Neutral Citation Number: [2018] EWCA Civ 2231

Case No: C1/2017/1202

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HONOURABLE SIR ROSS CRANSTON

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/10/2018

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE HENDERSON
and
THE RIGHT HONOURABLE LORD JUSTICE PETER JACKSON

- -

Between:

THE QUEEN ON THE APPLICATION OF PML ACCOUNTING LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondent**

- -
- -

Mr Sam Grodzinski QC & Mr Ben Elliott (instructed by **Bird & Bird LLP**) for the **Appellant**
Mr Akash Nawbatt QC & Mr Sebastian Purnell (instructed by **General Counsel and Solicitor to HMRC**) for the **Respondents**

Hearing dates: 24th & 25th July 2018

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Approved Judgment

Lord Justice Longmore:

Introduction

1. This is an appeal from a judgment of Sir Ross Cranston sitting as a judge of the High Court refusing the claimant's request for an order that the defendants destroy work product derived from what the claimant says was an unlawful notice requiring information and documents to be provided by it in its capacity as a managed service company provider.

2. Individuals who provide services to users through a company rather than as employees have, for some time, been of concern to the Commissioners for Her Majesty's Revenue and Customs ("HMRC") because, to instance one such concern, a company pays corporation tax at a rate lower than most individuals pay income tax. Chapter 9 of Part 2 of the Income Tax (Earning and Pensions) Act 2003 ("the 2003 Act") addresses the position of individuals who provide their services through such companies and treats certain payments made for provision of services by the company as earnings liable to income tax and national insurance contributions as if the individual were an employee, provided that the company falls within the definition of a managed service company (an "MSC"). The legislation also identifies a person, carrying on the business of promoting or facilitating the use of companies providing the services of individuals, as a managed service company provider ("MSC provider"). There are circumstances in which, if an MSC is unable or fails to pay tax or national insurance contributions which are due, the debt can be transferred to the MSC provider. The claimant and appellant, PML Accounting Ltd ("PML"), is one such MSC provider offering services, in particular, to road haulage companies, including preparation of accounts and financial records, PAYE and VAT registration, tax computation, preparation and submission of tax returns and other general advice. The sole director is Mr Paul Hazell and he and his two brothers ("the Hazells") hold the company shares in equal proportions. The brothers play no role in the day to day business of the company but their father Richard Hazell, the proprietor of the accounting firm Hazell Minshall, plays a part in the history in as much as it was Hazell Minshall who dealt with HMRC correspondence and inquiries.

3. The legislative provisions can only be sensibly utilised by HMRC if they can obtain information and documents from the MSC provider. There are two ways in which this can be done, first by serving a notice on the MSC provider for the purpose of obtaining information and documents relating to its own tax position (a taxpayer notice) and secondly by serving such a notice in respect of the provider's client (a third party notice). On 26th November 2012 HMRC served what they considered to be a taxpayer notice ("the Notice") on PML pursuant to paragraph 1 of schedule 36 of the Finance Act 2008 ("the 2008 Act). They did not consider the response to be a proper compliance and levied an initial penalty and then daily penalties.

4. PML then appealed; the nature of that appeal is one of the matters in controversy but the upshot of that appeal to the First-tier tribunal ("the tribunal" or "the FTT") was a determination that the notice was invalid and the penalties were not, therefore, enforceable. It decided that the taxpayer notice was invalid since it considered that it related to the tax position of PML's clients (for which a third party notice would be necessary) and not that of PML itself. The tribunal concluded its determination by noting that it had no power to require HMRC to return the documents provided by PML

pursuant to the Notice but expressed the opinion that they "must" be returned to PML. HMRC did not seek to appeal the tribunal's decision and returned the documents (and copies that they had made) to PML on 19th January 2016.

5. PML requested HMRC to provide or delete any information, analysis and work product derived from the material provided pursuant to the Notice. HMRC declined that request and PML on 2nd February 2016 instituted judicial review proceedings ("the current judicial review") challenging HMRC's refusal to

    1) deliver up or destroy all analysis, schedules and other work product derived from the Notice; and

    2) to give any undertaking that they would not use that work product in any further MSC investigation or for any further purpose.

6. The background to that request is that HMRC are conducting a substantial criminal investigation into the activities of PML suspecting (inter alia) that PML have instigated or participated in a fraudulent conspiracy to declare amounts of corporation tax on behalf of the MSCs to whom they provide services which differ from the amount they have themselves declared as MSC providers; this would arguably not only be a fraud on HMRC but also a fraud on their own clients. On 23rd April 2015 HHJ Rowland acceded to an ex parte application by the Criminal Investigation team of HMRC for search warrants in relation to PML and those warrants were executed on 29th April. On 23rd July the Hazells filed a judicial review claim for a declaration that the search warrants were unlawful and for the return of all items seized and copies ("the Hazell judicial review"). On 14th October 2015 Collins J refused permission for that judicial review on the papers; the Hazells orally renewed their application which was refused by the Divisional Court on 4th December 2015 in a judgment of Irwin J with whom Burnett LJ agreed.

7. The current judicial review came before Langstaff J on 6th October 2016 who ordered a rolled-up hearing of the application. On 7th April 2017 Sir Ross Cranston handed down a judgment which gave permission for what the parties have called the illegality ground only, thus excluding any claim based on the European Convention on Human Rights. But he dismissed the claim for a number of reasons, one of which was that it was not illegal for HMRC to retain their own work product.

8. The other reasons he gave were in broad summary:-

    1) in December 2012 PML had agreed that its appeal was only in relation to the time given for compliance with the Notice and not an appeal in relation to its validity; it had asked for an extension of time for compliance and HMRC had agreed to extend that time. The effect of paragraph 32(5) of Schedule 26 of the 2003 Act and section 54 of the Taxes Management Act 1970 ("the 1970 Act" or "TMA 1970") was that the Notice was confirmed as varied and that agreement constituted a final decision as regards any issue concerning the validity of the Notice;

    2) the tribunal had no jurisdiction to consider the validity of the Notice in what was solely an appeal in relation to penalties;

3) HMRC were not estopped from asserting that the tribunal had no jurisdiction to rule on the validity of the Notice;

4) The tribunal had not ordered or recommended the return of HMRC's work product and PML had not identified any basis on which HMRC were obliged to do so;

5) Even if all that were wrong he would not grant relief because

i) HMRC had, in serving the Notice, adopted the course which PML had itself wanted since any third party notice would have alerted its clients to the existence of a revenue investigation which would be detrimental to its business;

ii) PML had acquiesced in the production of the material obtained as a result of the Notice;

iii) any order of the kind sought would be likely to give rise to further dispute and satellite litigation; and

iv) he accepted HMRC's evidence that their work product was derived from a combination of sources, only one of which was the material provided pursuant to the Notice, and could only be disentangled from such combination with great difficulty particularly as the relief sought, if granted, would require HMRC to review thousands of its files to determine if there was, in fact, information derived from the material provided as a result of the Notice.

9. Each of the reasons given by the judge is now the subject of this appeal and, to set the appeal in context, it is necessary to set out the statutory scheme which, as far as powers to obtain information and documents are concerned, is contained in Schedule 36 of the 2008 Act.

The statutory scheme

10. Paragraph 1 of Schedule 36 provides:-

"**Power to obtain information and documents from taxpayer**

(1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer") –

a) to provide information, or

b) to produce a document,

if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.

(2) In this Schedule, "taxpayer notice" means a notice under this paragraph."

11. Paragraphs 2 and 3 provide for third party notices for checking the tax position of a third party but such notices cannot be given without the agreement of the third party taxpayer or the approval of the tribunal. Paragraph 29(1) gives the taxpayer a statutory right of appeal against a taxpayer notice. It provides:-

"**Right to appeal against taxpayer notice**

29 (1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal against the notice or any requirement in the notice."

12. The procedure for making an appeal is set out in paragraph 32 which provides:-

"**Procedure**

32 (1) Notice of an appeal under this Part of this Schedule must be given –

a) in writing,

b) before the end of the period of 30 days beginning with the date on which the information notice is given, and

c) to the officer of Revenue and Customs by whom the information notice was given.

(2) Notice of an appeal under this Part of this Schedule must state the grounds of appeal.

(3) On an appeal that is notified to the tribunal, the tribunal may

a) confirm the information notice or a requirement in the information notice,

b) vary the information notice or such a requirement, or

c) set aside the information notice or such a requirement.

...

(5) Notwithstanding the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007 a decision of the tribunal on an appeal under this Part of this Schedule is final.

(6) Subject to this paragraph, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax."

13. Part 5 of TMA 1970 includes s 49, s49A, s49D and s54 which provide:-

"49 **Late notice of appeal**

(1) This section applies in a case where –

a) notice of appeal may be given to HMRC, but

b) no notice is given before the relevant time limit.

(2) Notice may be given after the relevant time limit if-

a) HMRC agree, or

b) where HMRC do not agree, the tribunal gives permission.

(3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.

(4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.

(5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.

(6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.

(7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.

(8) In this section "relevant time limit", in relation to notice of appeal, means the time before which the notice is to be given (but for this section).

49A **Appeal: HMRC review or determination by tribunal**

1) This section applies if notice of appeal has been given to HMRC.

2) In such a case –

a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see section 49B),

b) HMRC may notify the appellant of an offer to review the matter in question (see section 49C), or

c) the appellant may notify the appeal to the tribunal (see section 49D).

3) See sections 49G and 49H for provision about notifying appeals to the tribunal after a review has been required by the appellant or offered by HMRC.

4) This section does not prevent the matter in question from being dealt with in accordance with section 54 (settling appeals by agreement).

49D **Notifying appeal to the tribunal**

(1) This section applies if notice of appeal has been given to HMRC.

(2) The appellant may notify the appeal to the tribunal.

(3) If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question.

…

54 **Settling of appeals by agreement**

(1) Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the tribunal, the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under the appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.

(2) Subsection (1) of this section shall not apply where, within thirty days from the date when the agreement was come to, the appellant gives notice in writing to the inspector or other proper officer of the Crown that he desires to repudiate or resile from the agreement.

…

(5) The references in this section to an agreement being come to with an appellant and the giving of notice or notification to or by an appellant include references to an agreement being come to with, and the giving of notice or notification to or by, a person acting on behalf of the appellant in relation to the appeal."

14. Schedule 36 also provides that a person who fails to comply with an information notice will be liable to an initial standard penalty of £300 (paragraph 39) and daily penalties not exceeding £60 for each subsequent day on which the failure continues (paragraph 40).

15. Paragraph 46 provides that HMRC cannot assess a penalty until the time limit for appealing an information notice has expired or, if notice of appeal has been given, until that appeal has been determined or withdrawn. This paragraph is as follows:-

"46 **Assessment of penalty**

(1) Where a person becomes liable for a penalty under paragraph 39, 40 or 40A, …

a) HMRC may assess the penalty, and

b) if they do so, they must notify the person.

(2) An assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the date on which the person became liable to the penalty, subject to subparagraph (3).

(3) In a case involving an information notice against which a person may appeal, an assessment of a penalty under paragraph 30 or 40 must be made within the period of 12 months beginning with the latest of the following –

a) the date on which the person became liable to the penalty,

b) the end of the period in which notice of an appeal against the information notice could have been given, and

c) if notice of such an appeal is given, the date on which the appeal is determined or withdrawn…."

16. Paragraphs 47-48 set out the right of appeal against any penalties and the appeal procedure. They provide:-

"**Right to appeal against penalty**

47 A person may appeal against any of the following decisions of an officer of Revenue and Customs –

a) a decision that a penalty is payable by that person under paragraph 39, 40 or 40A, or

b) a decision as to the amount of such a penalty.

Procedure on appeal against penalty

48 (1) Notice of an appeal under paragraph 47 must be given –

a) in writing,

b) before the end of the period of 30 days beginning with the date on which the notification under paragraph 46 was issued, and

c) to HMRC.

(2) Notice of an appeal under paragraph 47 must state the grounds of appeal.

(3) On an appeal under paragraph 47(a), that is notified to the tribunal, the tribunal may confirm or cancel the decision.

(4) On an appeal under paragraph 47(b) that is notified to the tribunal, the tribunal may –

a) confirm the decision, or

b) substitute for the decision another decision that the officer of Revenue and Customs had power to make.

(5) Subject to this paragraph and paragraph 49, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax."

The Grounds of Appeal

17. There are six grounds of appeal asserting that the judge erred:-

    1) in allowing HMRC to re-argue issues which had been conclusively determined by the tribunal and in particular the issue whether the conclusion of the section 54 agreement meant that the FTT should not have made any findings as to the validity of the Notice and indeed whether the tribunal had jurisdiction to determine validity at all;

    2) in holding that the issue of validity had been determined by any section 54 agreement;

    3) in holding that the tribunal had no jurisdiction to consider the validity of the Notice on a penalties appeal;

    4) in holding that PML could not have appealed out of time;

    5) in relying on the fact that the tribunal's decision said nothing about HMRC's work product; and

    6) in deciding that, even if he was wrong on the issues of principle, he would not grant the relief sought.

18. Mr Akash Nawbatt QC for HMRC submitted this is an illogical way of attacking the judgment, because grounds (2), (3) and (4) should logically precede ground (1). There is some force in that submission and I will consider the issues in the order in which he argued them rather than the order in which Mr Sam Grodzinski QC for PML argued them. But I must first summarise the factual background.

Factual background

19. On 6th August 2012 Mr Mark Dootson, an HMRC officer, wrote to PML requesting an informal meeting to assist his consideration of whether the arrangements which existed between PML and its clients brought PML within the scope of the MSC legislation. He received no reply until 3rd October when Mr Paul Hazell said that PML's agents (Hazell Minshall) would be dealing with HMRC's enquiries. On 9th October Mr Dootson repeated his request for a meeting and, not receiving any reply, wrote again on 24th October 2012 informally requesting information and documents as attached to the letter and explaining that, if a meeting was not possible, HMRC would consider using their "information powers" and that their enquiry might involve HMRC contacting PML's clients at a later date. If the information and documentation were not provided by 23rd November 2012, he would issue a formal notice. On 25th October Hazell Minshall replied to HMRC's letter of 9th October again declining a meeting and saying HMRC should "let us know precisely what information and documents you require".

20. Mr Dootson accordingly issued the Notice to PML on 26th November with a request for information and documentation attached in much the same form as previously requested. He said that they must be provided by 11th January 2013 and referred to paragraph 1 of Schedule 36 of the 2008 Act. The notice warned that, if PML did not do what the Notice asked, there would be a penalty of £300 without further warning, followed by a daily penalty of £60 until compliance.

21. On 7th December 2012 Hazell Minshall wrote in the following terms:-

> "Thank you for your letter dated 26th November 2012, together with the copy of the Notice made on our above-named client under Sch 36 FA 2008.
>
> The Notice asks for a substantial amount of information covering almost five years and requires compliance by 11th January 2013.
>
> We wish to appeal against the Notice as it does not give us or our client sufficient time to provide all of the information requested. There are three reasons for this:-
>
> 1. We are now entering the Christmas/New Year holiday season with consequent office closures etc.
>
> 2. The period between now and 31st January is probably the busiest period of the year for an accountancy practice given the 31st January deadline for filing personal tax returns. It also happens to be a busy time for filing the returns of corporate clients, many of whom have 31st March or 31st December accounting year ends.
>
> 3. Unfortunately, Richard Hazell, the principal of this firm, has recently had medical issues which have prevented him giving full attention to matters such as your enquiry.
>
> We shall therefore be grateful if you will be able to agree a deferral of the deadline set by the Notice to 28th February 2013. We are confident that we should be able to comply fully with the Notice by that date."

22. On 11th December HMRC replied acknowledging the letter of 7th December and saying:-

> "I understand there are issues around timing of the notice and the health of the gentleman handling my enquiry. However, I want to draw your attention to the fact that I first made contact with the company some four months ago and despite promises of full co-operation this has not been forthcoming.
>
> Furthermore, I requested the documents and information in my earlier letter of 24th of October 2012 so the company has already had sufficient time to address the issues before the formal notice was actually issued. In extending the compliance date it will give the company over four months to respond.
>
> I also need to make it clear that the information request is to the company and not yourselves as the agent. The company is the entity that is required to comply with the notice and it is the company who may or may not have a valid reason for needing

more time. I do note however that it is your intention to fully comply with the notice.

Having considered the position, I accept that PML Accounting Ltd is probably also involved in the submission of client self-assessment returns and will have the same issues as Hazell Minshall and I would be happy to accept your request to defer the compliance date from 11th January 2013 to 28th February 2013 on the understanding that the notice is complied with in full by the new date.

Before I finally agree to this I would like you to clarify the following:-

1. You mention the word "appeal", in your letter, am I correct to assume that this is not an appeal against the notice itself but a request to extend the deadline, please confirm my understanding.

2. That the company or yourselves will contact me two weeks before the 28th February 2013 compliance date to confirm that the matter is in hand and to explore any difficulties that may be encountered. HMRC is able to offer the services of a data handler who can assist in the transfer of electronic data.

I should be obliged if you will let me have a written response to this letter, preferably faxed to me today, to confirm that 1 & 2 above are acceptable to PML Accounting Ltd and in return I will then write to confirm my agreement to the extension to the compliance date."

23. This elicited a short reply from Hazell Minshall:-

"With regard to the matters which you require clarification of we would respond as follows:

1. The appeal was in relation only to the request to extend the deadline.

2. Either the company or ourselves will contact you two weeks before the 28th February 2013 as requested."

24. Mr Dootson then agreed to extend the compliance date to 28th February "on the basis of our agreement and as set out in my letter of 11th December 2012".

25. Sixteen boxes of documents were delivered to Mr Dootson's office in Sheffield on 8th March 2013. On 15th March HMRC wrote to say that the response to the Notice was incomplete and Mr Dootson issued a penalty notice on 20th March for £300 marking the original Notice to show what HMRC still needed. He said that if what was marked was not provided by 19th April 2013, HMRC "may charge further penalties of up to £60 a day from the date of this penalty notice". He also pointed out that if PML disagreed

with the decision to charge the penalty, PML could appeal within 30 days and did not have to pay the penalty while the appeal was being considered.

26. On 15th April 2013 Hazell Minshall appealed against the penalty notice. On 16th May Mr Paul Hazell said that PML was assembling full replies but there might be a delay due to medical difficulties in the family. On 24th May HMRC issued a second penalty notice in respect of the period from 20th March to 2nd May 2013 but in a reduced amount of £20 per day. On 17th June a further notice was given for the period 3rd May to 7th June at £30 per day. On 20th June PML appealed against those notices also.

27. HMRC had still not received the further information and documentation by early July and expressed an intention to contact PML's clients. That elicited this response of 12th July 2013 from Hazell Minshall:-

> "We refer to your letter dated 8th July 2013 addressed to our above-named client company.
>
> It remains our intention and that of our client to let you have the outstanding information within the next three weeks. You are aware of the severe difficulties we have had with both the life threatening health scare affecting Richard Hazell and the earlier incident with Paul Hazell's daughter. Please understand that every effort is being made to comply with your requests and we are disappointed that you have continued to pressurise our client despite knowing the background circumstances.
>
> We note that you intend to contact other parties by which we understand you to mean companies to which PML Accounting Limited provides accounting and administrative services. You are, of course, entitled to make contact with these companies but we have concerns that such an approach is premature given the fact that you still have not received all the background information requested and are therefore not in a position to formulate a reasoned view of the applicability of the MSC legislation to our client company's position. It seems that you have reached your "interim view" relying upon nothing more than the speculative and tentative statement that PML Accounting Limited is "probably" involved as an MSC with its client companies. We should be grateful to hear your arguments around this point so that we might have an opportunity to consider these and respond accordingly.
>
> Furthermore, PML Accounting Limited is very concerned that direct approaches to its clients by HMRC in these circumstances may have a damaging effect on its commercial relationships with those clients. Our client company, therefore, feels obliged to put HMRC on notice that it will, if necessary, seek legal redress should its commercial interests be adversely affected by HMRC's premature actions.

> To sum up, we do not consider that PML Accounting Limited is a Managed Service Company Provider and we certainly cannot see that your contention that it is "involved with" its client companies can be sustained in any way. We are fully aware of the five activities set down in statute with respect to the meaning of "involved with" and do not see that any of these is relevant in this case. Indeed, we also take comfort from HMRC's own view of the application of this term in its guidance document on Managed Service Companies.
>
> As we said in our response to your letter of 6th August 2012, when PML Accounting Limited was established we were very much aware of the potential impact of the MSC legislation and took steps to ensure that our client company was (and would remain) in full compliance with it."

28. On 17th October 2013 PML notified its appeal to the FTT. On 15th November HMRC issued a further penalty notice for the period up to 30th September. In March 2014 the case was referred to HMRC's criminal investigation ("CI") team. On 2nd April PML appealed the November penalty notice and on 24th June 2014 eventually provided its bank statements.

29. On 23rd April 2015 the CI team applied to Southampton Crown Court for search warrants which were executed on 29th April 2015. The Hazells applied for a judicial review of the search warrants on 23rd July, which (as I have already said) was eventually refused on oral renewal, by Burnett LJ and Irwin J.

30. On 10th September 2015 the tribunal (Judge Aleksander and Ms Newns) published its final decision in relation to the penalty notices, [2015] UKFTT 0440 (TC). This determined:-

    1) there was no open appeal against the Notice itself because the exchange of correspondence summarised in para 21-24 above effectively settled that appeal in a manner that satisfied the requirements of s. 54 of the TMA 1970;

    2) PML had no reasonable excuse for its failure to comply with the Notice;

    3) on the true construction of the Notice, it related not to PML's tax position but to that of its clients; it followed that it was not a valid notice within para 1 of schedule 36 and breached the Article 8 rights of PML's clients by not adopting the correct procedure which (in the absence of consent) required the prior approval of the tribunal;

    4) it was open to PML to challenge the validity of the Notice even though the time limit for an appeal had passed (and even though the appeal which had been launched had been settled as per (1) above) since the onus was on HMRC to demonstrate that the penalties had been lawfully assessed. If the original Notice was invalid, so were the penalties; and

    5) HMRC should return the documents (and any copies made by them) to PML, although the tribunal had no power to make any order to such effect.

31. The judge noted that both parties to the penalties appeal were represented by non-lawyers. Eight days after the hearing on 8th July 2014 the tribunal directed that PML should make submissions about (inter alia) whether the Notice related to its own tax position rather than that of its clients and whether PML's failure to appeal the Notice prevented it from raising its validity thereafter and that HMRC should respond to those submissions. The tribunal released a draft decision on 27th April 2015 but requested further assistance on the validity of the Notice given what it characterised as "the hitherto limited submissions of the parties on the issue". The final decision was, as I have said, released on 10th September 2015.

32. HMRC did not appeal this decision and returned the documents (and copies) on 19th January 2016.

33. That was followed on 2nd February by PML's current judicial review application asking for an order that HMRC's work product be deleted.

Had the validity of the Notice been determined by the section 54 agreement? (Ground 2)

34. The tribunal decided that there had been an appeal against validity which had been determined by the exchange of correspondence. The judge agreed with this conclusion and held, further, that the tribunal was therefore wrong to engage with any argument that the Notice was itself invalid, that matter having been settled by agreement. PML submitted that both these conclusions were wrong.

35. As to the first conclusion PML contended that there were two categories of appeal under para 29 of schedule 36 of the 2008 Act namely an appeal against the notice and an appeal against any requirement set out in the notice. It emphasised the word "or" in para 29(1) which provides that the taxpayer:-

> "… may appeal against the notice or any requirement in the notice."

It then contended that, on the true construction of the relevant correspondence, it had only appealed against the requirement to provide documents and information by the particular date of 11th January 2013 and it was only that appeal that was settled by HMRC agreeing to defer the date to 28th February 2013.

36. I disagree with both of these contentions. First, I do not accept that para 29 of the schedule envisages two separate appeals. That would be confusing and inefficient. There can only be one appeal at any one time and that appeal must encompass any complaint about the notice given by HMRC. If that appeal is then settled by HMRC agreeing to a variation of the notice (e.g. by agreeing an extension of time for compliance) then that settlement takes effect as if it were a determination of the tribunal varying the notice in the manner agreed.

37. That is not to say that the taxpayer would necessarily be precluded from seeking to amend its appeal to include another ground of appeal. If that amendment was sought to be made within the statutory 30 days allowed by para 32 of the schedule, there would normally be no difficulty in it being dealt with. If it was sought to be made after time for appealing had expired, it would be necessary to consider the requirements of section 49 of the 1970 Act in relation to late appeals. But neither step was taken by PML in

the present case and no more need be said about the position that would obtain if any such step had been taken.

38. It is of great importance that para 29 should be construed in the way stated above because para 46 of the schedule (considered more fully in ground 3 and paras 47ff below) expressly provides that penalties for non-compliance must be assessed within a period of 12 months which begins with the latest of

    a) the date on which the taxpayer became liable to the penalty;

    b) the end of the period in which notice of appeal against the information could have been given; and

    c) if such notice is given, the date on which it is determined or withdrawn.

    This contemplates that questions of validity of the notice must be dealt with before any question of the assessment of any penalty (let alone any appeal against such assessment) can occur. That is, of course, a beneficial provision from the taxpayer's point of view, since he is not at risk of penalties being enforced while the appeal process takes its course. If two (or more) appeals can be made the time for assessing penalties can never be certain and it would be possible for the taxpayer to defer the assessment of penalties indefinitely by mounting new appeals.

39. Secondly even if this construction of paragraph 29 is wrong and two separate appeals are theoretically possible, not only was no separate appeal ever made but PML was expressly invited by HMRC in their letter of 11th December 2012 to say whether any appeal other than for an extension of time was being made:-

    > "am I correct to assume that this [appeal] is not an appeal against the notice itself but a request to extend the deadline."

    PML confirmed that this was the case and that confirmation was part and parcel of the agreement reached which constituted the settlement of the appeal pursuant to section 54 of the 1970 Act. The decision to issue the notice was, by the terms of the section, to be treated as if the tribunal had determined the appeal and varied the decision to enable PML to submit the documents and information by 28th February 2013. That deemed determination concluded all issues of validity and has the same effect for estoppel purposes as if the question of validity had been determined in favour of HMRC, see Barnett v Brabyn [1996] STC 716, 723b per Lightman J.

40. The judge preferred to resolve this question by holding (para 60) that there was never any appeal as to validity and (para 61) that no late appeal was possible. That is an alternative way of looking at the matter, although (as will become clear in relation to ground 4) the real reason why no late appeal was possible is that it is a requirement of section 49 of the 1970 Act in relation to late appeals that no notice of appeal was given before the relevant time limit. Since Hazell Minshall's letter of 7th December 2012 expressly stated that it (or more accurately PML) wished to appeal against the Notice, the requirement (that there should have been no notice of appeal) was not met and there was, therefore, no scope for a later appeal.

41. It follows that I would reject ground 2 of the appeal and hold that the issue of validity had been determined pursuant to section 54 of the 1970 Act. Any concern that, in some other case unlike this case, HMRC might "bounce" a taxpayer into agreeing that a notice was valid when he has sought to appeal some minor point of the notice is mitigated by para 54(2) of the 1970 Act which gives the taxpayer 30 days within which to resile from any such agreement.

Did the tribunal have jurisdiction to consider the validity of the Notice on a penalty appeal (Ground 3)?

42. It must, in my view, follow from the conclusions reached so far that the tribunal did not have jurisdiction, on the penalty appeal, to consider the validity of the Notice. That was a matter that had been settled by agreement in the exchange of correspondence and that settlement had the effect of a tribunal determination that the Notice was a valid notice.

43. PML relied on the well-known principle exemplified by Wandsworth LBC v Winder [1985] A.C. 461 that the invalidity of a public body's prior action may be relied upon as a defence. This principle has been relied on by tribunals in penalty appeals which have held that an appellant cannot be penalised for not complying with an invalid information notice, see Spring Capital Ltd v HMRC [2015] UKFTT 8(TC) (Judge Mosedale) and Spring Capital Ltd v HMRC [2016] UKFTT 232 (TC) and Birkett t/a Orchards Residential Home v RCC [2017] UKUT 80 (TC) (Nugee J and Judge Greenbank) para 30(3). None of these cases, however, had the feature that there had already been a determination (or deemed determination) that the notice was in fact a valid notice. Such a determination must, on principle, operate as either an estoppel per rem judicatam or at least an issue estoppel precluding any further questioning of the validity of the notice.

44. PML also relied on R v Inland Revenue Commissioners, ex parte Taylor (No. 2) [1990] 2 All ER 409 in which a notice served pursuant to section 20 of the 1970 Act (a provision similar to that contained in para 1 of schedule 36 to the 2008 Act) was attacked by judicial review on the basis that it was an irrational (and therefore unlawful) abuse of power because, unlike a different provision, which it was said the IRC should have used, the taxpayer had no opportunity to oppose the notice before it was given. Bingham LJ (with whom Lord Donaldson of Lymington MR and Nourse LJ agreed) accepted that the taxpayer had no such opportunity but said (page 414f):-

> "… the taxpayer's remedy is, in the event of non-compliance followed by penalty proceedings, to resist the penalty proceedings and then attack the giving of the notice."

Once again, however, there was no prior determination (or deemed determination) that the notice was a valid notice. If there had been, that would have been an additional reason for upholding the notice as the court, in any event, did in that case.

45. It follows from this that the tribunal should have decided that, by reason of the section 54 agreement, it was not open to it to embark on an inquiry into the validity of the notice. As the judge put it in para 62 "the tribunal was wrong in assuming that it had jurisdiction to consider the validity of the information Notice". It must follow that a decision that the Notice was in fact invalid was outside the jurisdiction of the tribunal.

46. The judge gave a further reason for saying that the tribunal had no jurisdiction to consider the validity of the Notice namely that the statutory scheme contemplated that all questions of validity had to be decided before the tribunal considered the matter of penalty. As the judge put it (para 68):-

> "… any appeal against the validity of an information notice is decided at an earlier stage than the penalty appeal and under separate statutory provisions. In this case if on the penalty appeal the tribunal was to consider the validity of the information notice it would have had to be by way of a late appeal."

47. This further reason is, in my view, also correct. Although the judge did not spell it out, para 46 of schedule 36 (which precedes the right of appeal against penalty in para 47) expressly states that HMRC must assess any penalty within the period of 12 months from the date on which the taxpayer becomes liable to the penalty "subject to sub-paragraph (3)". That sub-paragraph then states:-

> "In a case involving an information notice against which a person may appeal, an assessment of a penalty under paragraphs 39 and 40 must be made within the period of 12 months beginning with the latest of the following:-
>
> a) the date on which the person becomes liable to the penalty,
>
> b) the end of the period in which notice of an appeal against the information notice could have been given, and
>
> c) if notice of such an appeal is given, the date on which the appeal is determined or withdrawn."

It is therefore only after appeal rights in relation to the Notice have been exhausted (or not utilised) that any right to appeal against penalties can come into existence. This suggests very strongly that a tribunal considering an appeal against penalties has no jurisdiction to consider the validity of a notice which can only be determined by an appeal which has to be brought before any appeal against (or indeed any assessment of) a penalty can occur. It was no doubt partly for this reason that Mr Dootson was concerned in December 2012 to establish whether there was to be any appeal against the Notice apart from time for compliance.

48. In coming to this conclusion I would not put the same weight as the judge did on Birkett's case since that case merely held that the right of appeal, conferred by para 47 of schedule 36 in relation to a decision that a penalty is payable under paragraphs 39, 40 or 40A of the schedule, did not extend to a potential public law challenge to an assessment under para 46 of the schedule but I certainly agree with the general point made in that determination that the ambit of an appeal under paragraph 47 is a matter of statutory construction. For the reasons I have given the correct construction of the schedule is that all questions of validity must be determined before any appeal against penalty is decided.

49. PML argued that the fact that a late appeal could be made pursuant to section 49 of the 1970 Act showed that a tribunal hearing a penalty appeal did have jurisdiction to

consider the validity of the Notice since any such late appeal would be made to the tribunal and there was no reason to suppose that the tribunal hearing the penalty appeal could not also be the tribunal to which application for permission for a late appeal could be made.

50. This contention cannot be correct. The true position is that any tribunal considering a penalty appeal would have to defer its determination of such penalty appeal until the question, whether a late appeal against validity was to be entertained, had been resolved. It might well be that the same tribunal could consider that question but until the question of permission for a late appeal was determined and, if it was permitted, was itself determined, the tribunal could not go on to determine the penalty appeal. The judge went on to decide that, in any event, no late appeal was possible on the facts of this case. That raises ground 4 of the appeal.

51. In my view, therefore, the second reason given by the judge for saying that the tribunal had no jurisdiction to consider the validity of the Notice is also correct and I would reject ground 3 of the appeal.

Could an out of time appeal have been made? (Ground 4)

52. Since PML never made an application for permission to make a late appeal, this is an academic point. The tribunal did not consider the point because it held (wrongly in my judgment) that it had jurisdiction to consider the validity of the Notice on the penalty appeal (paras 180-181). The judge went further than he needed to when he decided (para 61) that a late appeal was not possible. Even if it had been possible, permission to make a late appeal was never applied for.

53. It might, however, be said that if it was possible to apply for permission to make a late appeal and, if it was obvious that such permission should have been granted and if it were further obvious that such late appeal would have been successful, it would be a triumph of form over substance to hold, as the judge did, that PML's application for judicial review should fail.

54. On this somewhat slender basis it could be said that it is relevant to decide whether the judge was right to hold that a late appeal was not possible, although it seems that HMRC's non-lawyer representative had conceded before the tribunal that "a late appeal might be possible" (para 29 of the judgment).

55. The short answer to this question is that section 49 of the 1970 Act (which provides for late notices of appeal) applies where

> "(a) notice of appeal may be given to HMRC, but
>
> (b) no notice is given before the relevant time limit."

In this case notice of appeal <u>was</u> given on 7th December 2012 before the relevant time limit of 30 days and section 49 therefore has no application. The fact that it was latter clarified that such Notice related to time for compliance and that no appeal against validity was being made can make no difference to the fact that notice of appeal was given. This is not the reason given by the judge for saying that no appeal was possible, but is the true reason for concluding that no appeal was possible.

56. The actual reasons given by the judge are also, in my opinion, correct insofar as he held it was a pre-condition that HMRC should be asked to agree that a later appeal be made. That is because section 49(2) of the 1970 Act provides that notice of appeal may be given after the relevant time limit if HMRC agree, or where HMRC do not agree, the tribunal gives permission. HMRC are then required by subsequent sub-sections to agree if certain conditions are met, including that they are satisfied that there was reasonable excuse for not giving the notice before the expiry of the relevant time limit (Condition B). To my mind, this means that HMRC must be asked to agree to a late appeal before any question of applying to the tribunal for permission can arise. That is for the (perhaps obvious) reason that any tribunal would wish to know, before considering whether to grant permission for a late appeal, the view of HMRC about the reasonableness of the excuse for not giving notice before the 30 days had expired.

57. The judge held (para 61):-

> "Late appeals are possible where no in-time appeal has been made, but under section 49 TMA 1970 they turn on HMRC being notified and satisfied as to reasonable excuse and that there has been no unreasonable delay. No attempt was ever made to address these preconditions for a late appeal as regards the notice's validity."

No doubt the judge was incorrect to describe the "satisfaction" of HMRC as to absence of reasonable excuse and unreasonable delay as "preconditions", since the option of seeking permission from the tribunal is available but, subject to that, the judge was correct, since HMRC must at least be notified and asked to agree to a late appeal before the option of asking the tribunal for permission can be utilised.

58. It should, perhaps, be added that it is far from obvious that, if the permission of the tribunal had been sought for a late appeal sometime after April 2015 when the tribunal asked for submissions about the validity of the Notice, such permission would have been granted about two and a half years after time for appealing had expired.

59. I would therefore reject ground 4 of the appeal.

60. If the reader has persevered thus far, it should be fairly clear why I have agreed with Mr Nawbatt for HMRC that it is only now that it is appropriate to consider ground 1 of PML's appeal. That ground asserts that the tribunal conclusively determined that it had jurisdiction to decide whether the Notice was invalid and that it was in fact invalid, that HMRC never appealed those determinations and should not have been allowed to argue, on the judicial review application in relation to the work product, that the tribunal had no jurisdiction to determine those questions. It is only if the tribunal did not have such jurisdiction in relation to validity that this question can arise; since I have held (in agreement with the judge) that the tribunal erred in holding it had jurisdiction, ground 1 must now be addressed. It cannot be addressed satisfactorily unless one knows the reasons why it is that the tribunal had no jurisdiction namely (1) that there was an earlier conclusive determination that the Notice was valid and (2) that the statutory scheme excludes consideration of validity of a notice on a penalties appeal.

Should the judge have allowed HMRC to argue that the tribunal had no jurisdiction to determine the validity of the Notice? (Ground 1)

61. It will be recollected that the current judicial review proceedings relate to the refusal of HMRC (1) to deliver up or delete work product derived from the information and documentation provided pursuant to the Notice and (2) to undertake not to use the information and work product which they have for any future purpose. It is in these proceedings that PML seek to say that the doctrine of issue estoppel applies to prevent HMRC asserting that the tribunal had no jurisdiction to determine the validity of the Notice.

62. These are, however, entirely different proceedings from the proceedings for a penalty before the tribunal. In a formal sense the parties are not the same. Only HMRC and PML were parties to the tribunal proceedings. The parties to the current judicial review are HMRC and the Crown whose supervisory power is being invoked by PML so as to require HMRC to delete their work product. This is not mere pedantry because the Crown's interest is not the same as HMRC's and, according to PML, is (or should be) actively opposed to HMRC. A requirement to delete work product, if it exists, is a requirement of public law in relation to a public body and is not a matter which falls within the tribunal's jurisdiction at all. In deciding, therefore, whether as a matter of public law HMRC are required to delete their work product it would not be right for the court to be constrained by a tribunal decision which that tribunal had no jurisdiction to make. The form of the proceedings is thus not a mere formality and the first and essential requirement for the doctrine of issue estoppel namely that the parties must be the same parties as were parties to the previous decision is not satisfied.

63. The modern doctrine of issue estoppel was stated by Diplock LJ in Mills v Cooper [1967] 2 QB 459, 468:-

> "a party to civil proceedings is not entitled to make, as against the other party, an assertion whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect…."

Lord Diplock stated the same principle in relation to a foreign court in The Sennar [1985] 1 WLR 490, 493H to 494A:-

> "To make available an issue estoppel to a defendant to an action brought against him in an English court upon a cause of action to which the plaintiff alleges a particular set of facts give rise, the defendant must be able to show: (1) that the same set of facts has previously been relied upon as constituting a cause of action in proceedings brought by that plaintiff against the defendant in a foreign court of competent jurisdiction; and (2) that a final judgment has been given by that foreign court in those proceedings."

64. It is on this principle that PML relies to contend that HMRC asserted (expressly or by necessary implication) in the penalty proceedings that PML was precluded by reason

of the section 54 agreement from arguing that the Notice was invalid; that assertion was an essential element in HMRC's cause of action for the penalty; that assertion was necessarily decided by the tribunal to be incorrect; HMRC are therefore estopped in the current judicial review proceedings from asserting by way of defence (to a claim that they must delete their work product) that PML is precluded from asserting invalidity of the Notice.

65. This contention is incorrect for three quite separate reasons. In the first place the current judicial review is not between the same parties as explained above. A comparable situation in relation to VAT tribunals arose in R v Customs and Excise Commissioners ex parte Kay & Co Ltd [1996] STC 1500. The Commissioners had refused or deferred the taxpayers' claim for refunds of VAT overpaid more than three years previously because the government had announced that it would in the future apply a "three-year time limit with immediate effect". A VAT tribunal allowed the taxpayer's appeal holding that the Commissioners had no discretion to delay or defer repayments of overpaid VAT but held that it had no power to direct payment by the Commissioners which was a matter for judicial review. On the judicial review the Commissioners sought to argue that, notwithstanding the tribunal's decision, they did have the power to defer repayments. The taxpayer contended that there was an issue estoppel. Keene J rejected that contention (although he went on to hold that there was in fact no such power to defer). He cited Mills v Cooper and then said:-

> "It might be thought that to suggest that the parties to the present application are different from those in the value added tax tribunal is mere pedantry and that the bringing of the judicial review proceedings in the name of the Crown is no more than a formality. However, it reflects the fact that this court is dealing with what are essentially issues of public law, in the present case whether this public body, the Commissioners or Customs and Excise, has a power to defer payment and whether it has acted unlawfully …
>
> None of this means that issue estoppel may not sometimes operate in the public law context outside the ambit of RSC Order 53, as in such cases of statutory challenge as occur under the Town and Country Planning legislation (see Thrasyvoulou v Secretary of State for the Environment [1990] 2 A.C. 233). But there must be great difficulties in the doctrine applying in judicial review proceedings for the reasons to which I have referred."

66. I would respectfully approve this decision of Keene J, which was followed by the judge at the end of para 76 of his judgment, and hold that the doctrine of issue estoppel cannot apply to preclude HMRC from arguing in the current judicial review proceedings that all questions of validity have been decided by virtue of the section 54 agreement.

67. Another reason why it does not apply is that whereas HMRC may have asserted in the penalty proceedings as part of their cause of action that all questions of validity had been determined in their favour by the section 54 agreement and the tribunal may have decided that their assertion was incorrect, HMRC now make the assertion by way of defence to a claim by PML that their work product must be deleted. Mills v Cooper

may prevent a party making a second claim from asserting an essential element which has been held to be incorrect in an earlier claim but says nothing about precluding an earlier claimant from putting forward a defence if he is sued as a defendant in quite different proceedings. PML submitted that HMRC should be so precluded, unless they appealed the earlier decision. But I do not think that can be correct, since HMRC must have been entitled to consider that an appeal to recover a comparatively modest penalty was hardly worthy of the investment of further time and further taxpayer's money, but they should not be precluded from relying on any defence truly open to them if they are, in turn, sued by PML (the former defendants) in relation to their work product, a matter quite different from recovery of penalties.

68. The third reason why PML's contention is incorrect (and the main reason advanced by HMRC and accepted by the judge) is that the tribunal was not a court of competent jurisdiction to decide that the Notice was invalid and that the requirement that the earlier decision be a decision of a court of competent jurisdiction (as set out in Mills v Cooper and The Sennar) is not therefore met. This has two separate strands.

69. In the first place, (as the judge decided and I have already held) a tribunal hearing a penalty appeal has no jurisdiction to consider the validity of a notice, which must already have been determined before a penalty is assessed, let alone appealed. A wrong decision by a tribunal as to its own jurisdiction cannot create a court of competent jurisdiction for the purposes of the doctrine of issue estoppel.

70. Mr Grodzinski for PML submitted that this approach is contrary to the abolition of the distinction between jurisdictional and non-jurisdictional error achieved by Anisminic v Foreign Compensation Commission [1996] 2 A.C. 147 and R (Cart) v Upper Tribunal [2012] 1 A.C. 663. But neither Anisminic nor Cart had anything to say about issue estoppel or the requirement of issue estoppel that the earlier decision be that of a court of competent jurisdiction. In the present context it is inevitable that arguments about jurisdiction will be made and have to be assessed.

71. Even if this is wrong (which I do not think it is), there is the second strand of HMRC's argument which is peculiar to the present case. It is that the section 54 agreement itself operates as a determination that the Notice was a valid notice and that it is PML which is precluded by the doctrine of issue estoppel from arguing otherwise, in other words that PML is itself estopped from arguing that HMRC are estopped.

72. We were not referred to any authority on the existence of conflicting estoppels. Mr Grodzinski submitted that they should be treated like conflicting decisions of the Court of Appeal in respect of which it is usually held that a third Court of Appeal should follow the second and more recent decision, at any rate if it was aware of and had considered the earlier decision. But I cannot accept that argument because estoppel operates as a bar to prevent an argument being made. To that extent it is a matter of substance and concludes the question for the future so that subsequent attempts to undermine it should be rejected. A decision based on a second and conflicting estoppel (whether reached through ignorance, misapprehension or defiance) should logically be ignored, see Showlag v Mansour [1995] 1 A.C. 431. If an analogy is to be sought, a second determination reached in ignorance, misapprehension or defiance of an earlier determination is more similar to a second marriage (which has to be disregarded) or to a nullity decree obtained after a declaration of validity, than to a second decision of a Court of Appeal, see Vervaeke v Smith [1983] 1 A.C. 145.

73. The judge (para 76) gave a further reason for rejecting PML's contention that HMRC should not be allowed to argue the point which they lost before the tribunal; that was that the doctrine of issue estoppel does not apply in tax cases. This raises a difficult and controversial issue into which it is not necessary to go. I have given three reasons for rejecting PML's contention and that is quite enough.

74. I would, therefore, reject Ground 1 of the appeal and hold that the judge was correct to decide that HMRC were entitled to argue that all questions of validity had been determined and could not be revisited by PML. On that basis, this appeal must fail but I will deal briefly with the grounds which relate to the judge's reasons for refusing relief, even if the Notice must be taken to be an invalid notice.

Did the tribunal say nothing about "work product"? (Ground 5)

75. PML submits that although the tribunal did not expressly refer to work product derived from the information and documents provided pursuant to the Notice, it necessarily follows from the tribunal's decision (that the documents should be returned unless HMRC wanted to make a further application for the same documents and information under paras 2 or 5 of schedule 36 and, pending any decision as to such further application, were not to rely upon or use the information obtained) that the work product was necessarily encompassed in the tribunal's decision.

76. It is difficult to understand this ground of appeal. It is common ground that the tribunal did not even have jurisdiction to order HMRC to return the documents and that, if HMRC had not returned them, PML would have had to proceed by way of judicial review. Still less would the tribunal have any jurisdiction to make any order in respect of work product. Any observations which the tribunal may have made about work product would, therefore, be of marginal interest only.

77. As it is, what the tribunal actually said was this:-

> "183. As we have found that the Information Notice was invalid, if follows that HMRC are in possession of documents and information to which they are not entitled. Save to the extent that they lawfully have those documents otherwise than pursuant to the Information Notice, they must therefore return the documents (and any copies they may have made) to PML, and cannot rely upon them."

The judge was correct to hold that the tribunal said nothing about work product.

78. It is worth noting that, in relation to documents and copies of images made from computers seized pursuant to warrants executed by the police and other prosecuting authorities, sections 50-59 of the Criminal Justice and Police Act 2001 ("the 2001 Act") impose an obligation to return seized property not properly within the scope of the warrant but also provide for an exception to that duty when the properly seized property cannot, applying a test of reasonable practicability, be separated from material not covered by the warrant, see e.g. section 53(3). There is no counterpart of these nuanced provisions in schedule 36 of the 2008 Act, no doubt because the schedule provides for the taxpayer to appeal against a notice before he hands over any documents or other information, whereas the subject of a warrant has no such opportunity before it is

executed. Questions about the return of documents and any consequences are thus left to the good sense of the judge hearing any judicial review applications who can have regard, if appropriate, to the fact that no appeal was made, or if it was, it was compromised.

Judge correct to refuse relief? (Ground 6)

79. PML said that, if the Notice was invalid, it must follow that any material derived from the documents or information obtained pursuant to it must be deleted so as to ensure it is never used.

80. That was not the approach of the Divisional Court in R (Cook) v Serious Organised Crime Agency [2011] 1 WLR 144, R (Cummins) v Manchester Crown Court [2010] EWHC 2111 (Admin) or R (Business Energy Solutions Ltd) v Preston Crown Court [2018] EWHC 1534 (Admin) which considered applications pursuant to the Police and Criminal Evidence Act 1984 and the 2001 Act. In the first of these cases, Leveson LJ was concerned about the scope for satellite litigation any such order as sought by PML would encourage, saying at para 22:-

> "As to the derivative use of knowledge, if I understand the meaning of the phrase, there is a real risk of allowing the subject of unlawful search a protection from an investigation which is not warranted. For my part, I would not be prepared to make an order that would encourage satellite litigation either in a civil or criminal context as to the origin of other, lawfully obtained, evidence. Thus, assume a prosecution is mounted using a witness who can lawfully prove a material fact. I would reject the proposition that the court should inquire whether the train of inquiry to that witness started as a result of what was learnt from the unlawful seizure or in some other way and doubt the utility of an investigation of the many steps in what are sometimes complex criminal inquiries."

81. PML relied on R (Chatwani) v National Crime Agency [2015] EWHC 2254 (Admin) in which the Divisional Court held that the issue and execution of a search warrant had been procured in breach of sections 15 and 16 of the Police and Criminal Evidence Act 1984 and was therefore unlawful, and said (para 131):-

> "… on the principle that a person should not profit from his own wrong, that imposes an obligation on the agency of the state that has obtained documents to return all of the material seized and not use any work product derived from the material, such as copies."

That was, however, said in the context of a particularly serious abuse of state power and, as indicated above, in a case in which the citizen had no opportunity to contest the warrant before it was issued, unlike PML who had every opportunity to appeal the Notice before complying with it. The judge was right to say (para 85) that Chatwani had no application to the present case where the statutory and factual contexts are so different.

82. The judge therefore had a discretion whether to grant relief and on well established principles this court will not interfere with the exercise of that discretion unless the judge took irrelevant considerations into account or failed to take relevant considerations into account or was otherwise wrong.

83. As already indicated the judge gave five reason for refusing relief:-

1) PML had initially failed to engage with HMRC's enquiry, the issue of the Notice was therefore justifiable and, even after it was issued, there was substantial non-compliance;

2) there was nothing reckless in the issue of the Notice and PML itself did not want a third party notice to be issued;

3) PML never exercised any right of appeal even during the penalties appeal, when the matter was only raised at the initiative of the tribunal;

4) if the order were made as asked in relation to work product, there would be a substantial risk of satellite litigation; and

5) compliance with any order would require HMRC to review thousands of its files which amounted to a substantial practical difficulty.

84. As to the first of these reasons, the judge was entitled to have regard to PML's reluctance to engage with HMRC's enquiries forcing HMRC to resort to the issue of the notice. On the tribunal's view of the matter (which has to be supposed to be correct for the purposes of considering the judge's discretion) it was an invalid notice; it could, therefore, be said that PML were entitled not to comply with it and that non-compliance was, therefore, irrelevant. But the judge was not intending to pull himself up by his own bootstraps; the non-compliance to which he referred was merely illustrative of PML's non-cooperation and was not an irrelevant consideration.

85. Although PML had originally categorised the issue of the Notice as reckless because it should have been obvious to HMRC that the way to obtain the information they needed was to have sought consent (or a tribunal order) to issue a third party notice, Mr Grodzinski said that that was an argument which PML did not now pursue; but the judge's point that PML did not want a third party notice to be issued is still a good one. It is true that that expression of concern is contained in a letter of 12th July 2013 in response to an HMRC observation that they might have to contact PML's clients in the light of PML's continuing failure to comply with the Notice, but there is no reason to suppose that that would not have been PML's position where the Notice was originally issued.

86. The third reason given by the judge is obviously correct as a matter of fact and highly relevant. It never occurred to PML to appeal the validity of the Notice of 26th November 2012; there was purported compliance over a lengthy period; and everyone assumed it was valid until the tribunal itself raised a query about it on 16th July 2014 after the oral hearing on 8th July 2014. It is not as if PML were unfamiliar with the legislation; indeed in reply to HMRC's very first enquiry in August 2012 and in their letter of 12th July 2013, Hazell Minshall was at pains to say that, ever since PML was established in 2007,

it was "very much aware of the potential impact of the MSC legislation and took steps to ensure that our client company was (and would remain) in full compliance with it".

87. This court cannot second guess the judge's concern about satellite litigation.

88. The judge's fifth reason relating to practical difficulties is entirely sound. Mr Dootson's evidence was compelling. Mr Grodzinski submitted that the judge should have been more sceptical about it. But the time-scale resulting from the fact that there was no appeal against validity tells its own story. Any appeal should have been made within 30 days of 26th November 2012. If it had been made and determined, HMRC could have been criticised if they had continued to produce work product during any such appeal. As it is, the claim for judicial review was issued on 22nd February 2016 over three years later. It is hardly surprising that HMRC have continued to work on the case and generated many internal documents or computer files relying on the documents and information provided pursuant to the Notice. On the application for permission Langstaff J referred to the analogous case of springboard injunctions but it is of the essence of springboard injunctions that they have to be applied for promptly.

89. The judge's decision not to grant relief was plainly a decision open to him and I would not have interfered with it, if it had been relevant to consider the matter.

Conclusion

90. As it is, I would uphold the judge's order and dismiss this appeal.

Lord Justice Henderson:

91. I am grateful to Longmore LJ for his clear exposition of the facts, the procedural background, the relevant legislation and the issues which arise on this appeal. I agree with him that PML's appeal must be dismissed, and I also agree with most of the reasoning which has led him to that conclusion. But there are parts of his analysis from which I respectfully differ, particularly in relation to grounds 2 and 3. I must therefore explain the areas of disagreement between us, and set out the differences in the route which lead me to the same ultimate conclusion.

92. The central point on which I take a different view is the question whether it is open to a taxpayer, when appealing from the assessment of a penalty under paragraphs 39 or 40 of schedule 36 to the Finance Act 2008, to argue that the information notice with which he has allegedly failed to comply was invalid, because it did not satisfy the statutory requirements for such a notice; or whether the true position is that all aspects of the validity of the notice must be challenged, if at all, in an appeal brought by the taxpayer against the giving of the notice under paragraph 29 of schedule 36.

93. Longmore LJ considers that the statutory scheme of schedule 36 requires all issues about the validity of an information notice to be determined by an appeal under paragraph 29, with the consequence that if the taxpayer neglects to exercise his right of appeal against the notice he cannot later challenge its validity as a defence to the assessment of a penalty based on failure to comply with it. Furthermore, if the taxpayer does exercise his right of appeal under paragraph 29, he must advance all his grounds of challenge to the notice on that appeal, and cannot later rely on any grounds which he failed to raise on the appeal as a defence to penalty proceedings based on the notice.

This is so, according to Longmore LJ's analysis, even if (as in the present case) the sole matter raised in an appeal against the notice relates to a particular requirement in the notice, such as the time allowed for compliance with it. Once that issue has been determined, whether by the FTT on hearing the appeal or by an agreement under section 54 of the Taxes Management Act 1970 (a "section 54 agreement"), the validity of the notice in all respects must be taken to have been conclusively determined as between the taxpayer and HMRC.

94. This was also the view of the judge: see his judgment at paragraphs 60, 62 and 68 (which is quoted by Longmore LJ in paragraph 46 of his judgment). As the judge put it in paragraph 68, the effect of the statutory scheme is that "any appeal against the validity of an information notice is decided at an earlier stage than the penalty appeal, and under separate statutory provisions." Accordingly, when the FTT heard the penalties appeal, it "was wrong in assuming that it had jurisdiction to consider the validity of the information notice": see paragraph 60.

95. I regret that I am unable to agree that this is the correct interpretation of the statutory scheme.

96. In the first place, there is a fundamental difference between the position when a notice is first given, thus generating a right of appeal under paragraph 29 of schedule 36, and the position later on, after liability to a penalty for non-compliance with the notice has arisen under paragraphs 39 or 40, and after a penalty has been assessed under paragraph 46, thus generating a right of appeal against the penalty under paragraph 47.

97. At the stage when the notice is first given, HMRC are seeking to obtain information (in the case of a "taxpayer notice") for the purpose of checking the taxpayer's position: see paragraph 1(1). By virtue of paragraph 58, "checking" includes "carrying out an investigation or enquiry of any kind", while paragraph 64 defines a person's "tax position" in broad terms which include:

> "… the person's position as regards any tax, including the person's position as regards –
>
> (a) past, present and future liability to pay any tax,
>
> …"

HMRC may therefore be at a very early stage of their investigation or enquiry when the notice is given, and the purpose of the notice is to obtain potentially relevant information from the taxpayer which may assist HMRC with the conduct of the investigation or enquiry.

98. That is the context in which the right of appeal conferred by paragraph 29(1) has to be considered. The appeal may challenge "the notice or any requirement in the notice", other than a requirement to provide any information, or produce any document, that forms part of the taxpayer's statutory records: see sub-paragraphs (1) and (2). The right of appeal is also wholly excluded if the tribunal approved the giving of the notice pursuant to paragraph 3(2): see sub-paragraph 29(3). On such an appeal, the burden lies upon the taxpayer, in the usual way, to establish his grounds of appeal; and in disposing of the appeal, the FTT has the powers set out in paragraph 32(3).

99. Importantly, paragraph 32(5) then provides:

> "Notwithstanding the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007 a decision of the tribunal on an appeal under this Part of this Schedule is final."

100. This means that the normal rights of appeal from a decision of the FTT to the Upper Tribunal, and from the Upper Tribunal to this court, are excluded. The inference which I draw from this unusual provision is that Parliament did not wish the collection of information by HMRC from taxpayers to be unduly delayed. Adequate protection for the taxpayer, at this early stage, is provided either by the prior approval of the tribunal to the giving of the notice, or (if such approval is not sought by HMRC under paragraph 3) by the single right of appeal under paragraph 29.

101. By contrast, an appeal under paragraph 47 against the imposition or amount of a penalty comes at a much later stage, and engages different considerations because the proceedings are of a penal character and involve the exaction of money by the State from the taxpayer. For those reasons, it is well established (and is common ground) that the burden of proof in penalty proceedings lies on HMRC, not on the taxpayer. Furthermore, once an appeal under paragraph 47 has been notified to, and decided by, the FTT, that is not necessarily the end of the road. By virtue of paragraph 48(5), "the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax."

102. The scope of an appeal against a penalty is delimited by paragraph 47, as follows:

> "A person may appeal… against any of the following decisions of an officer of Revenue and Customs –
>
> (a) a decision that a penalty is payable by that person under paragraph 39, 40 or 40A, or
>
> (b) a decision as to the amount of such a penalty."

Paragraphs 39 and 40 apply, so far as material, "to a person who – (a) fails to comply with an information notice": see paragraph 39(1). The reference to "an information notice" takes one back to the definition of that term in paragraph 6(1) as meaning "a notice under paragraph 1, 2, 5 or 5A". We are concerned with a notice under paragraph 1, i.e. a taxpayer notice. In principle, therefore, it must be open to a taxpayer exercising his right of appeal under paragraph 47 to argue that no penalty is payable by him because the taxpayer notice with which he has allegedly failed to comply is not a taxpayer notice within the meaning of paragraph 1, for example because the information or document requested is not "reasonably required by the officer for the purpose of checking the taxpayer's tax position."

103. In my judgment, it would require very clear language if the taxpayer's right to challenge the validity of a taxpayer notice on such grounds, as a defence to penalty proceedings based on that notice, were to be excluded. No such exclusion appears anywhere in Part

7 of schedule 36, which deals with penalties, and in my view it would be extraordinary if it did, in a context involving provisions of a penal character. Nor, with respect to Longmore LJ, can I find such an implied exclusion in the provisions of Part 5 of the schedule, dealing with appeals against information notices. As I have explained, the context of such appeals is very different, the appeal may relate merely to a requirement in the notice, and no appeal may proceed beyond the FTT. Furthermore, it would in my view be an extremely harsh regime if a taxpayer were compelled, at the very early stage of appealing against an information notice, to consider and raise all possible grounds of appeal that he might later wish to rely upon as a defence to penalty proceedings, even though the burden would then be on HMRC to justify the imposition of the penalty.

104. For these reasons, I consider that the FTT was clearly correct to hold that it was open to PML to challenge the validity of the information notice in its appeal against the penalty notices. As the FTT said, in paragraph 181 of its decision:

> "This is an appeal by PML against penalties, and the onus of proof is on HMRC to demonstrate that the penalties have been assessed in accordance with the law. If PML can show that the Information Notice to which the penalties relate was not valid, it follows that the penalties are also invalid, and the appeal must succeed."

105. For the avoidance of doubt, I should note that different considerations may arise where the taxpayer wishes to rely, as a defence to penalty proceedings, on a ground which he had already raised on an appeal against the relevant information notice and which had been determined adversely to him, either by the FTT or in a section 54 agreement. In that situation, it may well be that an issue estoppel would prevent the taxpayer from relying again on the same ground. But that question does not arise in the present case, and the whole subject of issue estoppel in tax proceedings is one of considerable difficulty. I therefore prefer to express no view on the question.

106. I should also make it clear that, although the FTT was in my view right to entertain the question, I would not necessarily endorse its conclusion that the notice in the present case did not comply with the requirements of paragraph 1 of schedule 36, because it did not relate to the tax position of PML, but rather to the tax position of its clients. HMRC did not appeal against that conclusion, and the issue is not before us, nor have we heard argument on it. I will therefore content myself with saying that, at least as a matter of first impression, I see considerable force in the argument that the admittedly contingent future liability to tax of PML under the MSC legislation is sufficient to ground the giving of a valid taxpayer notice under paragraph 1 of schedule 36, particularly having regard to the wide definition of "tax position" in paragraph 64.

107. I must now explain how my conclusion on ground 3 relates to the other grounds of appeal.

108. In relation to ground 2, I agree with Longmore LJ that paragraph 29 of schedule 36 contemplates only the bringing of a single appeal against an information notice, and that PML's appeal (confined to the issue of time for compliance) was effectively determined by a section 54 agreement reached in correspondence. But for the reasons I

have given in relation to ground 3, I do not agree that the section 54 agreement concluded all potential issues between PML and HMRC in relation to the validity of the notice, so as to prevent such issues being raised by PML as a defence to subsequent penalty proceedings. In my view, therefore, no relevant question of res judicata or issue estoppel arises in the context of the penalty proceedings before the FTT. Accordingly, I would find in favour of PML on both grounds 2 and 3.

109. For similar reasons, I do not consider it necessary or appropriate to express any view on the question whether an out of time appeal could have been made (ground 4), and I would prefer to leave open the question whether section 49 of TMA 1970 must be construed as precluding the possibility of a late appeal in circumstances where there has been an earlier appeal on a different issue.

110. It follows from what I have already said that my starting point in considering ground 1 (the question whether the judge should have allowed HMRC to argue that the FTT had no jurisdiction to determine the validity of the notice) is different from that of Longmore LJ. If I am right in relation to grounds 2 and 3, the answer to ground 1 is simple. There is no reason why HMRC should not have been free to argue that the FTT lacked jurisdiction to determine the validity of the notice, because the scheme of schedule 36 does not lead to the conclusion that all questions of validity of the notice were decided by virtue of the section 54 agreement. Furthermore, even if I were wrong in relation to grounds 2 and 3, I would respectfully agree with the reasons given by Longmore LJ for rejecting ground 1. Where I differ from Longmore LJ and the judge is not in relation to the issue whether HMRC should have been permitted to reargue the key issues determined by the FTT in the different context of the judicial review proceedings, but rather in relation to the merits of grounds 2 and 3, on which I have come to the opposite conclusion.

111. In relation to grounds 5 and 6, I agree with the judgment of Longmore LJ and have nothing further to add. It follows that I too would refuse PML any relief and dismiss the appeal, even though the notice must in my view be taken for the purposes of the judicial review proceedings to have been an invalid notice, because that is what the FTT determined, and had jurisdiction to determine, on the penalty appeal, and HMRC did not appeal against that decision.

Lord Justice Peter Jackson:

112. I agree that this appeal should be dismissed for the reasons given by Longmore LJ and add my own brief reasons only in relation to Grounds 2-4, as to which he and Henderson LJ differ.

113. This appeal arises out of an appeal from a penalty notice. I would therefore first consider Ground 3: can the validity of the underlying information notice be challenged on a penalty appeal? An appeal to the FTT under paragraph 47 of Schedule 36 lies from a decision that a penalty is payable by a person who in the words of paragraph 39(1) *'fails to comply with an information notice'*. By paragraphs 1 and 6 an information notice is a notice in writing issued by HMRC to obtain information or documents reasonably required for the purpose of checking the taxpayer's tax position. Part 5 of the Schedule ('Appeals Against Information Notices') provides a specific route of appeal, with paragraph 29 applying in the case of a taxpayer notice. This allows the taxpayer to argue, for example, that the information or document is not reasonably

required. But if the right of appeal is not exercised, the notice stands. The question is whether it can be struck down at a later stage, as the FTT purported to do.

114. In my view it cannot. I agree with the reasoning of Sir Ross Cranston at [68] and of Longmore LJ at [46-51]. Part 7 of the Schedule ('Penalties') cannot be read in isolation. The Schedule as a whole consists of ten parts, forming an integrated statutory scheme that proceeds in logical stages. The analysis of paragraph 39(1) favoured by Henderson LJ in effect inserts words into paragraph 39(1) so as to read *'fails to comply with a valid information notice'*. That would imply that HMRC is required to re-establish the validity of the notice on a Part 7 penalty appeal even though a different appeal process exists for that very purpose in Part 5, a process that has by definition (as otherwise a penalty could not have been exacted) been exhausted or not used. This goes against the grain of the legislation and in the absence of some special feature is unlikely to represent the intention of Parliament.

115. Does the fact that we are concerned with a penal provision amount to such a special feature? No, because the taxpayer's position is protected by the right of appeal under paragraph 29 or by a late appeal under paragraph 49 where good reason is shown. Nor do I consider the penal effect of the Schedule to be unduly harsh when measured against its legitimate aim, which is to seek to ensure that taxation is correctly levied.

116. I do however think there is much in Henderson LJ's observation at para 106 in respect of the FTT's conclusion that a third party notice rather than a taxpayer notice was appropriate in this case but, as he says, that conclusion was not appealed by HMRC.

117. As to Ground 2, I agree with the FTT, Sir Ross Cranston and Longmore LJ that the section 54 agreement was conclusive as to the validity of the information notice. Section 54(1) provides that an agreement shall have *"like consequences"* to the outcome of an appeal and the conclusion on Ground 2 therefore follows from the conclusion on Ground 3.

118. As to Ground 4 (late appeal) I agree with the analysis of Longmore LJ and have nothing to add.