsequent retirement of the offshore trustees in favour of the UK trustees. However, he was anxious "in the giving of instructions that the process could not be construed as a series of pre-ordained transactions."

13. In a fax of 25 May 2000 Mazars outlined the tax planning to the Jersey trustees of the other taxpayer's settlements, the timescale for the appointment of Mauritian trustees, the flotation of the company and the appointment of UK trustees to take advantage of the Mauritian-UK double tax treaty.

14. Mr Maslen wrote to Mr Chandra Gujadhur of Deloitte & Touche Offshore Services Ltd in Mauritius on 1 June 2000, inquiring on behalf of the settlor of several trusts, written under English law, with trustees resident in Jersey. The settlor had tax planning needs, and Mauritius trustees might be suitable to meet them. After they were appointed,

> "they will be asked to undertake various steps…
>
> a) extension of class of beneficiaries
>
> b) the appointment of part of the funds on discretionary trusts
>
> c) the appointment of capital to beneficiaries
>
> d) the disposal of some trust shareholdings
>
> e) the onward appointment of UK trustees, probably at the end of October 2000."

15. In a letter to Mr Haworth on 2 June 2000, Mr Maslen noted the suggestion of Mazars that they should identify and check the credentials of the Mauritius trustees. Mr Maslen also noted that there was a suggestion that Canada could still be an alternative to Mauritius. Another letter from Mr Maslen to Mr Haworth, this on 6 June 2000, summarised a conversation between them a few days earlier. It read in part:

> "The existing Jersey trustees will be asked to retire in favour of trustees resident in Mauritius. This transfer is to be carried out as soon as possible…Following the appointment of trustees in Mauritius, a proportion of the settlement funds will be appointed on discretionary trusts. The purpose of this is to ensure that the settlement is liable to tax in Mauritius, …After flotation UK resident trustees will be appointed and the cash proceeds, subject to reassurances for the trustees in the event of tax planning not being successful, will be distributed to [Mr Haworth]."

16. In mid-June the claimant and Mr Maslen visited Mauritius to meet potential trustees to be satisfied as to their security and standing. They met Mr Chandra Gujadhur of Deloitte & Touche Offshore Services Ltd in Mauritius. The note of the meeting recorded that the claimant was there on behalf of his and another taxpayer's trusts. (That was confirmed in statements by the claimant and Mr Maslen 6 years later in 2006, who also recorded that they were aware that the trustees acted independently and that they did

not instruct them.) The proposals were outlined and the implications of Mauritian law explored.

17. Having seen the note of the meeting in Mauritius, Mazars wrote to Mr Gujadhur on 22 June on behalf of another taxpayer and his trusts. They noted that, as Mr Maslen would have explained, it was anticipated that the Mauritian trustees would be appointed around the end of June, with their retirement in favour of UK trustees likely to occur towards the end of October. The proposed creation of a discretionary fund was to ensure that at least part of the income accrued to the trust, with no beneficiary having as part of the planning an absolute right to that income as against the trustees.

18. In response to a request from the Jersey trustees, Pinsent Curtis sent further information to them on 23 June 2000 about the rationale behind their retirement. The solicitor explained that the tax advice on the change of trustees had been given by Mr Maslen and Kevin Prosser QC, that a significant capital gain would arise as a result or the floatation of Teleware plc, and that a significant reduction of capital gains tax would result by the trustees being Mauritius resident at the time of flotation. That was the primary reason for the proposed change in trustees. Reducing tax liabilities would be of benefit to the beneficiaries.

19. There was an exchange of faxes the same day, 23 June 2000. Pinsent Curtis had sent documentation about the corporate restructuring to Mr Gujadhur. Mr Gujadhur responded: "Although the documentation is informative as we have had no involvement in the group structuring, we have no comments to make thereon". There was then a telephone conversation between the solicitor at Pinsent Curtis and Mr Gujadhur, where Mr Gujadhur was told that the documentation was relevant to the trustees, since they would be shareholders in the companies comprising the new Telework Group plc.

20. Three days later, on 26 June 2000, Pinsent Curtis sent a fax to Mr Gujadhur where the solicitor stated that the firm had reviewed the documentation on the trustee's behalf; he hoped the telephone conversation had cleared up some outstanding points; the claimant was satisfied with the restructuring; and the flotation would be in the beneficiaries' interests. There is what appears to be a wrongly dated attendance note by the solicitor of the telephone conversation, where Mr Gujadhur raised a question whether the corporate restructuring would prejudice the trustees' shareholdings. Six years later, in a draft statement of 1 June 2006, Mr Gujadhur stated that he had reviewed the restructuring documentation and found it reasonably acceptable, except for 5 issues on which he wanted clarification.

21. On 26 June 2000 the Jersey trustees formally retired in favour of Mr Gujadhur and Deloitte & Touche Offshore Services Ltd. The trust became registered in Mauritius.

22. There are two faxes the following day, 27 June 2000, from Pinsent Curtis to Mr Gujadhur. The first explained that a colleague of the claimant would call about the corporate restructuring; set out what the trustees' minutes would need to contain in approving the restructuring; and asked for the return of the executed documents in relation to the appointment of the trustees of the settlements. The second fax concerned the next steps that would need to be taken by the trustees regarding the corporate reorganisation. Mr Gujadhur was asked to return the trustees' formal approval by return if possible. Signature of the documentation would ideally take place on 6 July, and as a

precaution against his not being available that day it was worthwhile appointing two Pinsent Curtis partners under powers of attorney. Mr Gujadhur made some comments on the draft powers of attorney and they were executed in early July.

23. There are a number of documents about the operation of the claimant's trust in Mauritius. For example, on 28 June 2000 Pinsent Curtis sent Mr Gujadhur a draft deed of appointment, suggesting the specific amounts to appoint and for whose benefit. The covering fax acknowledged that the appointment would create a tax liability in Mauritius - "in connection with the tax planning which is now taking place" - in the current tax year. If he was happy with it he should complete the appointment and prepare a minute of the meeting approving it. On 30 June 2000 Mr Gujadhur and Deloitte & Touche Offshore Services Ltd as trustees appointed the assets as suggested.

24. In early July, once the group reorganisation had occurred and the trustees became shareholders in Telework Group plc, Pinsent Curtis explained the placing agreement to Mr Gujadhur in a letter of 7 July. The letter concluded: "I would be grateful if you could now approve the Placing Agreement by holding a Trustees' meeting and producing a Minute evidencing the same." There was a further explanation by telephone on 10 July. After satisfying Mr Gujadhur's outstanding query about the stock exchange transfer forms in favour of the trustees, he approved.

25. On 14 July 2000 a fax from Pinsent Curtis to Mr Gujadhur informed him of new settlements in favour of the claimant's children and requested the trustees to consider appointing shares to them, referring to planned outcomes if the double tax treaty planning was successful or unsuccessful. A deed of appointment and two deeds of indemnity were included. If the trustees were happy with the documentation they should execute it. They were also advised what to include in a trustees' minute. On 20 July Pinsent Curtis sent a fax to Mr Gujadhur about what needed the trustees' attention during the next couple of days. One of these concerned the number of shares the trustees would sell, once the number of purchasers and price was known. Pinsent Curtis sent a fax to Mr Gujadhur on 28 July that given the attractiveness of the share issue the "green shoe" option of issuing more shares was likely to be exercised; Mr Gujadhur was later informed that it had been. Mr Gujadhur faxed Kleinwort Benson Private Bank on 14 August 2000, explaining his investment of the sale proceeds and his negotiations for a higher interest rate from the bank.

26. On 23 August 2000 Pinsent Curtis informed Mr Gujadhur of the steps that the trustees should take in relation to investment decisions, confirming that the decisions were for the trustees alone. They could appoint professional advisors but would need to have letters of engagement for this. Later, on 20 September 2000, Mr Maslen wrote to Mr Gujadhur suggesting how funds in discretionary trusts should be invested to produce income chargeable to income tax in Mauritius.

27. Meanwhile, steps were being taken for the relocation of the trusts to the UK. Thus on 3 September 2000 Kleinwort Benson Private Bank sent the claimant a letter following a conversation with him, containing information about the services Kleinwort Benson Trustees Ltd could provide. Amongst other things the letter stated:

> "In broad terms the Trustees in Mauritius will need to retire in favour of Trustees who are resident in the United Kingdom between now and the end of the year at a time that Chris Maslen will identify for strategic reasons."

28. On 4 September 2000 Mr Maslen informed the claimant that Pinsent Curtis had been tasked to prepare documentation for the repatriation of the settlements. By the third week of September, as recorded in an attendance note dated 20 September, the firm was in a position to send Mr Gujadhur the draft documentation to repatriate the settlements to the UK.

29. Pinsent Curtis faxed Mr Gujadhur on 22 September 2000, enclosing draft documents relating to the retirement of the Mauritius trustees and the appointment of UK trustees, asking for approval as soon as possible so that they could be circulated for execution.

30. In light of a press report that the Chancellor's autumn statement might be brought forward, on 25 September Mazars informed relevant parties that it was more pressing "to complete everything in Mauritius and repatriate the trusts". (Apparently there was a fear that disadvantageous statutory changes would be introduced.) Mr Maslen informed Mr Gujadhur of the urgency the next day, 25 September. On 29 September 2000 there was a fax from Mr Gujadhur to Mazars stating that he was aware of the "revised schedule for the 'remigration' of the Trusts".

31. The Deed of Retirement and Appointment was dated 24 October 2000. The Mauritian trustees retired and UK trustees, Kleinwort Benson Trustees Ltd and the head of its trust department were appointed.

HMRC investigations into the claimant's affairs

32. The claimant disclosed the transactions on his return for the year ended 5 April 2001. HMRC opened an enquiry into that return on 20 January 2003. The enquiry continued over a decade. During that period, the claimant provided information, witness statements and technical submissions to HMRC, while maintaining that neither he nor the trustees were chargeable in respect of the capital gains.

33. After the *Smallwood* decision in 2010, HMRC sent the claimant letters in February 2011 and August 2012 regarding the case. The 3 August 2012 letter to the claimant and KPMG set out its view that *Smallwood* applied and on the POEM of the claimant's arrangements. It invited views. There was further internal analysis by HMRC comparing the case with *Smallwood* in October 2012.

34. For a meeting with KPMG on 21 February 2013, there was a 9 page "meeting stencil", prepared by Ms Rose Noble of HMRC. It identified what HMRC considered to be the key documents in Mr Haworth's and another taxpayer's cases. The meeting stencil was given to KPMG. In relation to the *Smallwood* "pointers" it cross-referred to relevant documents.

35. In an email dated 22 May 2014, Mazars was provided with a table headed *Smallwood* "pointers" setting out in narrative form the relevant documents. Under cover of a letter dated 12 June 2014, HMRC provided Mazars with another list of the documents held by HMRC, this time covering another taxpayer's case as well, identifying which documents were said to demonstrate that the *Smallwood* "pointers" were present in the claimant's case. Responding to HMRC, on 8 October 2014 Mazars sent documents and information to HMRC about the claimant's case. HMRC acknowledged this over two months later. It seems that these were scanned and entered on the system by mid-December 2014. In an internal email dated 9 March 2015, Ms Noble reported that she

was reviewing the documents provided. When completed she would submit the case to technical colleagues and Solicitor's Office for their approval to issue closure notices.

Smallwood *and its aftermath in HMRC*

36. Following the handing down of the Court of Appeal's judgment in *Smallwood*, at some point HMRC's Solicitor's Office gave advice that in another case the tribunal would reach a similar result having regard to the following factors: 1.The place of management test is the same as in the UK/Mauritius [double taxation treaty]; 2. A UK taxpayer; 3. A scheme (or relevant arrangements) devised in the UK; 4. The steps taken in the scheme were carefully orchestrated throughout from the United Kingdom; 5. It was integral to the scheme that the trust should be exported to the overseas territory [i.e. Mauritius] for a brief temporary period only; 6. It was integral to the scheme that the trust should then be returned, within the fiscal year, to the United Kingdom 7. Effect was given to the integral features of the scheme as designed. In HMRC documents these seven factors became known as the "Smallwood pointers", "Smallwood hallmarks", or "Smallwood criteria".

37. In June 2014 HMRC prepared a template for prioritising the issue of accelerated payment notices. In a box on one such template it was stated that *Smallwood* was a factual case, and that HMRC might not be able to rely on it for accelerated payment.

WFGG and follower notices

38. In light of the assurances given publicly when the follower notice regime was in preparation, in particular to Parliament, about the machinery for issuing them, HMRC established the Workflow Governance Group ("WFGG"), a panel of officers with the function of determining whether a follower notice should be issued. In her witness statement Julie Elsey, deputy director (policy and technical) of HMRC's counter avoidance directorate, and the senior responsible officer for the implementation of the follower notice regime, explains that the WFGG was established in accordance with HMRC's published guidance to act as the senior HMRC panel. It first met in April 2014. It would not take a decision unless someone of senior civil service grade was present. WFGG operated by considering submissions initially prepared by the compliance team responsible for the relevant enquiry, who worked in tandem, as might be appropriate, with officers in counter avoidance, the relevant technical specialists and Solicitor's Office.

39. At its meeting on 27 August 2014 WFGG approved the issue of follower notices in 11 *Smallwood* cases. A submission to WFGG in respect of the second tranche of *Smallwood* cases was made in November 2015. It recommended follower notices for 2 cases. The signatory to the submission, Janet Landells, stated that there were over 50 remaining cases to consider before the cut-off date of July 2014, 2 years after the royal assent of the Finance Act 2014, and each had to be considered against the "criteria" identified by Solicitor's Office. She briefly described the modus operandi of the arrangements and summarised *Smallwood*, quoting in particular paragraph [70] of Hughes LJ's judgment. He found, she explained, that the POEM in that case was necessarily in the UK. Advice from Solicitor's Office was that the Tribunal was likely to reach the same conclusion as the Court of Appeal "if the following facts were present". There followed the 7 Smallwood factors. Solicitor's Office had not reviewed the scheme documents in the 2 cases but the technical specialists were content that the

criteria were met. The submission noted that the free text for follower notices had been drafted and agreed, inter alia, by the Solicitor's Office. Work was ongoing to establish:

> "whether the fact pattern set out in the advice from Solicitor's Office…occurs in other cases…WFGG are asked to 'approve in principle' the issue of follower notices for all cases that meet this factual matrix. Details of all such cases will then be notified to WFGG on the user spreadsheet with a covering email instead of a full submission."

Where a case did not meet all 7 criteria there would be a separate submission.

40. A meeting of the WFGG on 6 November 2015 noted that given the statutory provisions the deadline for the issue on notices was July 2016. The group was asked for submissions to WFGG on the 50 outstanding cases so that there could be the appropriate governance over the cases. The WFGG approved the issue of follower notices in the 2 cases referred to in Ms Landells' submission. The WFGG also approved a streamlined process for submissions on further cases.

41. The streamlined process was set out in an email from Ms Landells on 9 November 2015. It stated that WFGG was not convinced that the 50 cases which had to be reviewed before July 2016 should be pre-approved in light of the assurances Ministers had given. However, the approval process could be simplified where cases were in line with the November submission to WFGG in meeting the Solicitor's Office criteria. Submission on these could be by brief email referring back to that submission. Otherwise individual submissions were necessary.

42. In a WFGG submission dated 1 April 2016 the lead officer for RTW cases, Ms Tilling, recommended to Ms Landells that follower notices not be issued for a number of cases. It recorded that 13 follower notices had been issued in *Smallwood* cases. In the meeting of WFGG that month, authority was given that follower notices not be issued for 28 RTW cases, "as they were not considered sufficiently similar to *Smallwood* in respect of the planning and transactions undertaken."

43. On 4 May 2016 there was a proposal to WFGG under the streamlined process for the approval of 11 follower notices in respect of *Smallwood* at the May meeting. It noted that it was the last opportunity before the July deadline for the approval of such notices. There were another 4 cases where the "Smallwood hallmarks" could not be identified, and they would need to be taken forward individually. It recorded that to date some 16 follower notices had been issued. The streamlined process was attached. In all cases, the proposal noted, "the conditions in respect of the *Smallwood* decision have been met". The 7 factors mentioned in previous memorandum were set out. The proposal concluded that for the meeting there might be an additional 4 cases, but at the time there was insufficient evidence. Attached was a table with names of the claimant's and other taxpayers' cases, with limited details such as the date the inquiry opened (January 2003), the year of tax advantage (2000/2001) and the amount to be used to calculate the accelerated payment.

Claimant's review document/spreadsheet

44. During the course of HMRC's consideration of whether a follower notice should be issued in the claimant's case, material was entered onto an internal review document in

the form of a spreadsheet. When printed it is 33 pages long. There was a similar internal review document for other taxpayers who had undertaken similar transactions. The meta-data reveal that the claimant's spreadsheet was created by Ms Noble of compliance and last saved by Mr James (Alan) Smith ("Mr Smith").

45. The spreadsheet identified line by line the documents HMRC held in relation to the claimant's case and then in horizontal columns the date and name of each. There was also columns in the middle of the spreadsheet headed "Smallwood pointers" and one called "Additional comments". On the extreme right-hand side there was a column entitled "WFGG conditions for follower notice". That column has 9 entries.

46. In her first witness statement Ms Tilling, then head of RTW compliance, stated that evidence in each case for submissions to WFGG was identified and critically analysed. The team responsible for preparing submissions for WFGG included Ms Noble and Mary Franklin. They reviewed scheme documentation to confirm cases were suitable for follower and accelerated payment notices. Ms Tilling did not carry out reviews herself. In the claimant's case the review was carried out by Mr Smith, an experienced member of the compliance team who was brought in to assist the RTW group. He was provided with a technical and project overview of the work to date. The team sat near each other and there was regular and informal contact which was not recorded in emails or otherwise. Mr Smith had retired and in the claimant's case there was no account of his review, apart from the spreadsheet. (Mr Smith's emails have been deleted.) The date when he last saved the spreadsheet was consistent with the preparation of the submission to WFGG about the claimant. Ms Tilling could not recall a discussion with Mr Smith about the claimant's case, but she must have been satisfied at the time, along with others in the team, that the review had concluded that notices should be issued. Otherwise she would not have included it in the submission to WFGG.

47. The claimant submitted that there was no evidence of Mr Smith or anyone else completing a review of the claimant's case. Ms Tilling did not consider the evidence herself and her conclusion that she must have been satisfied at the time did not follow from the evidence HMRC had adduced. There was no note of any discussion about the case, or of a conversation about a conclusion to the review. It was likely that the columns "Smallwood pointers" and "Additional comments" had been prepared by Ms Noble, given the similarity of the wording between those entries on the spreadsheet and what she had prepared for the "meeting stencil" with KPMG in early 2013.

48. Given these submissions, and unimpressed myself with the absence of any record of a conclusion to the review regarding the claimant's case, I requested that HMRC prepare a further witness statement about the spreadsheet and its authorship, and whether there was any further evidence about the review, whether conducted by Mr Smith or anyone else. In her second witness statement, Ms Tilling was unable to shed any further light on the matter, although she states that she has no specific recollection that it was Mr Smith who carried out the review. She reiterates her earlier statement that she must have been satisfied that a review had been conducted and that it had concluded that it met the conditions for a follower notice to be issued. If she were not satisfied, she would not have recommended that it be issued at that time but would have recommended the contrary.

Follower notice in claimant's case

49. The submission to WFGG for approval of a follower notice in the claimant's case was under the signature of Ms Franklin and dated 4 May 2016. The claimant's case was dealt with along with others: 10 cases were also recommended for follower notice, but in 4 cases it was recommended that follower notices not be issued. The submission noted that it was the last opportunity to give approval before the July deadline. It was in accordance with the streamlined procedure.

50. The follower notice in the claimant's case was dated 24 June 2016. After stating that the conditions in the Finance Act 2014 had been satisfied, it referred to *Smallwood* under the heading, "The final judicial ruling relevant to the chosen arrangements". It continued that the claimant as settlor used a similar scheme. He also had failed by use of the chosen arrangements to achieve the intended advantage. The principles or reasoning in *Smallwood* set out applied to the tax arrangements. After reference to the factors in the majority reasoning in the case, dealt with below, the notice stated: "Corresponding reasoning applies to the circumstances and implementation of the tax arrangements used by you or on your behalf". Later the notice explained that if it was believed that *Smallwood* was not a relevant ruling, the reasons need to be explained.

51. An accelerated payment notice was issued to the claimant on 24 June 2016. In his witness statement, the designated officer who issued this notice, Mr Griffin, states that he always accesses the controlled access folder, containing the relevant files on a taxpayer, before the issue of a notice. He would have considered a scheme summary explaining how the scheme was intended to work. He understood that HMRC's view was that the scheme arrangements did not work. In the statement Mr Griffin lists the documents that in particular he would review. In the claimant's case he would have been satisfied as to the amount of understated tax, having reviewed what he considered to be the relevant documents. Unless satisfied that the calculations were correct and supported by the relevant documentation, he would not authorise the issuing of an accelerated payment notice. The amount of understated tax recorded in the claimant's notice was therefore correct to the best of his information and belief.

52. On 22 September 2016 the claimant's accountants, Mazars, sent representations on behalf of the claimant in a 15 page letter dated 22 September 2016. Ms Chalmers was the review officer who responded to these representations. In her witness statement she states that she reviewed all the relevant documents held on the claimant in the shared controlled access folder, and that her review included looking at the avoidance scheme summary containing a link to *Smallwood*, the scheme user data and the submissions made to the WFGG. She also considered the letter to Mazars dated 12 June 2014. In her review letter of 12 December 2016, she stated that "the features of your use of the Round the World scheme were not identical to use of the scheme in *Smallwood*, but they were not materially different". Like the taxpayer in *Smallwood*, there was no connection with Mauritius in the claimant's case. The formation of HMRC's view was "an administrative decision involving the exercise of skilled judgment, in which, even if you disagree, HMRC is entitled to its own opinion".

53. Closure notices were issued in the claimant's case on 31 October 2016. Mazars responded on 25 November 2016. The claimant has begun proceedings in the tribunal challenging HMRC's assessment.

THE LEGAL FRAMEWORK

Consultation and Parliamentary process

54. The follower notice provisions were first consulted on in HMRC's Consultation document, *Raising the stakes on tax avoidance*, 12 August 2013. It described the purpose of the follower notice proposals as encouraging people who had used an avoidance scheme to settle their tax affairs once the scheme was defeated in the courts. The document explained that where a tax avoidance scheme was mass-marketed, as they often were, HMRC was presented with a large number of returns all based on the same assumption that it worked. Sometimes it was most efficient for HMRC to investigate representative cases, taking them to litigation if necessary, but when HMRC won a representative case in the courts others taxpayers who had used the same, or very similar schemes, sometimes saw little incentive to settle. The proposal was that where taxpayers who used an avoidance scheme that had been shown to fail in another party's litigation, they should confirm that they accepted that the judgment did so 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.

55. In his Autumn Statement on 5 December 2013, the Chancellor announced that legislation would introduce a requirement for taxpayers to settle their dispute on receipt of a 'follower notice' that their case is on the same or substantially the same grounds as a case already decided in the tribunal or court, 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.

56. The *Summary of Responses and Draft* to the *Raising the stakes on tax avoidance consultation* was published in January 2014. It recalled that one aspect of the proposal was that if taxpayers believed the litigated case did not apply to their circumstances they should tell HMRC why they thought it was not relevant, but that if they did not respond to HMRC within the time required, or if it was subsequently found that the scheme they used rested on the same point of law as the representative case, there would be a penalty for failing to comply with the obligation. As to concerns about the difficulty of determining the extent to which a scheme which had been proven to fail in litigation applied to another taxpayer, it responded that HMRC would carefully consider whether a case was sufficiently similar to the scheme before issuing a notice, and that decisions would be subject to a governance process. However, for the majority of cases it would be clear that the failed litigation case was sufficiently similar or "on all fours" with the schemes used by other taxpayers. The draft clause for "relevant judicial ruling" read: "(b) the principles laid down in the ruling would, if applied to the chosen arrangements, deny the asserted advantage, or a part of that advantage…"

57. There was a further consultation document on 24 January 2014, *Tackling marketed tax avoidance*. 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 HMRC's experience, it was extremely rare for a taxpayer to even proceed to their own litigation in the face of such a decision, but while the vast majority did eventually concede, they prolonged the dispute for as long as they are able, often agreeing to settle only as the date of litigation approached. 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.

58. *Tackling marketed tax avoidance: response document* was published in March 2014. It contained the government's responses to comments on the proposed legislation for 'follower notices'. One concern was that the term 'principles' in the draft clauses was too broad and could catch a wider range of disputes than intended. Amendments would be made to the draft legislation: "The proposal aims to focus on the tribunal's or court's reasoning behind the decision." As to the absence of an appeal against a follower notice, that was to prevent further litigation, which would defeat the purpose of the proposals, but HMRC was putting in place "strict internal governance and safeguards so that follower notices can only be issued following approval at senior level within the organisation, and will be scrutinised by staff other than those who have been working on the detail of the case." Those governance safeguards were reiterated later in the document.

59. 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…"

60. In speaking to the follower notice and accelerated payment provisions in the House of Commons Public Bill Committee on the Finance Bill on 17 June 2014, columns 476-486, the Exchequer Secretary to the Treasury said that the aim was to accelerate the settlement of disputes between taxpayers and HMRC where the taxpayer has used avoidance arrangements which had been shown to fail in another party's litigation. This avoided the system being clogged up with unmeritorious appeals. Those challenging HMRC's assessment of the impact of another judicial ruling should not have the benefit of the money whilst that challenge was resolved. He quoted a response of one professional body to HMRC, that HMRC should be able to root out hopeless cases clogging the courts. He said that the Bill had been amended to make clear that notices could only be issued when a scheme had been shown by the courts not to work. The purpose of follower notices was to discourage certain taxpayers from spinning out their disputes unreasonably with HMRC. There would be strict governance regarding the issue of the notices. Notices would only be issued if a decision was clear, and only if the courts had shown that an avoidance scheme would fail. The purpose of the measure was to release the logjam and speed up the resolution of slow cases.

61. As regards follower notices, the Bill as introduced was not amended in its passage through Parliament.

Finance Act 2014: follower notices and accelerated payment notices

62. Chapter 2 of Part 4 of the Finance Act 2014 contains the follower notice provisions. It 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…"

63. 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."

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

"Section 206 – Content of a follower notice

A follower notice must—

(a) identify the judicial ruling in respect of which Condition C in section 204 is met,

(b) explain why HMRC considers that the ruling meets the requirements of section 205(3), and

(c) explain the effects of sections 207 to 210."

65. 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 confirm or withdraw the notice: s. 207(3).

66. 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: ss. 208-209.

67. 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: s. 214(3)(b), or that it was otherwise reasonable in all the circumstances for the individual not to have taken the necessary corrective action: s. 214(3)(d). The penalty is not payable until the appeal against it is determined: s. 214(6). 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: s. 214(2).

68. Section 218 contains definitions, including that "HMRC" means Her Majesty's Revenue and Customs.

69. 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 DOTAS arrangements…

70. 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": s 220(2)(b). 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…": s 220(3).

71. Where the accelerated payment notice is reliant under section 219(4)(a) on a follower notice, 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."

"Denied advantage" has the meaning given in section 208(3), which is so much of the asserted advantage as is denied by the application of the principles laid down, or reasoning given, in the judicial ruling identified in the follower notice under section 206(a): s.220(5)(a).

Follower notice guidance

72. HMRC has published guidance, *Follower notices and accelerated payments*. Paragraph 1.7.3 states that although the legislation does not exclusively apply to widely marketed schemes, the definition of 'relevant' makes it much less likely that it will apply outside

that context. "Nonetheless, the legislation could apply to a judicial ruling which determines a case against one person, and there is only one or a small number of others that are potential followers." Paragraph 1.19.1 deals with the selection of the follower cases. It provides:

> "Decisions over the giving of follower notices will be taken by a senior HMRC panel. This panel will consider the principles and reasoning established by final judicial rulings and the context within which those principles arise. The panel will be independent from the teams who investigate cases. It will consider both existing final cases which may be relevant, as well as new cases which will arise from time to time".

The Commissioners for Revenue and Customs Act 2005: HMRC

73. The Commissioners for Revenue and Customs Act 2005 ("the 2005 Act") established HMRC and provided for the appointment of Commissioners to exercise the functions at that point vested in the Commissioners of Customs and Excise Commissioners and of Inland Revenue. Under section 4(1) the Commissioners and the officers of Revenue and Customs are together referred to as Her Majesty's Revenue and Customs. Section 5(1)(b) provides that the Commissioners are responsible for the collection and management of revenue for which the Commissioners of Customs and Excise were responsible before the Act came into effect. Section 12 empowers the Commissioners to make arrangements for the conduct of their proceedings. Section 14 provides for delegation. In its relevant parts it reads:

> "(1) Arrangements under section 12 may, in particular, enable the Commissioners, or a number of Commissioners acting in accordance with arrangements by virtue of section 12(2)(b), to delegate a function of the Commissioners…
>
> > (b) to a committee established by the Commissioners (which may include persons who are neither Commissioners nor staff of the Commissioners nor officers of Revenue and Customs)".

74. Explanatory Notes to the Act explain that HMRC, like its predecessor departments, is a non-ministerial government department, and then summarize in a clear and helpful manner the provisions of the legislation.

The Smallwood case

75. In outline, in *Smallwood v Revenue and Customs Commissioners* [2010] EWCA Civ 778; [2010] STC 2045 Mr Smallwood settled shares on trust for the benefit of himself and his family. He was resident in the United Kingdom. The trustee was a Jersey company. The shares had increased in value and it was decided to sell some. In an attempt to avoid the effects of section 86 of the Taxation of Chargeable Gains Act 1992 the trustee resigned as trustee in favour of trustees in Mauritius. Mauritius did not tax capital gains and had a double taxation agreement with the UK, as a result of which chargeable gains were taxable only in the contracting state in which the taxpayer was liable to tax as a resident. The shares were sold and before the end of the financial year Mr Smallwood and his wife were appointed as English trustees. They claimed double taxation relief in the UK on the gains from the sale of the shares.

76. For present purposes, the relevant issue in *Smallwood* is what the court established in relation to the POEM of the trust. The Special Commissioners in *Smallwood* endorsed the OECD commentary on POEM:

> "The place of effective management (POEM) is the place where key management and commercial decisions that are necessary for the conduct of the entity's business are in substance made. The place of effective management will ordinarily be the place where the most senior person or group of persons (for example a board of directors) makes its decisions, the place where the actions to be taken by the entity as a whole are determined; however, no definitive rule can be given and all relevant facts and circumstances must be examined to determine the place of effective management."

77. They then went on ask where the "real top level management (or the realistic positive management) of the trustee qua trustee" was to be found, and concluded that it was in the UK: [2008] STC (SCD) 629, [130], [136]-[149].

78. In the Court of Appeal Patten LJ dissented. He quoted the OECD commentary on POEM but held at [61] that it led inevitably to the question whether the effective decision by the trustee company to implement the tax scheme and to sell the shares was taken by its board of directors, albeit on the advice and at the request of KPMG Bristol, or whether the board effectively ceded any discretion in the matter to KPMG by agreeing to act in accordance with their instructions. Given that the directors remained in place and exercised their powers as directors to effect the sale, the approach to the issue suggested in *Wood v Holden* [2006] EWCA Civ 26 was the right test. Patten LJ then held that on the basis of their findings the Special Commissioners could not properly have concluded that the POEM of the trustees at the relevant time lay in the UK rather than in Mauritius. Thus their conclusions were not ones which were open to them on the evidence or on the findings of fact which they made: [63].

79. The majority judgment was given by Hughes LJ, with whom Ward LJ agreed. At [67] he said that the Special Commissioners' conclusion on the issue of POEM was one of fact and the taxpayers could succeed on their cross-appeal only if the Special Commissioners had reached a conclusion of fact which was simply not available to them, and thus made an error of law: *Edwards v Bairstow* [1956] AC 12. If the question was the POEM of the particular trust company trustee for the time being at the moment of disposal, it may be that the reasoning in *Wood v Holden* [2006] EWCA Civ 26 would justify the conclusion that the Commissioners were in error: [68]. However, to apply that reasoning to the present case was to ask the wrong question, and to return to the rejected snapshot approach when trustees are, by section 69(1) Taxation of Chargeable Gains Act 1992, treated as a continuing body, and the POEM with which the case was concerned was the POEM of the trust: [69]. Hughes LJ then said:

> "[70] On the primary facts which the Special Commissioners found at paragraphs 136-145, which are set out in the judgment of Patten LJ, I do not think that it is possible to say that they were not entitled to find that the POEM of the trust was in the United Kingdom in the fiscal year in question. The scheme was devised in the United Kingdom by Mr Smallwood on the advice of KPMG Bristol. The steps taken in the scheme were carefully orchestrated throughout from the United Kingdom, both by KPMG and by Quilter [investment advisers]. And it was integral to the scheme that the trust should be exported to Mauritius for a brief temporary

> period only and then be returned, within the fiscal year, to the United Kingdom, which occurred. Mr Smallwood remained throughout in the UK. There was a scheme of management of this trust which went above and beyond the day to day management exercised by the trustees for the time being, and the control of it was located in the United Kingdom."

80. *Lee and Bunter v Revenue and Customs Commissioners* [2017] UKFTT 0279 (TC) is a recent decision of the First-tier Tribunal (Tax Chamber) dismissing taxpayer appeals. In the course of his reasoning Judge Colin Bishopp held that despite the close resemblance, the outcome of *Smallwood* could not simply be applied to the facts of another case: [73]. He held that in *Smallwood* Hughes LJ had not determined the appeal by reference to his own view of the arrangements, but to the criteria laid down in *Edwards v Bairstow* [1956] AC 14 and the long line of authority following it, which limited the ability of an appellate court to interfere with findings of fact. The receipt of advice was not relevant unless it crossed the threshold into instruction, citing at [76] *Wood v Holden* [2006] EWCA Civ 26; [2006] 1 WLR 1393.

APPPLICATION OF SMALLWOOD: GROUND 1

81. The claimant contended that HMRC's issue of a follower notice in his case was wrong in law, since there were no "principles" or "reasoning" of general application arising from *Smallwood*, as required by section 205(3) of the 2014 Act, which would deny him a tax advantage. The existence of applicable principles or reasoning in a judicial ruling is a precondition of HMRC exercising its powers, and that precondition is not met in this case. In any event, the claimant submitted, HMRC had incorrectly identified the principles in *Smallwood*. Further, it had applied the wrong test in determining where the POEM of the claimant's trust was located, as well as adopting too low a threshold (that HMRC is likely to win the appeal on the balance of probabilities). The claimant contended that the follower notice regime had a clear purpose of deterring taxpayers from prolonging cases which were objectively hopeless as a result of principles established in a previous judicial decision. The principal mischief was mass marketed tax avoidance schemes, the relevant constituents of which were materially the same, where other scheme participants refused to or delayed abiding by the outcome of the test cases.

(1) *Principles or reasoning from* Smallwood

82. The claimant contended that "principles" or "reasoning" in section 205(3)(b) Finance Act 2014 must necessarily be legal principles and reasoning, since it is not possible to apply the factual findings of one case to another. There were no such principles in *Smallwood* that would be expected to be adopted to determine another case. As in *Lee and Bunter v Revenue and Customs Commissioners* [2017] UKFTT 279 (TC), one could not apply the outcome in *Smallwood* to the facts of another case based on high-level similarities even where, as the Tribunal found in that case, there was a close resemblance in the facts. HMRCs' June 2014 template for prioritising the issue of accelerated payment notices recognized that *Smallwood* was a factual case.

83. Even if there were principles or reasoning within the meaning of the legislation, the claimant submitted, these principles were not regarded by Hughes LJ as being decisive of where POEM was. Hughes LJ merely concluded that he did not think that it is possible to say that the Special Commissioners were not entitled to find that the POEM

of the trust was in the United Kingdom. In other words, the matters listed by Hughes LJ, even if they were principles, and made it legally permissible for the Special Commissioners to find that POEM was in the UK in that case, were not factors which in another case would determine that POEM was in the UK. Hughes LJ was not deciding on POEM itself.

84. Thus, in the claimant's submission, HMRC had erred in law in believing that the Court of Appeal did decide that the POEM of the trust in *Smallwood* was in the UK. Misidentification of the decision of the Court of Appeal in this way was to be found throughout HMRC's decision-making process. On a correct direction as to what the majority in the Court of Appeal decided, all HMRC could have concluded was that the presence of such factors might lead to the conclusion in that case that POEM was in the UK.

85. At one point by reference to the legislative history, the claimant suggested that the term "reasoning given" in section 205(3)(b) somehow qualified the term "principles laid down", so that section 205 was satisfied only in the event of legal principles denying the asserted advantage. Reference was also made as regards reasoning to the dictionary meaning of ratio decidendi of a case. However, the statutory language of section 205(3)(b) is clear: "principles laid down" and "reasoning given" are separate and alternative concepts, both with a well-understood and ordinary meaning. The condition at issue in section 204 is Condition C, whether HMRC was of the opinion that there was a judicial ruling relevant to the chosen arrangements. The test in section 205(3)(b) is therefore satisfied if HMRC was of the opinion that the principles laid down, or reasoning given, in Smallwood would, if applied to the arrangements in the present case, deny the asserted tax advantage.

86. As to *Smallwood*, the claimant in my view misunderstands the nature of Hughes LJ's judgment. He was not simply concerned with an *Edwards v Bairstow* challenge to the findings of fact by the Special Commissioners that the POEM of the trust was in the UK. His judgment contains both principles and reasoning. First, Hughes LJ implicitly accepted the OECD approach to determining the place of effective management, that it is where key management and commercial decisions necessary for the conduct of the entity's business are in substance made, although in any particular case all relevant facts and circumstances have to be examined. Secondly, he rejected the snapshot approach that one considered as the place of effective management of the trustees where the trust company was resident at the instant of disposal. That in effect was to reject the test for determining POEM adopted by Patten LJ. I regard both aspects as principles.

87. Thirdly, Hughes LJ's judgment contains reasoning applicable in other cases. For in paragraph [70], quoted above, he identified important facts relied upon by the Special Commissioners relevant to determining POEM: the scheme was devised in the UK by the taxpayer; the steps taken were carefully orchestrated from the UK; it was integral to the scheme that the trust should be in Mauritius for a brief period only and then move to the UK within the fiscal year; the taxpayer remained throughout in the UK; and there was what he termed "a scheme of management" of the trust "which went above and beyond the day to day management exercised by the trustees for the time being, and the control of it was located in the UK". The reasoning led him to conclude that the Special Commissioners were entitled to find that the POEM of the trust was the UK notwithstanding that day to day control over the trust was being exercised in Mauritius.

88. In my view these principles and reasoning are capable of application to other similar schemes by other taxpayers. The language of "pointers" and "hallmarks" may be infelicitous, and in some internal HMRC documents *Smallwood's* import may have been mangled, but this is what HMRC was doing in this case: it was applying the principles and reasoning of *Smallwood* to the documents, evidence and representations in the claimant's case to determine whether there was a scheme of management controlled from the UK which would deny the asserted advantage. It properly understood the legislation and *Smallwood*, and in the absence of any irrationality or other public law flaw this ground fails.

(2) ***Decision that* Smallwood *principles would deny the asserted advantage***

89. The claimant submitted that HMRC had not formed the view, pursuant to section 205(3)(b), that the principles or reasoning in *Smallwood* "would…deny the asserted advantage". By reference to the consultation documents, the Parliamentary material and the statutory language, the claimant submitted that the threshold for issuing a follower notice was that the principles or reasoning in the earlier case had clearly determined the issue in the subsequent case, and where a taxpayer was spinning out his appeal unreasonably because it has no reasonable prospect of success or was hopeless. It had to be presumed that unless the principles established by the judicial ruling meant that the prospects of success had this character, Parliament would not have interfered with a taxpayer's fundamental rights such as the right of access to justice: *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51; [2017] 3 WLR 409, [65]-[66], [76].

90. I return to the issue of fundamental rights under Ground 5, the challenge under Article 1 of the First Protocol of the European Convention of Human Rights. At this point I simply note that the statutory language is clear: the test is satisfied if HMRC is of the opinion that the principles or reasoning in the relevant judicial ruling "would … deny the asserted advantage". Whatever might have been said during the process of formulating and enacting the follower notice regime, there can be no resort to this under *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 when the legislation is unambiguous. If Parliament had intended the higher threshold the claimant suggests, it would have said so. Concepts such as "no reasonable prospect of success" or "hopeless" are well known in the law: e.g., *R (Wasif) v Secretary of State for the Home Department* [2016] EWCA Civ 82; [2016] 1 WLR 2793, [15], per Underhill LJ. The legislation makes no reference to them. HMRC's opinion was that the principles and reasoning of the Court of Appeal in *Smallwood*, applied to the claimant's chosen arrangements, would deny the asserted advantage. For reasons given elsewhere in the judgment, I do not regard that opinion as flawed.

EXPLANATION OF RELEVANCE OF SMALLWOOD: GROUND 3

91. The claimant contended that HMRC did not give the explanation required by section 206 of the Finance Act 2014 as to why Smallwood determined its case. The notice had punitive consequences and a proper explanation was an important statutory safeguard so that taxpayers could make effective representations and an informed decision whether they should concede. A duty to give reasons includes a duty to provide adequate and intelligible reasons at the time to the subject of the decision: *R (Nash) v Chelsea College* [2001] EWHC 538 (Admin), [34]. The claimant submitted that the follower notice in this case should at the very least have identified the key facts on

which HMRC relied in exercising their discretion in his individual case, in particular in determining the fact-sensitive issue of the POEM. The review officer, it added, did not provide any further detail concerning HMRC's reasoning so the situation was not remedied at that stage.

92. In my view the follower notice itself provided, albeit succinctly, an explanation of why HMRC considered that *Smallwood* was the relevant judicial ruling and that corresponding reasoning applied to the claimant's case. There is no statutory requirement to set out the detailed facts or to identify the scheme documents relied upon by HMRC for its conclusion that the *Smallwood* hallmarks are present.

93. Further, the claimant well knew the background to HMRC's thinking about the arrangements he had effected. Among other things there was HMRC's letter to the claimant on the application of *Smallwood* in August 2012; HMRC's meeting stencil given to the claimant's then advisers, KPMG, in early February 2013, which identified what HMRC considered to be the key documents and the application to them of the *Smallwood* "pointers"; and the email dated 22 May 2014 to Mazars with its table setting out in narrative form why HMRC considered that the *Smallwood* "pointers" were present in his case, again by reference to the underlying documents. Three weeks later on 12 June 2014, under cover of Ms Noble's letter, Mazars was provided with an itemised list of the documents held by HMRC, identifying which documents were said to demonstrate that the *Smallwood* "pointers" were present. Consequently, this ground fails in light of contents of the follower notice and the context in which it was issued.

HMRC'S DECISION MAKING PROCESS: GROUND 3A

94. By the time of the hearing, the claimant's attack on HMRC's decision-making process in the issue of a follower notice in his case had evolved along four lines: (1) that the WFGG did not make the decision because it delegated it to an officer within the compliance team; (2) there is no evidence of a decision having been made in the claimant's case; (3) there was a failure to take into account relevant considerations and/or a pre-determination of the issue of the POEM of the trust; and (4) the designated officer for the issue of the accelerated payment notice failed to satisfy his statutory duties for the purpose of issuing it.

(1) ***Improper delegation/decision-maker did not effectively make decision***

95. The claimant submitted that the power to issue follower notices is vested in HMRC, which under the 2005 Act means the Commissioners and the officers of Revenue & Customs. Pursuant to the assurances given at the time, the Commissioners delegated the function to the WFGG under section 14 of the 2005 Act, but under the streamlined process it delegated the task to the compliance team, which in turn appears to have delegated it to Mr Smith. That was in breach of the principle that a delegate cannot normally sub-delegate his authority. The WFGG was not expressly or impliedly authorised to delegate the function, which would have been contrary to the assurances given to Parliament. Nor did it have the means in practice of supervising what was required to be the sensitive evaluation being undertaken by Mr Smith because it lacked information on the matter. Thus the WFGG, which was entrusted to make the decision, did not turn its mind to the crucial question and the relevant factors as to whether the principles properly applied to the claimant's trust would deny him the tax advantage.

96. Reliance was placed by the claimant on the principles governing delegation considered in *R (on the application of Ealing LBC) v Audit Commission* [2005] EWCA Civ 556, where the Court of Appeal held that the Audit Commission had not acted unlawfully when categorising local authority performance by reference to a rating of social care determined by the Commission for Social Care Inspection ("CSCI"). In giving the judgment of the court, Keene LJ referred to *Lavender v. Minister of Housing and Local Government* [1970] 1 WLR 1231, where the Minister of Housing and Local Government had adopted a policy under which he would not exercise his statutory power to grant planning permission for mineral working unless the Minister of Agriculture was not opposed to it. In that case Willes J had held that it had been wrong for a policy to be applied, which in reality eliminated all material considerations except for what the Minister of Agriculture said. The effective decision on any appeal within agricultural reservations where the latter objected to the working had been delegated. Keene LJ went on to contrast the position with the Audit Commission, which was not delegating its decision in any individual case to the CSCI: the CSCI did not make such individual decisions once it had arrived at the underlying scores: [27].

97. To my mind the legislation did not forbid what HMRC established for the administration of follower notices. Under the Finance Act 2014, administration of follower notices, including their issue under section 204, was conferred on HMRC, and section 218 defines HMRC to mean Her Majesty's Revenue and Customs. Section 4(1) of the 2005 Act provides that references to HMRC are to the Commissioners and the officers of Revenue and Customs together. In her statement Ms Elsey explains that WFGG was established to act as the senior panel to HMRC, in accordance with HMRC's published guidance for the approval of follower notices. That guidance followed the assurances given during the formulation and enactment of the follower notice legislation. Neither the guidance nor the assurances suggested that the high level committee was not to delegate functions to officers within HMRC. That would have been unrealistic and in my view not something any drafter of a government consultation document or Minister would suggest. There is nothing in Ms Elsey's evidence to suggest that the WFGG was a committee of HMRC, established by the Commissioners under section 14 of the 2005 Act to which the function of administering follower notices had been delegated.

98. As explained by the former compliance lead, Ms Tilling, in her statement, submissions on cases were made to WFGG by the compliance team. The streamlined process was then adopted, as we saw earlier, to reduce the administrative burden of reproducing in later submissions to WFGG the explanation of the *Smallwood* factors given in the submissions to WFGG in November 2015. In effect the November 2015 submissions were being incorporated into all subsequent streamlined submissions. All these measures were consistent with the ordinary machinery of administration. They are miles away from the *Audit Commission* and *Lavender* cases. None constituted improper sub-delegation.

(2) ***Decision in the claimant's case***

99. Under this head the claimant contended that there was no evidence that anyone in HMRC completed a review in the claimant's case as to the POEM of the trust and whether or not a follower notice could be issued. The argument majored on the spreadsheet described above, and the role of Mr Smith. Ms Tilling was in charge of the relevant part of the compliance team. As such she did not conduct reviews herself but

was responsible for drafting submissions to the WFGG and supervising the analysis of each taxpayer's evidence. Yet she had no specific recollection that it was Mr Smith who carried out the review. She simply assumed that it was. In fact, submitted the claimant, most of the work seemed to have been done by Ms Noble, in the middle columns ("Smallwood pointers" and "Additional comments"). In the claimant's submission, her evidence was that she could only trust whichever reviewing officer it was had considered the relevant documents.

100. If Mr Smith was responsible for the extreme right-hand column ("WFGG conditions for follower notice"), the claimant submitted, that only had 9 entries and ignored important documents. It was not an adequate review. There was no record of any conclusion being reached or what the conclusion was. Thus HMRC were not certain who carried out the review and what it entailed. Even if it was followed in relation to the claimant, which was not accepted, the highly informal and unstructured process described by Ms Tilling was clearly inconsistent with the assurances of strong governance and independent scrutiny given to Parliament.

101. As I noted earlier, it is most unfortunate that there is no direct record of the conclusion of the review in the claimant's case. But in light of Ms Tilling's unchallenged evidence, it is impossible for the claimant to contend that the review was incomplete. Her clear evidence is that she must have been satisfied that a review had been conducted and had concluded that the case met the conditions for a follower notice to be issued because, and if she were not so satisfied, she would not put a case forward to the WFGG. There is corroborative evidence supporting this, particularly the evidence that in a number of cases WFGG received submissions from her unit that follower notices not be issued.

102. Further, Ms Tilling goes some way to explain the absence of a record. There was the modus operandi of her unit, its small team in close physical proximity to each other where views were exchanged orally with few emails necessary. The spreadsheet itself shows that it was the subject of a continuing process, with work on it by at least two members of the team, Ms Noble and Mr Smith. (Ms Franklin prepared the submission which included the claimant's case, although there is no evidence she worked on the spreadsheet.) Whether Mr Smith worked on other than the "WFGG conditions for follower notice" column, and whether Ms Noble is the sole author of the "Additional Comments" column seems to me beside the point.

103. That leaves the claimant's case that the review was inadequate. Again there is Ms Tilling's unchallenged evidence that the facts and circumstances of every individual user of the RTW scheme were reviewed in detail by her team to determine if on those facts Smallwood was a relevant judicial decision and that they only recommended that follower notices be issued where they considered that the relevant conditions were met. Ms Noble had been working on the claimant's case for some time, and we have her analysis of the documents in the middle columns. Ms Tilling's evidence is that Mr Smith was an experienced officer and was properly briefed when he joined the team.

104. If I had not reached these conclusions, I would have applied section 31(2A) of the Senior Courts Act 1981 and refused the claimant relief, since in my view "it appears … to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred": Senior Courts Act 1981, s. 31(2A). The concept of "conduct" in section 31(2A) is a broad one, and includes both the making of substantive decisions and the procedural steps taken in the course of

decision-making: *R (on the application of Goring-on-Thames Parish Council) v South Oxfordshire DC* [2018] EWCA Civ 860, [23]. In other words, in the present case I would have concluded, looking backwards, that even if the review was inadequate it is highly likely that the outcome would be the same in the claimant's case had Ms Tilling's unit conducted an adequate review of the claimant's case before the submission to the WFGG for the issue of a follower notice.

105. The evidence was set out at length above, but in particular there was Mr Maslen's letter of the 24 April 2000, with counsel's advice ; Mr Maslen's letter to Mr Gujadhur of 1 June 2000, setting out the five steps which would be asked of the Mauritian trustees; the note of a meeting in Mauritius held in mid-June 2000, showing that a RTW scheme was intended; Mr Gujadhur's ignorance in his comments of 23 June 2000 about the corporate reorganisation he was being asked to approve; evidence that the greenshoe was activated in late July without consultation of Mr Gujadhur, who was simply notified; the letter of 3 September 2000 from the new UK trustees concerning the retirement of the Mauritian trustees; the fax from Pinsent Curtis to Mr Gujadhur on 22 September 2000, enclosing draft documents relating to his retirement and the appointment of UK trustees; and the other communications with him about the urgency of the retirement of the Mauritian trustees in light of the Chancellor's autumn statement. In light of this, and other documents, it is in my view highly likely that Ms Tilling's team would have come to the conclusion that *Smallwood* was a relevant judicial ruling on the facts of the claimant's case.

106. To put it in general terms, albeit that Mr Gujadhur and Deloitte & Touche Offshore Services Ltd as the trustees in Mauritius might have acted in some day to day matters independently, and albeit that Pinsent Curtis in particular was careful to avoid any suggestion that they were instructing the trustees, the highly likely conclusion for HMRC which would have followed from consideration of this evidence is obvious: the arrangements in the claimant's case were being run from the UK to a pre-arranged plan and *Smallwood* was the relevant judicial ruling.

(3) ***Taking into account relevant considerations and/or predetermination***

107. The claimant's complaint in this regard was that the decision-making process adopted by HMRC was entirely one-sided in that it required the decision-maker to identify facts that suggested that the POEM was in the UK, with no intention or procedure for identifying or taking into account any factors which suggested that it was in Mauritius. This also constituted a form of pre-determination since the object of the exercise was to find facts supporting the issue of a follower notice, for which purpose the decision-maker closed his mind to the actual task, which was to determine on the basis of all the evidence whether or not POEM was actually in the UK. The claimant highlighted a passage in Ms Tilling's evidence, that "the officer would be looking for material that showed that the pointers were likely to be met". Moreover, the extreme right-hand column on the spreadsheet headed "WFGG Conditions for follower notice" had entries stating which of the *Smallwood* pointers was relevant in a document, but there was no procedure for identifying documents suggesting that a hallmark might not be met, or that the POEM of the trust was not in the UK.

108. In my view the evidence from the spreadsheet comes not only from the "pointers" in the extreme right-hand column entitled "WFGG conditions for follower notice", but also from the middle columns headed "Smallwood pointers" and "Additional

comments". On the basis of the whole of that analysis, the import of Ms Tilling's evidence is that the RTW compliance team were satisfied that *Smallwood* was a relevant judicial ruling. There was then a recommendation to WFGG and they endorsed it. As mentioned earlier, corroborative evidence that the compliance team examined the whole picture, including negative features, is that in a number of cases it recommended to the WFGG that a follower notice not be issued. In my view the claimant has not established that the decision-making process adopted by HMRC was unbalanced or one-sided. If I had not reached this conclusion, I would have applied section 31(2A) of the Senior Courts Act 1981 in this context as well.

(4) ***Designated officer: accelerated payment notice***

109. The claimant's case was that the court could not be confident that the designated officer had reached the required independent view when in the claimant's case issuing the accelerated payment notice. Reference was made *R (on the application of Rowe) v Her Majesty's Revenue and Customs* [2017] EWCA Civ 2105; [2018] STC 462, which held that the designated officer had to be positively satisfied on the information he then had that the scheme was not effective; it was not enough to find that there was a dispute: [62], [69], per Arden LJ; [220], per McCombe LJ. In the claimant's submission, the designated officer in this case, Mr Griffin, saw his role as calculating the understated tax, rather than considering the efficacy of the arrangement. He calculated the understated tax on the assumption that no tax advantage was available. Nor did he have the underlying documents, HMRC's *Smallwood* hallmarks or the analysis undertaken elsewhere in HMRC.

110. In my view, the designated officer in this case could be satisfied that the scheme was not effective. That was because there was a decision that a follower notice be issued. The judgment in *Rowe* regarding the role of a designated officer was in the context of the appeal from Charles J's decision in *R (Vital Nut Co Ltd and another) v Revenue and Customs Commissioners* [2016] EWHC 1797 (Admin); [2016] 4 WLR 144. The accelerated payment notices in that case had been issued under section 219(4)(b) of the Finance Act 2014 on the basis that the arrangements were "DOTAS arrangements" under the Disclosure of Tax Avoidance Schemes regime in Part 7 of the Finance Act 2004. In other words the context in *Vital Nut*, which prompted the Court of Appeal's ruling, was of the designated officer in that case issuing an accelerated payment notice without any view having been formed as to the effectiveness of the scheme.

111. That is not this case. With a follower notice the context is that conclusion has been reached as to the effectiveness of the scheme, albeit elsewhere in HRMC. The legislation itself provides by section 220(4)(a)(i) (with its reference to sections 206(b) and 205(3)(b)) for the designated officer to proceed on the basis that the judicial ruling would deny the asserted advantage. In other words, the designated officer does not review the decision to issue a follower notice and as a result of section 220(4)(a) need not form a view on the effectiveness of the scheme. What the designated officer needs to do, as with Mr Griffin in this case, is to take the work done elsewhere in HMRC and to determine the understated tax to the best of his information and belief: cf. *R (Glencore Energy UK Ltd) v Revenue and Customs Commissioners* [2017] EWCA Civ 1716, [2018] STC 51, [48], per Sales LJ. For the sake of completeness I note that, contrary to the claimant's submissions, the unchallenged evidence of Mr Griffin is that he always accesses the folder with all relevant documents in a taxpayer's case before issuing an accelerated payment notice, that there was no reason that he should not have

done that in the claimant's case, and that in this case he would have considered a generic scheme summary, in other words, the *Smallwood* hallmarks.

BREACH OF A1P1: GROUND 5

112. The claimant advances this ground in the alternative to the statutory construction argument pursued under Ground 1, contending that the legislation has to be construed taking into account that there has been a disproportionate interference with his possessions contrary to Article 1, Protocol 1 of the European Convention on Human Rights ("A1P1"). At the hearing this was advanced on the basis of HMRCs' interference with his money, with reference to analysis of McCombe LJ in *R (on the application of Rowe) v Revenue and Customs Commissioners* [2017] EWCA Civ 2105; [2018] STC, [168]-[170], a case concerned with the accelerated payment regime of the Finance Act 2014 not with follower notices.

113. In my view the issue of a follower notice cannot by itself involve any interference with taxpayers' possessions. No money is demanded by a notice. Indeed, the claimant in this case still has his money. Taxpayers may be exposed to a penalty if they proceed to challenge HMRC's assessment that there is a judicial ruling that would deny the tax advantage. However, they can challenge the penalty under the statutory provisions in section 214 outlined earlier. (In this case for unexplained reasons HMRC became time barred to impose a penalty.)

114. Even if coupled with the accelerated payment regime, a follower notice on the current state of the authorities does not constitute an interference with the taxpayer's money. Unfortunately the Court of Appeal in *Rowe* reached no firm conclusion on whether the accelerated payment regime constituted an interference with a taxpayer's possessions. Unless I think it wrong I am bound by Simler J's conclusion at first instance, that there is no interference: *R (on the application Rowe) v Revenue and Customs Commissioners* [2015] EWHC 2293 (Admin); [2015] BTC 27, [115]-[126]. Suffice to say that I do not think Simler J's conclusion wrong.

115. If there was interference with his possession, the claimant argued that no fair balance has been struck between the demands of the general interest of the community and the requirements of protecting his fundamental rights: *Axa General Insurance Ltd v HM Advocate* [2011] UKSC 46; 2012] 1 AC 868, [126]. With the issue of a follower notice, it was said, although the taxpayer is not formally obliged to relinquish their rights to have their appeal determined by an independent tribunal, they are heavily penalised if they do not do so. The pressure is to pay up front. Until a closure notice is issued, the taxpayer has no means of accessing the tribunal to determine the underlying dispute and, even if an appeal is underway, there is little practical likelihood of obtaining a determination from the tribunal within the time allowed for taking corrective action.

116. The starting point in considering this submission must be the reasons McCombe LJ gave on the A1P1 aspect of the case in *Rowe*, with which Arden and Thirlwall LJJ agreed. He said that he was in "no doubt that, even if the [accelerated payments/ partner payment notices] regime does engage A1P1, the interference is suitably provided by law and is a proportionate one in all the circumstances": [185]. Although in the background to the legislation there may have been suggestions that the follower notice regime would have a limited ambit, its aim overall is to ensure that someone who continues to challenge HMRC's assessment of the impact of another judicial ruling

should not have the benefit of the money while that challenge is resolved. In other words, it is not simply because HMRC takes the view that the tax is payable, but because there is another judicial ruling in support. Not only is that aim in my view legitimate, it is also given effect in a proportionate manner. There are the prerequisites for the issue of a follower notice, the information requirements, and the avenues to challenge the notice, and any associated penalty, with HMRC initially and either in this court or the tribunal. The taxpayer served with a follower notice will be in possession of more information about his circumstances than HMRC, and can take a decision about whether to take the necessary corrective action or pursue an appeal. In short, the A1P1 ground fails.

VALIDITY OF ACCELERATED PAYMENT NOTICE: GROUND 6

117. It was common ground that if the follower notice was bad, the accelerated payment notice fell. Since I am satisfied that the follower notice is valid, this ground of appeal goes nowhere.

CONCLUSION

118. For the reasons given I dismiss the claim.