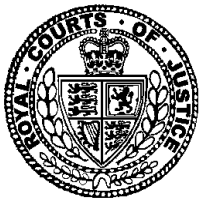

Neutral Citation Number: [2019] EWCA Civ 1021

Case No: C1/2018/0899

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE HONOURABLE MR JUSTICE GREEN
[2018] EWHC 695 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/06/2019

Before:

LORD JUSTICE FLOYD
LORD JUSTICE HENDERSON
and
LORD JUSTICE FLAUX

- -

Between:

THE QUEEN **on the application of** **MRS SHIRLEY ARCHER**	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Mr Conrad McDonnell (instructed by **KPMG LLP**) for the **Appellant**
Mr David Yates QC (instructed by the **General Counsel and Solicitor to HMRC**) for the **Respondents**

Hearing date: 14th May 2019

- -

Approved Judgment

Lord Justice Henderson:

Introduction

1. This is an appeal about costs, a subject which would normally not justify a first, let alone a second, appeal. But as Lewison LJ recognised, when granting permission on 1 November 2018 for a second appeal to this court, "the point raised is one of broad significance".

2. The appellant, Mrs Shirley Archer, and her husband, Mr William Archer, were among the first groups of taxpayers to receive an accelerated payment notice ("APN") from the Commissioners for Her Majesty's Revenue & Customs ("HMRC") following the enactment of Part 4 of the Finance Act 2014 ("FA 2014") which received the Royal Assent and came into force on 17 July 2014. After the issue of precursor letters, an APN was issued to Mr Archer on 19 September 2014, and a separate APN was then issued to Mrs Archer on 4 November 2014. Each APN said that it related to the same "DOTAS arrangements", that is to say tax avoidance arrangements which had been notified to HMRC and allocated a reference number (in this case 74201516) under section 311 of the Finance Act 2004 ("FA 2004").

3. The DOTAS legislation was contained in Part 7 of FA 2004 (sections 306 to 319, headed "Disclosure of tax avoidance schemes") and regulations made by the Treasury thereunder. It required the promoters of specified types of tax avoidance scheme to disclose prescribed information about them to HMRC prior to or shortly after their first implementation. Pursuant to those obligations, on 3 April 2006 KPMG LLP disclosed to HMRC a scheme described in the notification as "Certificate of deposit planning 2", the purpose of which (stated shortly) was to enable a client ("Mr X") to obtain an allowable loss for income tax purposes by means of certain transactions involving a "certificate of deposit" acquired by Mr X from a bank. The idea was that Mr X would grant his spouse ("Mrs X") an option to buy the certificate of deposit for substantially less than its market value; she would then sell the option to an independent third party for its full market value; and the third party would in due course exercise the option. In this way, it was hoped that the grant of the option by Mr X, its disposal by Mrs X to the third party, and the subsequent exercise of the option by the bank, would generate no liability to either income tax or capital gains tax ("CGT") in the hands of Mr or Mrs X, while leaving Mr X with an allowable loss roughly equal to the amount of the discount from market value at which the option was granted, and leaving Mrs X better off in capital terms to approximately the same extent. The net cost of the scheme to the taxpayers, if it worked, lay in the professional fees presumably payable to KPMG and the turn negotiated by the bank for its participation in the scheme.

4. The scheme was employed by Mr and Mrs Archer in March and early April 2006, with the object of reducing Mr Archer's income tax liability for the tax year 2005/06. The liability which he wished to avoid arose from the sale by him in April 2005 of loan notes in a UK trading company in which he held a substantial equity stake. It is common ground that this sale gave rise to an income tax liability in 2005/06, chargeable on Mr Archer under Case VI of Schedule D. As I understand it, however, loss relief could in principle be claimed against that liability for certain categories of loss, including any loss from transactions in deposits under Chapter 11 of Part 4 of the Income Tax

(Trading and Other Income) Act 2005 ("ITTOIA 2005"): see section 392(1) of ITTOIA 2005, and Part 2 of the table in section 836B(2) of the Income and Corporation Taxes Act 1988 ("ICTA 1988"), as then in force.

5. The provisions of Chapter 11 of ITTOIA 2005 (sections 551-554) impose a charge to income tax on profits and gains from the disposal of "deposit rights", which are defined in section 552(1) as including "(b) a right to receive the principal amount stated in a certificate of deposit, with or without interest." By virtue of section 552(2), "certificate of deposit" means a document which relates to the deposit of money in any currency; which recognises an obligation to pay a stated principal amount to bearer or to order, with or without interest; and by the delivery of which, with or without enforcement, the right to receive that stated amount, with or without interest, is transferable.

6. Against this background, the following transactions then took place:

(a) On 21 March 2006, Mr Archer acquired certificates of deposit with an issued value of £17.5 million and a maturity date of 20 April 2006. They were issued by Schroder & Co Limited, were payable to bearer, carried interest and were negotiable;

(b) On 27 March 2006, Mr Archer granted Mrs Archer an option to purchase the certificates from him for £2 million. The option was granted by deed for no consideration, and could be exercised only in full and only on 5 April 2006;

(c) On 4 April 2006, Mrs Archer sold the option to a Manx bank, Fairbairn Private Bank (IOM) Limited ("Fairbairn"), for £15,338,889. Before doing so, she took independent advice from the London office of KPMG and from a firm of solicitors, Addleshaw Goddard. The sale price was the result of negotiations over the period from 27 March to 4 April 2006. Mrs Archer then invested the cash proceeds of sale in an assurance bond in her sole name, which she still retained when the APN was issued to her some 8½ years later in November 2014; and

(d) On 5 April 2006, Fairbairn exercised the option and Mr Archer sold the certificates to Fairbairn for £2 million, thus incurring a paper "loss" on the transaction of £15.5 million.

7. Acting on advice from KPMG, Mr and Mrs Archer submitted their tax returns for 2005/06 in July 2007. Mr Archer claimed to set the loss arising from his sale of the certificates of deposit against his liability to income tax under Case VI of Schedule D. His return also included the DOTAS registration number of the scheme. Mrs Archer's return did not, however, include the £15,338,889 which she had received from Fairbairn on the sale of the option, presumably for the reason stated in the DOTAS notification, namely that the certificates of deposit were "a debt for [*CGT*] purposes" and her disposal of them was then thought to fall within section 251 of the Taxation of Chargeable Gains Act 1992 ("TCGA 1992") which provides that "Where a person incurs a debt to another… no chargeable gain shall accrue to that… creditor… on a disposal of the debt, except in the case of the debt on a security (as defined in section 132)." Mrs Archer was also advised that it was unnecessary for her to include the DOTAS registration number on her return, so she did not do so.

8. On 20 July 2007, HMRC opened an enquiry into both tax returns for 2005/06. A very lengthy period of correspondence and negotiation ensued, which left the matter still unresolved when the APNs were issued to Mr and Mrs Archer in September and November 2014. Despite the apparent simplicity of the scheme, HMRC evidently found it difficult to analyse and changed their ground more than once. For present purposes, the details do not matter, but the following stages in the history may be noted. On 22 September 2011, HMRC wrote to KPMG saying they had "decided not to pursue further arguments in respect of Mr Archer's claimed loss under s 551 ITTOIA on the disposal of the Certificates of Deposit", but expressing the view that CGT was due from Mrs Archer as a result of her disposal of the option. At about this time, HMRC proposed, and Mr and Mrs Archer agreed, to enter into a process of negotiation, referred to as "Tax Dispute Resolution" or " TDR", with a view to settling most, if not all, of the open issues between the Archers and HMRC. In the course of this process, the head of Dispute Resolution at HMRC wrote again to KPMG on 27 March 2013, indicating HMRC's acceptance that the loss was properly claimable by Mr Archer, with the result that the only dispute related to the tax position of Mrs Archer. Shortly afterward, however, there was a volte face. On 11 July 2013, in a telephone call with KPMG, HMRC said they had changed their mind in relation to the efficacy of the scheme and no longer accepted that Mr Archer had an allowable loss for 2005/06.

9. The next major development was in February 2014, when KPMG submitted a global settlement proposal on behalf of the Archers which dealt with many open issues, but in relation to the scheme involving the certificates of deposit proposed that HMRC should accept both that Mr Archer's loss relief claim was valid and that Mrs Archer had no liability to CGT. This proposal was considered by a Board of three Commissioners, but rejected by them on 30 July 2014. HMRC did, however, indicate that they would be minded to accept an offer under which Mrs Archer was not chargeable to CGT, but Mr Archer conceded that his loss was not allowable. The Archers were invited to submit an "improved offer" on those terms, but they declined to do so.

10. By this stage, the APN legislation had come into force, so before proceeding further I will describe its main relevant features.

The APN legislation

11. By way of a high level introduction to the subject, it is convenient to refer to the words of Arden LJ (as she then was) delivering the lead judgment of this court in the cases of R (Rowe) v Revenue and Customs Commissioners, and R (Vital Nut) v Revenue and Customs Commissioners [2017] EWCA Civ 2105, [2018] 1 WLR 3039 ("Rowe"), at [1]:

> "The object of APNs… is to change the financial benefit of tax avoidance arrangements by ending the economic benefit to taxpayers of retaining an amount equal to the disputed tax until the issue is finally determined against them (if the arrangements are ultimately held to be ineffective). APNs… thus require the persons on whom they are served… to pay disputed tax in advance of that final determination on the basis that the sums will be repayable with interest if the arrangements are held to be effective."

12. The core primary legislation is contained in sections 219 to 224 of FA 2014, which have to be read with the main definitions in sections 200 to 203. For present purposes, it is enough to refer to the following provisions:

> "**219 Circumstances in which an accelerated payment notice may be given**
>
> (1) HMRC may give a notice (an "accelerated payment notice") to a person ("P") if conditions A to C are met.
>
> (2) Condition A is that –
>
> (a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax, or
>
> (b) P has made a tax appeal (by notifying HMRC or otherwise) in relation to a relevant tax but that appeal has not yet been –
>
> (i) determined by the tribunal or court to which it is addressed, or
>
> (ii) abandoned or otherwise disposed of.
>
> (3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage ("the asserted advantage") results from particular arrangements ("the chosen arrangements").
>
> (4) Condition C is that one or more of the following requirements are met –
>
> …
>
> (b) the chosen arrangements are DOTAS arrangements;
>
> …
>
> (5) "DOTAS arrangements" means –
>
> (a) notifiable arrangements to which HMRC has allocated a reference number under section 311 of FA 2004,
>
> …
>
> **220 Content of notice given while a tax enquiry is in progress**
>
> (1) This section applies where an accelerated payment notice is given by virtue of section 219(2)(a) (notice given while a tax enquiry is in progress).

(2) The notice must –

(a) specify the paragraph or paragraphs of section 219(4) by virtue of which the notice is given,

(b) specify the payment (if any) required to be made under section 223 and the requirements of that section,

(c) explain the effect of sections 222 and 226, and of the amendments made by sections 224 and 225…

(3) 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.

(4) "The understated tax" means the additional amount that would be due and payable in respect of tax if –

…

(b) in the case of a notice given by virtue of section 219(4)(b) (cases where the DOTAS requirements are met), such adjustments were made as are required to counteract what the designated HMRC officer determines, to the best of that officer's information and belief, as the denied advantage;

…

(5) "The denied advantage" –

…

(b) in the case of a notice given by virtue of section 219(4)(b), means so much of the asserted advantage as is not a tax advantage which results from the chosen arrangements or otherwise,

…

221 Content of notice given pending an appeal

(1) This section applies where an accelerated payment notice is given by virtue of section 219(2)(b) (notice given pending an appeal).

(2) The notice must –

(a) specify the paragraph or paragraphs of section 219(4) by virtue of which the notice is given,

(b) specify the disputed tax,

> (c) explain the effect of section 222 and of the amendments made by section 224 and 225 so far as relating to the relevant tax in relation to which the accelerated payment notice is given,
>
> …
>
> (3) "The disputed tax" means so much of the amount of the charge to tax arising in consequence of –
>
> (a) the amendment or assessment of tax appealed against, or
>
> (b) where the appeal is against a conclusion stated by a closure notice, that conclusion,
>
> as a designated HMRC officer determines, to the best of the officer's information and belief, as the amount required to ensure the counteraction of what that officer so determines as the denied advantage.
>
> (4) "The denied advantage" has the same meaning as in section 220(5).
>
> …"

13. The concepts of "the understated tax" and "the disputed tax" are of central importance, because the amount so determined by the designated HMRC officer (who is in practice a senior officer: see Rowe at [13]) fixes the amount which the taxpayer is required to pay while the relevant tax enquiry or appeal is still in progress. In Rowe, this court determined that "the statutory language requires the designated officer to be positively satisfied on the information that he then has that the scheme is not effective": see [62]. It is therefore not enough "that the officer is simply not satisfied that the scheme is effective and that the taxpayer has to prove the contrary": ibid. As Arden LJ explained, at [61]:

> "The courts are entitled to approach these unusual powers on the basis that (unless the legislation clearly provides the contrary) Parliament would not confer power to serve an APN… unless there were reasonable grounds for concluding that the tax would ultimately be found to be payable. That would result in APNs… only being capable of being used in a proportionate manner when the interests of the state and of the taxpayers involved are fairly balanced. The contrary proposition would involve allowing the state arbitrarily to deprive individuals of their property, even only in anticipation of an obligation that has not yet become complete in law."

14. Apart from the positive burden thus placed on the designated HMRC officer, a further significant protection for the taxpayer is afforded by section 222, which confers a right to send written representations to HMRC objecting to the notice on the grounds that Conditions A, B or C are not met, or objecting to the amount of the accelerated payment specified. HMRC are then under a duty to consider the representations, and having done so they must either confirm the APN (with or without amendment), or withdraw it. If the notice is not withdrawn, HMRC must also determine whether a different amount of the accelerated payment ought to have been specified. Meanwhile, the taxpayer's obligation to pay the amount specified is suspended until (normally) thirty days from the day on which the taxpayer is notified of HMRC's determination under section 222.

15. The provisions of section 222 are central to the present appeal. I will quote them as they stood in late 2014, when the main events with which we are concerned took place:

> "**222 Representations about a notice**
>
> (1) This section applies where an accelerated payment notice has been given under section 219 (and not withdrawn).
>
> (2) P has 90 days beginning with the day that notice is given to send written representations to HMRC –
>
> (a) objecting to the notice on the grounds that Condition A, B or C in section 219 was not met, or
>
> (b) objecting to the amount specified in the notice under section 220(2)(b) or section 221(2)(b).
>
> (3) HMRC must consider any representations made in accordance with subsection (2).
>
> (4) Having considered the representations, HMRC must –
>
> (a) if representations were made under subsection (2)(a), determine whether –
>
> (i) to confirm the accelerated payment notice (with or without amendment), or
>
> (ii) to withdraw the accelerated payment notice, and
>
> (b) if representations were made under subsection (2)(b) (and the notice is not withdrawn under paragraph (a)), determine whether a different amount ought to have been specified under section 220(2)(b) or section 221(2)(b), and then –
>
> (i) confirm the amount specified in the notice, or
>
> (ii) amend the notice to specify a different amount,
>
> and notify P accordingly."

16. There is no fixed period within which HMRC must fulfil their duty to consider representations made to them under section 222, but it is common ground that HMRC must do so within a reasonable time, although (as Green J observed in the court below) "what will be reasonable will of course be highly fact and context specific": see [2018] EWHC 695 (Admin), at [24].

17. Some further initial points are also worth making, although at this stage on a provisional basis, about the taxpayer's right to make representations under section 222. First, the taxpayer is given a generous period of approximately three months within which to send his written representations to HMRC. This no doubt reflects the potential complexity of the underlying arrangements which may be in issue, and the need to give the taxpayer an opportunity to seek professional advice. I think it may also reflect the significance of the constitutional issues to which Arden LJ drew attention in Rowe, and the potentially harsh consequences of an APN at a time when the taxpayer's liability to the tax in question has yet to be determined through the usual machinery of agreement or an appeal against a closure notice or assessment to the First-tier Tribunal ("the FTT"). Secondly, it is a striking and controversial feature of the APN legislation that it confers no statutory right of appeal from the giving of an APN, with the consequence that the only way in which an APN may be challenged in legal proceedings is by an application for judicial review. Bearing in mind the well-established principles (to which I will need to return) that judicial review is a remedy of last resort, to which recourse should normally be had only where there is no available alternative remedy, Parliament is likely to have intended that a taxpayer who wished to challenge an APN should (where possible) first exercise his right to make representations under section 222. Indeed, the ninety day period allowed for that purpose is very similar to the maximum time limit of three months from the decision complained of within which a claim for judicial review must normally be made. Thirdly, the practical importance of the section 222 procedure should encourage the court to adopt a broad and non-technical approach to the permitted grounds of objection, with the object of ensuring as far as reasonably possible that all objections relating to the applicability of Conditions A, B or C, or to the amount of the understated tax, should be capable of resolution under the section. Finally, as I have already pointed out, the taxpayer normally has nothing to lose by making use of the procedure, because the accelerated payment does not have to be made until thirty days after notification of HMRC's determination under the section: see the definition of "the payment period" in section 223(5), quoted below.

18. I will now set out the relevant provisions of section 223, again as they stood in late 2014, before certain amendments were made which took effect form 26 March 2015:

> "**223 Effect of notice given while tax enquiry is in progress**
>
> (1) This section applies where an accelerated payment notice is given by virtue of section 219(2)(a) (notice given while a tax enquiry is in progress) (and not withdrawn).
>
> (2) P must make a payment ("the accelerated payment") to HMRC of the amount specified in the notice in accordance with section 220(2)(b).

> (3) The accelerated payment is to be treated as a payment on account of the understated tax (see section 220).
>
> (4) The accelerated payment must be made before the end of the payment period.
>
> (5) "The payment period" means –
>
> (a) if P made no representations under section 222, the period of 90 days beginning with the day on which the accelerated payment notice is given, and
>
> (b) if P made such representations, whichever of the following periods ends later –
>
> (i) the 90 day period mentioned in paragraph (a);
>
> (ii) the period of 30 days beginning with the day on which P is notified under section 222 of HMRC's determination.
>
> …"

19. Sections 224 and 225 then contain important provisions which restrict the normal powers to postpone the payment of tax pending an appeal in sections 55 and 56 of the Taxes Management Act 1970 ("TMA 1970"). In particular, the amendments made to section 55 of TMA 1970 prevent any postponement of payment of the understated tax specified in an APN which has been given and not withdrawn, pending the determination of an initial appeal to the FTT.

20. Section 226 imposes penalties for failure to pay an accelerated payment before the end of the payment period. The initial penalty is 5% of the amount of the accelerated payment, with further penalties of the same amount becoming payable if the accelerated payment remains unpaid after 5 and 11 months respectively.

21. Finally, section 227 deals with the withdrawal of an APN. By virtue of subsection (2):

> "Where an accelerated payment notice has been given, HMRC may, at any time, by notice given to P –
>
> (a) withdraw the notice,
>
> …"

Subsection (12) then provides that:

> "Where an accelerated payment notice is withdrawn, it is to be treated as never having had effect (and any accelerated payment made in accordance with, or penalties paid by virtues of, the notice are to be repaid)."

Events from August 2014 onwards

22. I can now pick up the history of events from August 2014.

23. On 22 August 2014, HMRC sent a precursor letter to Mr Archer to inform him that an APN would soon be issued to him arising from his use of the certificates of deposit tax scheme in 2005/06. The letter gave the DOTAS reference number of the scheme, and told Mr Archer that once he received the APN he would be legally required to pay the amount shown in it within ninety days, although "[t]hat date may change if you make representations objecting to the notice".

24. On 19 September 2014, HMRC wrote again to Mr Archer, enclosing the APN addressed to him. Copies of the covering letter and the notice were also sent to KPMG. The APN was headed "Notice for the year ended 5 April 2006". It informed Mr Archer that the amount due in respect of the notice was £6,042,410, payable on or before 22 December 2014, but that "[p]ayment may be due on a later date if representations are made under section 222 of the Finance Act 2014". Particulars of the certificates of deposit scheme were then set out, and the APN was said to be given under section 219(4)(b) of FA 2014 on the footing that the following conditions had been met: a tax enquiry was in progress into Mr Archer's self assessment tax return for 2005/06, the return was made on the basis that a tax advantage resulted from the chosen scheme arrangements, and the arrangements were DOTAS arrangements. Although conditions A, B and C in section 219 were not referred to as such, the conditions relied upon were set out with separate bullet points and appropriate references were given to section 219(2)(a), (3) and (4)(b) respectively. The notice then stated that the amount of the accelerated payment was determined by virtue of section 219(4)(b) – which appears to have been an error for section 220(4)(b) – and that it was to be treated as a payment on account of "the understated tax" as defined by section 220(4), being "the additional amount which would be due and payable in respect of tax in accordance with our view of the effect of the DOTAS arrangements."

25. The remainder of the notice told Mr Archer that he had no right to apply to HMRC or to a tribunal to postpone the payment of any understated tax, and that he would be liable to penalties for not paying on time, but (under the heading "What to do if you disagree this notice") that under section 222 of FA 2014 he could:

> "make representations to us objecting to the notice and/or the amount of the accelerated payment if you believe that one or both of the following applies:
>
> - One or more of the conditions shown earlier in this notice for issuing this notice have not been met
>
> - The amount shown on the notice is not correct – if this is the case you will need to tell us what you think the correct amount is and why

> If you want to make representations, you need to write to us to let us know what they are. You need to make sure that we receive your letter no later than 22 December 2014.
>
> We will then consider your representations and let you know our decision. If you make representations in relation to the conditions for issuing the notice we will either confirm this notice, (with or without amendment), or withdraw it. If you make representations about the amount specified in this notice, we will decide whether a different amount should have been specified and then either confirm the amount specified in this notice, or amend the notice to specify a different amount."

Finally, Mr Archer was informed that if he made representations before the date the payment was due, and the notice was not withdrawn, payment would then be due on or before the later of the original payment date or "30 days after the date on which we notify you of our decision in respect of your representations".

26. It can be seen, therefore, that both Mr Archer and KPMG were given appropriate notice of Mr Archer's right to make representations under section 222, both in relation to the conditions for issue of the notice and the amount of the accelerated payment, and were informed that the payment date would be extended if the representations did not result in withdrawal of the notice.

27. On the same day, 19 September 2014, HMRC sent a precursor letter to Mrs Archer. This was in materially similar terms to the letter previously sent to Mr Archer, and was copied to KPMG. It was then followed, on 4 November 2014, by a further letter enclosing the APN given to Mrs Archer. The APN was in materially identical terms to that given to Mr Archer, except that the amount due was stated to be £6,116,598.95, and the specified date for payment was on or before 5 February 2015. An attached computation explained how the amount said to be due from Mrs Archer had been calculated, on the basis of a chargeable gain of £15.3 million and an annual exempt allowance of £8,500, chargeable to tax at 40% and then rather mysteriously "rounded down" to the anything but round figure shown on the notice.

28. Mr and Mrs Archer's response to the APNs came less than four weeks later. On 28 November 2014, the legal services department of KPMG wrote on their behalf to HMRC saying that they would "shortly be applying for permission to judicially review HMRC's decisions" to issue APNs to Mrs Archer (the first applicant) and Mr Archer (the second applicant). Copies were enclosed of the statement of facts and statement of grounds upon which they intended to rely on the application for judicial review. The letter continued:

> "For the reasons given, we consider the APNs have been issued without HMRC having power lawfully to do so. If, on reflection, HMRC agrees with our analysis and is willing to withdraw the notices using the power to so in s.227 Finance Act 2014, or otherwise, we should be grateful if you would let us know as soon as possible. Pending that, we intend to proceed to issue the application given that time is running against our clients."

The writer then said that he would send HMRC a sealed copy of the claim form when the application had been issued. In fact, the claim form was issued the same day in the Administrative Court, although it was not served on HMRC until 2 December 2014.

29. The statement of facts and detailed statement of grounds which accompanied the claim form were settled for Mr and Mrs Archer by leading counsel instructed on their behalf, Mr David Goldberg QC.

30. The statement of grounds begins with a summary, in which it is alleged that the APNs were issued by HMRC outside their statutory powers for the following four reasons:

> "(i) on a proper interpretation of the legislation, HMRC are not allowed to issue the notices in cases of genuine dispute;
>
> (ii) the designated officer issuing the notices is required to determine the amount which is correctly payable "to the best of that officer's information and belief" and in the circumstances the officer cannot have reached such a determination in these cases;
>
> (iii) in Mrs Archer's case, she has not asserted any "tax advantage" nor met any of the other conditions, and accordingly the statutory conditions for HMRC to be able to issue an accelerated payment notice to her are not met;
>
> (iv) as shown by the issue of accelerated payment notices to both Mrs Archer and Mr Archer, the true purpose of HMRC's actions is not to enforce payment of a sum properly due to HMRC, but to impose a threat which will be regarded as so intimidating that it forces payment to HMRC of a sum which is not or, at least, may not be, properly due to them."

31. These contentions were then elaborated over several pages. Since we are primarily concerned with the APN issued to Mrs Archer, I will concentrate on the arguments which related specifically to her position. In section 5.1, the point that there was a "genuine dispute" in her case was said to be "particularly clear", and explained as follows:

> "There is no tax due from Mrs Archer to HMRC. The suggestion that she owes capital gains tax is fanciful: she does not. And, in any event, Mrs Archer did not use DOTAS arrangements and has not claimed or asserted a tax advantage. Accordingly (but without limitation) the requirements of Finance Act 2014 s.219(1), (3) and (4)(b) are not met and there is no question of HMRC being properly able to issue an APN to her: the APN has been issued without HMRC having the power to issue it. Moreover, there is no amount which can be determined as payable pursuant to an APN, because there is no "asserted advantage" which can be determined not to be a tax advantage

> resulting from the chosen arrangements, and indeed in Mrs Archer's case there are no "chosen arrangements"."

32. The contention that "Mrs Archer did not use DOTAS arrangements" appears a strange one, at any rate without fuller explanation, given her involvement as "Mrs X" in the DOTAS notification made by KPMG (which was not included in the papers before the judge, or in our appeal bundles, but was supplied to us at our request after the hearing). Further, while it may technically be true that Mrs Archer had "not claimed or asserted a tax advantage", it is far from obvious to me that Conditions A, B and C were not potentially capable of satisfaction in her case, on the basis that:

> (a) a tax enquiry was in progress in relation to her 2005/06 tax return;
>
> (b) her return was made on the basis that "the chosen arrangements" had the result that she was subject to no liability to either income tax or CGT arising from her disposal of the option to the bank; and
>
> (c) the chosen arrangements were DOTAS arrangements to which HMRC had allocated a reference number.

33. Be all that as it may, KPMG's next step on the Archers' behalf was to make representations under section 222 of FA 2014, but not to do so until two weeks after service of the judicial review claim form. The representations were made in a short letter dated 17 December 2014, which said that in Mrs Archer's case none of Conditions A, B or C was met in respect of her APN, while in the case of both Mr and Mrs Archer, objection was made to the amount specified under section 220(2)(b). The letter continued:

> "Our representations are made on the same basis as the application for the judicial review…, namely that we consider the APNs to have been issued without HMRC having power lawfully to do so, and we append a copy of the sealed Claim Form, statement of facts and detailed statement of grounds for ease of reference."

The letter ended with a proposal, "[a]s an alternative to expensive and protracted judicial review proceedings", that the parties should agree that there be a stay on the proceedings provided that HMRC did not confirm the APNs, so that they would not become payable, and HMRC should instead issue a closure notice so that an appeal could be made to the FTT. If adopted for both Mr and Mrs Archer, this proposal would of course have nullified the effect of the APN procedure, and left the normal appeal machinery to follow its usual course.

34. On 22 December 2014, HMRC Solicitor's Office wrote to KPMG, saying that HMRC had decided to withdraw the APN issued to Mrs Archer. The reasons given for this decision were:

> "Where both spouses play a part in avoidance arrangements, as in the case of your clients, best practice requires that all the

> circumstances of those arrangements including the involvement of both spouses should be considered before approval is given for the issuing of notices to both. In this case, my clients regret that best practice was not followed.
>
> Having now considered all the circumstances of your clients' arrangements, HMRC have decided to withdraw the notice issued to Mrs Archer.
>
> Please note that the notice is withdrawn without prejudice to HMRC's position that Mrs Archer is liable to tax in respect of her involvement in the Certificates of Deposit Scheme (DOTAS reference 74201516)."

35. The "best practice" referred to in this letter does not appear to have been contained in any published guidance, nor was its nature explained in HMRC's summary grounds of defence in the judicial review proceedings, settled by leading and junior counsel, which were filed and served on 23 December 2014, the day on which the APN issued to Mrs Archer was actually withdrawn. Instead, the grounds of defence merely recorded that Mrs Archer's APN had been withdrawn, with the result that her judicial review claim was no longer relevant. The grounds therefore addressed only the substantive grounds of Mr Archer's claim, while also explaining why HMRC considered both claims to have been premature, and giving an indication of HMRC's technical grounds for considering that not only was Mr Archer's claim to loss relief ineffective, but Mrs Archer was chargeable to CGT on the entire consideration received by her from the disposal of the option. The arguments in relation to Mrs Archer's CGT liability had evidently moved on from the optimistic assertion in the DOTAS notification, with the dispute now focusing on her base cost in respect of the option, and the question whether the certificates of deposit were within the exemption for "qualifying corporate bonds" in section 115 of TCGA 1992. We heard no argument on any of those points, and I express no view on the merits of Mrs Archer's case which has in any event now been settled: see [37] below.

36. More relevantly for present purposes, HMRC's grounds of defence submitted that:

> (a) there had been no compliance with the pre-action protocol for judicial review by either of the claimants, because KPMG's letter of 28 November 2014 did not purport to comply with it and was in any event written on the date the claim form was issued; and
>
> (b) both claims were premature, because the Archers had not exhausted their statutory remedies under section 222 of FA 2014.

The remainder of the grounds then addressed Mr Archer's grounds of challenge, to the extent that they fell outside (or arguably fell outside) the scope of any permissible representations under section 222.

37. Further correspondence ensued in relation to Mr Archer's claim, which it is unnecessary to trace. He was initially refused permission to apply for judicial review by Mitting J,

but on 28 July 2015 he was granted permission by Patten LJ. The matter never proceeded to a substantive hearing, however, because HMRC then issued a closure notice to Mr Archer and he paid all of the tax in dispute, thereby abandoning his loss relief claim and paying all the tax which he had sought to avoid. We were also informed that Mrs Archer's liability to CGT has subsequently been settled by an agreement under section 54 of TMA 1970.

Mr and Mrs Archer's application to the Administrative Court for their costs of the judicial review proceedings

38. Following inconclusive discussions between KPMG and HMRC in relation to the costs of the judicial review proceedings, on 29 March 2017 Mr and Mrs Archer made an application to the Administrative Court for their costs. The application was supported by written submissions for the Archers, settled by junior counsel (Mr Conrad McDonnell) who has subsequently appeared for Mrs Archer on the appeals to Green J and this court, to which HMRC Solicitor's Office responded on 5 April 2017. The application was dealt with on the papers, without a hearing, by Master Gidden. On 12 June 2017, he made no order as to costs in relation to each judicial review claim. Before I rehearse his reasons for so concluding in relation to Mrs Archer's claim (there being no appeal in relation to his decision on Mr Archer's claim), I will first summarise the gist of the parties' written submissions.

39. On behalf of the Archers, it was submitted that HMRC should pay their whole costs of the judicial review. It was argued that Mrs Archer had been fully successful in her claim, and the court was invited to infer from HMRC's letter of 22 December 2014 that, in reality, HMRC must by then have concluded they had no reasonable defence to her claim for judicial review. Consistently with this, HMRC's summary grounds of defence, served on the following day, responded only to Mr Archer's claim. Further, Mrs Archer had to issue her claim in order to achieve this outcome, and there was no alternative remedy for her. Indeed, it was necessary for both Mr and Mrs Archer to issue their claim jointly, "since their principal argument was that an APN could not lawfully and properly be issued in both of their cases, so that one or other, or both, of the APNs had to have been unlawfully issued."

40. In support of the argument that section 222 of FA 2014 did not provide either of the Archers with an adequate alternative remedy, it was said that representations made under the section amounted to no more than a request to HMRC to reconsider their original decision, and there was "every likelihood that they would decide to confirm the APNs, in response to any representations made". Further, the taxpayer has no power of compulsion governing the content or timing of HMRC's response, and the only form of legal redress if HMRC get it wrong remains judicial review. Since the time for bringing a claim for judicial review runs from the date of the original decision, and since HMRC may take many months to respond to representations, it follows that even if representations could in principle provide an alternative remedy, a taxpayer who makes them must also issue a claim form for judicial review promptly and within three months of the original issue of the APN, so as to comply with the strict time limits for bringing a judicial review claim in CPR 54.5(1).

41. Under the heading "Abbreviated Pre-Action Protocol", the Archers then submitted that KPMG's letter sent to HMRC by fax on the morning of 28 November 2014 amounted to a pre-action letter, to which no response had been received when the claim form was

served on 2 December 2014. Even if HMRC had been offered fourteen days to respond to the letter, they did not withdraw the APN in Mrs Archer's case or provide any other substantive response within that period. When HMRC's response eventually came on 22 December 2014, it said that Mrs Archer's APN would be withdrawn.

42. It was further argued that Mr and Mrs Archer had to act jointly, because of the alleged unfairness of issuing APNs to each of them effectively demanding payment on account twice, with the consequence that time ran from 19 September 2014, and if the Archers had waited fourteen days from 28 November 2014 before issuing their claim form, they could not have issued it until Monday 15 December, which would have been "perilously close" to expiry of the three month period for judicial review, and would have run the risk of the court holding that they had not issued their claim "promptly" as required by CPR 54.5(1)(a). In those circumstances, the correct course was for the Archers to issue their claim immediately, and not to await a response from HMRC under the protocol. Reference was made to the notes in the White Book at paragraph 54.5.1, and to R (Finn-Kelcey) v Milton Keynes Borough Council [2008] EWCA Civ 1067, [2009] Env. L. R. 17, at [27].

43. HMRC's submissions in response included the following points:

(1) Neither claimant made written representations to HMRC under section 222 during the periods of 70 days (in Mr Archer's case) and 24 days (in Mrs Archer's case) which ran from the date of issue of the relevant APN to the date of issue of the judicial review claim.

(2) The reformulated basis of the judicial review claim was significantly different from the grounds originally pleaded, where the emphasis had been that HMRC were not permitted to issue APNs in cases of genuine dispute.

(3) Mrs Archer did not need to issue the claim in order to achieve the withdrawal of her APN. She could have made representations under section 222 earlier than she did, and more importantly she failed to issue a pre-action protocol letter before issuing her claim.

(4) The letter faxed by KPMG to HMRC on Friday 28 November 2014 gave HMRC little more than one working day to respond before it was effectively superseded by service of the claim form on the morning of Tuesday 2 December 2014. HMRC then had 21 days within which to file their acknowledgment of service, including a summary of their grounds for contesting their claim.

44. I now turn to the Master's reasons for deciding to make no order as to costs in relation to Mrs Archer's claim. He began by holding that HMRC's decision to withdraw her APN because "best practice was not followed" meant that the outcome of the claim had to be placed in the first category of case identified in M v Croydon London Borough Council [2012] EWCA Civ 595, [2012] LGR 822, that is to say "a case where a claimant has been wholly successful following a contested hearing or pursuant to a settlement", and where "it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary": see the judgment of Lord Neuberger MR at [60] and [61]. There is no challenge to this part of the Master's decision.

45. The Master continued:

"The next question to consider is whether there is good reason to make a different order. [*HMRC*] argues that the issue of proceedings for judicial review was premature because representations in response to the APN were not forthcoming until almost three weeks after the issue of the claim. As the effect of these was to require [*HMRC*] to either confirm or withdraw the APN the submission of representations was therefore a clear alternative step for the Claimant and one which had not been taken at the time the claim was issued. The Claimant disagrees but no clear explanation for this has been given other than submissions which suggest the Claimants had limited confidence in the process of representations as an alternative remedy. However, it is significant that these submissions do appear to accept that only after consideration of representations and a decision by [*HMRC*] to confirm or withdraw the APN could judicial review be "the only form of legal redress", i.e. a remedy of last resort.

On balance I am not persuaded that the issue of a claim at the material time was justified. The Claimants points to a desire to act promptly but this virtue by itself should not override all other considerations and whether a claim for judicial review was at this stage truly a last resort, as it should be, is of course a matter of judgment and one to be reached taking into account all of the circumstances. On any objective analysis it would seem that there was at the point of issue a very significant potential for the situation to be resolved without the additional upheaval and cost of proceedings; an alternative course to litigation had still to be played out as events in the following three weeks swiftly demonstrated. By this time the dispute had been running many years and the relationship between what were clearly two very well-resourced parties was a well-established one. Progress between them was clearly ongoing and at an advanced stage as both parties must have realised. In this context the lawyers involved were under a heavy obligation to resort to litigation only if it was really unavoidable.

To my mind the force of the guidance and obligations identified in *R (Cowl) v Plymouth City Council* [2001] EWCA Civ 1935 are very much underlined by the extraordinary amount of costs that were subsequently generated overall in this case; even without any advanced preparations for trial the combined Claimants' costs alone are said to amount to approximately £601,557.20.

I have considered the parties' submissions very carefully and taking all the circumstances into account I am not persuaded that the issue of the claim was at the material time justified. In consequence, and balancing the various factors fairly in the

> scale, I consider the most appropriate outcome here is that there should be no order for costs."

46. It can be seen, therefore, that the main factors which, taken together, persuaded the Master to depart from the general rule and make no order as to Mrs Archer's costs were:

> (a) the commencement of judicial review proceedings was premature, given her failure to take the "clear alternative step" of making representations under section 222;
>
> (b) there was objectively "a very significant potential" for the dispute to be resolved without resort to litigation;
>
> (c) the fact that the parties had been involved in negotiations for many years, which were "clearly ongoing and at an advanced stage"; and
>
> (d) the guidance given by this court (Lord Woolf CJ, sitting with Mummery and Buxton LJJ) in the Cowl case.

47. Since Cowl is one of the cases upon which HMRC principally rely, and since the Master expressly referred to it, it is convenient at this stage to set out some of the guidance given in the judgment of the court delivered by Lord Woolf CJ. The question was whether it had been appropriate to initiate judicial review proceedings in relation to a decision taken by Plymouth City Council to close a residential care home. The claimants, who were residents of the home, sought to have the closure decision quashed, and an order requiring Plymouth to conduct a proper assessment of their needs and care plans. Plymouth's response to the application had been positive, and included a statement of willingness to put the complaint before an independently chaired panel, which would consider written and oral submissions made by or on behalf of the residents. Although not strictly binding on the local authority, Plymouth said it was conscious of the need to give sufficient weight to the panel's conclusions, and to the consequences of not doing so: see the judgment at [9].

48. The court began its judgment by saying:

> "1. The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible. Particularly in the case of these disputes both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress."

49. The court then said, at [14], in a passage upon which Mr David Yates QC for HMRC places particular reliance:

> "It appears that one reason why the wheels of the litigation may have continued to roll is that both parties were under the impression that unless they agreed otherwise the claimants were *entitled* to proceed with their application for judicial review unless the complaints procedure on offer technically constituted an "alternative remedy" which would fulfil all the functions of judicial review. This is too narrow an approach to adopt when considering whether an application to judicial review should be stayed. The parties do not today, under the Civil Procedure Rules, have a right to have a resolution of their respective contentions by judicial review in the absence of an alternative procedure which would cover exactly the same ground as judicial review. The courts should not permit, except for good reason, proceedings for judicial review to proceed if a significant part of the issues between the parties could be resolved outside the litigation process. The disadvantages of doing so are limited. If subsequently it becomes apparent that there is a legal issue to be resolved, that can thereafter be examined by the courts which may be considerably assisted by the findings made by the complaints panel."

50. After considering, and rejecting, ten reasons advanced by the claimants for saying that the complaints procedure was not a suitable alternative remedy to judicial review, the court concluded at [27]:

> "This case will have served some purpose if it makes it clear that the lawyers acting on both sides of a dispute of this sort are under a heavy obligation to resort to litigation only if it is really unavoidable. If they cannot resolve the whole of the dispute by the use of the complaints procedure they should resolve the dispute so far as is practicable without involving litigation. At least in this way some of the expense and delay will be avoided."

Mrs Archer's appeal to the High Court

51. Mrs Archer's appeal to the High Court against the Master's decision on her costs was heard by Green J (as he then was) on 6 March 2018. The parties were represented, as they have been before us, by Mr McDonnell for Mrs Archer and Mr Yates for HMRC. In his reserved judgment, handed down on 28 March 2018, the judge dismissed Mrs Archer's appeal. He acknowledged, at [4], "that whilst at first blush the issue might appear straightforward even light excavation reveals a series of complications which flow from the analysis". Nevertheless, his end conclusion was that the Master did not err, having "correctly concluded that it was premature to commence judicial review proceedings pending the exercise of the statutory right to make representations and a decision thereupon by HMRC": see [5]. Furthermore, in so far as the Master's ruling was based upon conclusions about Mrs Archer's conduct, this amounted to an exercise of discretion which the judge said he would not wish to disturb: see [3].

52. After summarising the factual history and describing the relevant legislation relating to APNs, the judge noted at [28] to [29] that the "nature, extent and legality of the APN system has now been considered by the courts upon a number of occasions in judicial review proceedings, but none of the challenges had been successful. Apart from Rowe, the cases to which the judge referred were R (Walapu) v HMRC [2016] EWHC 658 (Admin), R (Dickinson) v HMRC [2017] EWHC 1705 (Admin), [2017] 4 WLR 126, and the decisions of the High Court and this court in relation to what the judge called a "similar regime for countering tax avoidance also requiring payments on account of tax", under the Finance Act 2015 ("FA 2015"), in R (Glencore Energy UK Ltd) v HMRC [2017] EWHC 1476 (Admin), [2017] STC 1824, approved on appeal at [2017] EWCA Civ 1716, [2017] 4 WLR 213. As the judge said at [29], the main challenges in Rowe and in Walapu were on general public law grounds, including the alleged incompatibility of the APN system under the Human Rights Act 1998 and breaches of the principles of legitimate expectation, natural justice and fairness.

53. Turning to Mrs Archer's claim for costs, the judge recognised at [30] that there was some disagreement whether her arguments could all be brought within the scope of section 222 as being matters about which representations could be made. Regardless of how the arguments were to be classified for section 222 purposes, however, he thought it "clear that HMRC did, in substance, concede the merits of Mrs Archer's arguments and accordingly withdrew the APN": see [31]. He also noted, at [32], that although the appeal was concerned only with Mrs Archer's claim for costs, they nevertheless exceeded £265,000.

54. After quoting from the Master's judgment, the judge recorded the parties' submissions to him at [34] to [39]. For HMRC, Mr Yates argued that there were two strands to the Master's decision, on each of which he had been correct. The first was Mrs Archer's unjustified litigation conduct, while the second was "the point of principle about the procedure under section 222 amounting to an adequate alternative remedy". On behalf of Mrs Archer, Mr McDonnell took issue with the point of principle, for reasons which he elaborated orally (see [35]):

> "In oral submissions he argued that the conclusion that the Claim was premature because of section 222 was incorrect and failed to take account of the fact that the section 222 procedure had many inherent limitations: the review was entirely optional and not a mandatory part of the assessment system; the subject matter of representations was statutorily limited; there was no duty on HMRC to accede to arguments, even if compelling; HMRC was neither impartial nor independent in its own cause and was inherently likely to uphold its own prior assessment and conclusions; there was no time limit governing any new decision by HMRC; and the procedure was not linked to any immediate right of statutory appeal. Mr McDonnell argued that in consequence it was entirely appropriate for [*Mrs Archer*] to have issued the Claim Form as a protective measure. There could be no certainty that if she had awaited the outcome of the section 222 procedure that HMRC (or even a court of its own motion) might not say that there had been fatal delay and that it was inappropriate to exercise discretion in favour of allowing the

> claim to proceed. As a matter of practice issuing the Claim Form and then seeking a consensual stay pending a section 222 procedure was the sensible and pragmatic course and was in accordance with established practice and case law."

55. I note in passing that, in his skeleton argument for the hearing before Green J, Mr McDonnell had used vivid language in attacking the proposition that section 222 provided an alternative remedy which should be pursued before seeking judicial review. He described this as an "extraordinary and dangerous" suggestion, and submitted that "it was improper, incorrect, and irrational, for Master Gidden to speculate that the issues between Mrs Archer and HMRC might have been resolved without litigation": see paragraph 62 and 63 of that document.

56. Returning to Green J's judgment, he then cited substantial extracts from the judgment of Hickinbottom J (as he then was) in a case upon which Mr McDonnell placed considerable reliance, R (Zahid) v University of Manchester and Others [2017] EWHC 188 (Admin). In that case, a student had a complaint against her university. Having exhausted the internal complaints machinery, she could have begun legal proceedings, but also had the right to refer the matter to the Office of the Independent Adjudicator for Higher Education ("the OIA"). That body could review the complaint and decide whether it was wholly or partly justified, in which case it could make non-binding recommendations. The claimant made a reference to the OIA, but also sought judicial review of the relevant decision. She then sought a stay of the judicial review proceedings, to allow the reference to the OIA to run its course.

57. In deciding that a stay should be granted, Hickinbottom J reviewed the authorities on judicial review as a remedy of last resort and alternative remedies at [50] to [68]. He referred with approval to Cowl, while noting at [65] that in the Administrative Court "it appears to be a largely forgotten authority, perhaps because… ADR is regarded as inappropriate for many public law claims." One of the passages quoted by Green J was from Zahid at [52], where Hickinbottom J said:

> "… there is no hard-edged question concerning jurisdiction, but rather the exercise of discretion on the basis of the circumstances of the particular case. In deciding whether to exercise restraint in the face of an alternative remedy, the court will consider the potential for the alternative to provide a means of redress, taking into account relative convenience, expedition, cost and effectiveness; and exercise its judgment to determine whether the alternative remedy is more suitable, so that the court proceedings should be dismissed, or at least stayed, to allow it to proceed to a conclusion."

58. In the remainder of his judgment, under the heading "Analysis and Conclusion", Green J gave his reasons for concluding that the Master had been right to hold that section 222 provided an appropriate alternative remedy which the taxpayer could (and should) exhaust before beginning judicial review proceedings.

59. First, the judge considered that section 222 "is part of a single composite procedure for determining the APN amount": see [41] to [42]. Before that composite procedure has been completed, "the sum to be paid is a moving target". In the light of the APN and the information contained in it, section 222 enables the taxpayer to "continue a dialogue with HMRC in order to arrive at a definitive liability." It was Parliament's intention that all of a taxpayer's representations should have been taken into account before the composite two-part procedure was finalised, and it is only at the end of that process that the taxpayer must make a payment on account of tax.

60. Secondly, there are advantages in this being the position. Until completion of the section 222 procedure, the figure to be paid on account is "inchoate", and a prior claim for judicial review "might well become stale in short order": [43]. Nor is the appropriate solution to allow the taxpayer to begin judicial review proceedings, but then seek a stay pending the section 222 procedure, following the guidance in Zahid. That would be "a cumbersome answer", which would encourage litigation and expenditure of costs, quite possibly for no good reason. The situation analysed by the court in Zahid is very different from the two-stage statutory procedure applicable to APNs: ibid.

61. Third, there are concerns about legal certainty raised by Mr McDonnell. Unless proceedings are issued within three months of receipt of the first APN, there can be no certainty that a judicial review will be in time, and the taxpayer may find himself having to rely on a judicial discretion to extend time. Green J acknowledged "some force in this argument", but said at [44] that the concern falls away if it is made clear that:

> "(i) ordinarily the taxpayer should await the outcome of the section 222 procedure so that the final position was known before applying for permission; and (ii), HMRC could not ordinarily argue that any such application for permission to apply for judicial review was tardy or late or out of time; and (iii), in the (most unlikely) event that a court was nonetheless called upon to exercise its discretion to extend time that it should ordinarily do so."

In the judge's view, "these three points serve to extract the sting from the legal certainty complaint": ibid.

62. Fourth, the judge dealt with the scope of representations which could be made under section 222. After reviewing passages from the judgments in Walapu, Rowe and Glencore, the judge noted that HMRC recognised that they have a free-standing obligation to consider formal submissions from a taxpayer about his liability to tax, quite apart from the machinery of section 222. The right to make representations under that section "objecting to the amount specified in the notice" should in any event be given a broad interpretation, and could extend to non-computational matters which bear upon the amount to be paid: see [45] to [50].

63. The judge then stated his conclusion on this point, at [51]:

> "My conclusion on this is therefore that section 222 must be construed broadly and it should be rare that any representation made by a taxpayer about the APN could fall outside of the ambit of that provision. But if it did then section 222 is supplemented

> by the broader common law and HMRC's general acceptance in *Glencore* that it should deal in good faith with proper representations made to it by taxpayers. Insofar as there is any daylight between section 222 and the arguments a taxpayer wishes to advance HMRC's general position should plug that lacuna."

64. Fifth, the judge found support for his conclusions in the case of Glencore, upon which HMRC relied. Green J had given the judgment at first instance in that case. On the appeal to this court, the leading judgment was delivered by Sales LJ (as he then was). Singh LJ delivered a short concurring judgment, and Gloster LJ agreed with both judgments. The case concerned a new tax, Diverted Profits Tax ("DPT"), which was introduced by Part 3 of FA 2015 ("FA 2015") with effect from 1 April 2015. As Sales LJ explained, at [8]:

> "DPT is a tax introduced to counter the use of aggressive tax planning deployed by multinational corporate groups to divert profits which would otherwise have been subject to corporation tax in the UK away from the UK to low tax jurisdictions, thereby eroding the UK tax base. The tax becomes chargeable in relation to "taxable diverted profits" arising to a company in a relevant accounting period (section 77) under certain conditions, in an amount calculated by comparing the UK tax payable in relation to the arrangements which result in the diversion of profits with the notional tax payable in the UK if they had not been diverted. The assessment of whether the relevant conditions exist and the elaboration of the counterfactual scenario to work out the notional tax payable (i.e. the tax which would have been payable had a "relevant alternative provision" been in place between relevant parties: see section 82) can involve considerable complexity."

65. The statutory procedure devised to deal with this complex subject matter was helpfully summarised by Sales LJ at the beginning of his judgment:

> "2. The FA 2015 makes detailed provision for the procedures to be followed when the respondent commissioners ("HMRC") consider whether to make a charge to DPT and then after they issue a charging notice setting out DPT which they say is due to be paid in respect of an accounting period. A designated officer of HMRC must first issue a preliminary notice within 24 months after the end of the relevant accounting period setting out the tax which she has reason to believe is due. The taxpayer has 30 days in which to make representations and the designated officer has 30 days in which to consider those representations and decide whether to issue a charging notice for DPT and if so in what amount. The taxpayer is obliged to pay the tax set out in the

> charging notice within 30 days thereafter. The designated officer is then obliged to review the case and the charge to DPT in the following period of 12 months ("the review period"), and may issue an amending notice to reduce the DPT or a supplementary notice to increase the DPT assessed to be due. The taxpayer has 30 days from the end of the review period to institute an appeal to the FTT. There is no right of appeal before that point. The appeal is, like other tax appeals, a full merits appeal on the law and the facts. If the taxpayer succeeds on an appeal, it will have been out of its money during the period of the review and the appeal, but the amount of the tax will be repaid with interest."

66. The principal issue which the court had to determine was whether the taxpayer company, to which a charging notice to DPT had been issued under section 95 of FA 2015, had suitable alternative remedies available to it in the form of the statutory review provided for by section 101, together with the statutory right of appeal to the FTT within thirty days after the end of the review period under section 102, before (as it did) commencing judicial review proceedings to challenge the charging notice. In agreement with Green J, this court held that the application for judicial review should be dismissed on the grounds that a suitable alternative remedy was available: see the judgment of Sales LJ at [98].

67. As Green J pointed out in his judgment in the present case at [53], there are "some significant differences" between the procedure relating to DPT in FA 2015 and the regime relating to APNs in FA 2014:

> "(i) in *Glencore* there was an automatic statutory right of review which followed issuance of the notice to pay whereas under section 222 the review is optional at the behest of the taxpayer;
>
> (ii) in *Glencore* the review was time limited and HMRC had to respond within a fixed period of time whereas in section 222 there is no time limit for a determination by HMRC; and
>
> (iii), in *Glencore* there was a statutory right of appeal to the First-tier Tribunal upon expiry of the review period whereas there is no equivalent immediate right of appeal under the FA 2014."

To these, I would add that under the DPT regime the tax charged is not postponed during the review period, whereas under the APN regime it is.

68. The judge went on to cite extensive extracts from the judgments in Glencore. I will content myself with reproducing two paragraphs from Sales LJ's discussion of the "suitable alternative remedy principle", which appear to me most germane to the present case:

> "55. In my view, the principle is based on the fact that judicial review in the High Court is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure

> is suitable to achieve that objective. However, since it is a matter of discretion for the court, where it is clear that a public authority is acting in defiance of the rule of law the High Court will be prepared to exercise its jurisdiction then and there without waiting for some other remedial process to take its course. Also, in considering what should be taken to qualify as a suitable alternative remedy, the court should have regard to the provision which Parliament has made to cater for the usual sort of case in terms of the procedures and remedies which have been established to deal with it. If Parliament has made it clear by its legislation that a particular sort of procedure or remedy is in its view appropriate to deal with a standard case, the court should be slow to conclude in its discretion that the public interest is so pressing that it ought to intervene to exercise its judicial review function along with or instead of that statutory procedure. But of course it is possible that instances of unlawfulness will arise which are not of that standard description, in which case the availability of such a statutory procedure will be less significant as a factor.
>
> 56. Treating judicial review in ordinary circumstances as a remedy of last resort fulfils a number of objectives. It ensures the courts give priority to statutory procedures as laid down by Parliament, respecting Parliament's judgment about what procedures are appropriate for particular contexts. It avoids expensive duplication of the effort which may be required if two sets of procedures are followed in relation to the same underlying subject matter. It minimises the potential for judicial review to be used to disrupt the smooth operation of statutory procedures which may be adequate to meet the justice of the case. It promotes proportionate allocation of judicial resources for dispute resolution and saves the High Court from undue pressure of work so that it remains available to provide speedy relief in other judicial review cases in fulfilment of its role as protector of the rule of law, where its intervention really is required."

69. Finally, the judge stated his conclusions as follows:

> "57. I now pull the threads together. Mr Yates reminded me that the issue in this case was not permission to apply for judicial review but an appeal about costs. The nub of the issue was whether the Master erred. In my judgment based upon the analysis above he did not err. He was entitled on the facts of the case to conclude that the section 222 procedure was an adequate alternative remedy which should have been exhausted before a Claim Form was issued. In concluding also that it was open to [*Mrs Archer*] to require HMRC to confirm or withdraw the APN following the making of statutory representations the Master did not err. He was correct in his construction of section 222 which

> does impose a duty on HMRC to make a determination. He correctly concluded that the issuance of judicial review was not a remedy of last resort.
>
> 58. As to Mr Yates' argument that the Master was taking a decision limited to particular facts and expressing condemnation of the litigation conduct of Mrs Archer I am less convinced. The Masters reasoning is relatively brief… He focused upon the argument of HMRC that the claim was premature. He places this in its factual context pointing out that the section 222 representations made by [*Mrs Archer*] post-dated the Claim Form and he expressed the view (no doubt based upon the fact that the dispute was rapidly resolved) that the dispute between the parties was capable of being resolved *via* the section 222 procedure. In my view this reasoning is perfectly sound but it does assume that the section 222 procedure is an adequate alternative and if he had been wrong in this then it would follow that the pith and substance of his reasoning for awarding no costs was also flawed."

70. I should add that in a postscript to his judgment, running from [60] to [63], the judge gave his views on the possible implications of his ruling in various other factual situations which might arise. These observations were necessarily obiter, and based on hypothetical facts. While clearly intended to be helpful, I must say that I have some reservations about the wisdom of undertaking such an exercise, particularly in an area where so much is likely to depend on the facts of individual cases. In any event, I propose to say no more about these paragraphs, while making it clear that I express no views on the hypothetical points canvassed by the judge.

The submissions of the parties

(1) Submissions for Mrs Archer

71. Mrs Archer's grounds of appeal are lengthy, and I will not attempt to summarise them. They cover the same ground as Mr McDonnell's replacement skeleton argument dated 29 March 2019, which he supplemented with his brief and focused oral submissions to us.

72. Mrs Archer's central submission is that she had no choice but to issue her judicial review claim form at or about the time she did, for two reasons. First, her cause of action accrued and time started running when she received her APN on 4 November 2014. Secondly, since her judicial review claim was a joint one with her husband, the joint claim had to be issued before the expiry of three months from the APN issued to Mr Archer on 19 September 2014, that is to say on or before 18 December 2014. As to the first point, Mrs Archer argues that the cause of action must accrue when the APN is first served on the taxpayer, both because the decision to give the notice is the decision whose lawfulness is being tested, and because it is a statutory notice with immediate legal consequences, including most obviously the obligation to pay the sum specified. That basic obligation remains in place, submits Mrs Archer, even if the obligation is suspended by the taxpayer taking advantage of the review machinery in section 222. While it is true that the court has a discretion to extend the time for a

judicial review claim, and Green J's judgment at [44] has suggested guidelines which may apply for the future, those guidelines did not exist as rules of practice when Mrs Archer issued her claim; and, in any event, the guidelines do not offer the legal certainty to which she was entitled, because they only indicate the procedure which should "ordinarily" be followed. In essence, therefore, Mrs Archer is now being *penalised* in costs for acting correctly and sensibly under the rules in force at the time, and in particular for complying with CPR 54.5(1).

73. In support of her submission that judicial review tests the lawfulness of the original APN, Mrs Archer criticises the judge's view that until completion of the section 222 procedure the figure to be paid on account is in some way provisional or "inchoate". The correct position, she says, is that the figure stated in the APN is final, and gives rise to an immediate obligation to pay it, subject only to the possibility of variation of the amount if the taxpayer decides to make representations under section 222. The section 222 procedure is entirely optional, and amounts to no more than a request to HMRC to reconsider their decision. The procedure is also dependent on an APN having been lawfully issued in the first place: if there is no valid APN, then section 222 does not come into play. Furthermore, the judge's approach undermines the statutory significance of the original APN, by implying that "it can always be corrected following representations". As Mr McDonnell puts it, in his written submissions:

> "That approach places the onus on the taxpayer to make representations and the onus on HMRC to make the correct decision following representations, rather than requiring the original decision to be correct. But the decision following representations is secondary and derivative."

74. As to the allegedly joint nature of the judicial review application, Mrs Archer's basic case is that since HMRC had accepted (in negotiations) that tax was due from one or other of the Archers, but not from both of them, the designated officer could not properly have determined under section 219 of FA 2014, to the required high standard, that tax was underpaid by both of them. Furthermore, HMRC's decisions to issue the two APNs had the result that payments of approximately £12 million in total were demanded, when only half that sum was truly believed to be due. The correct course, in those circumstances, would have been for HMRC to decide which of the Archers they considered to be the correct taxable party, or the more likely of them to be taxable, and to issue an APN to that person alone. HMRC would then have held that payment on account, regardless of the ultimate outcome of the substantive tax issues. It is also apparent from the letter of 22 December 2014 from HMRC's Solicitor's Office that the joint aspect of the claim was the real reason for HMRC's decision to withdraw Mrs Archer's APN. Moreover, the timing of the two notices was such that there would not, in practice, have been time to make representations to HMRC under section 222 and obtain a response before 19 December 2014. Nor was the joint aspect of the claim a point capable of resolution through the section 222 procedure, which provides no scope for the position of another taxpayer to be taken into account.

75. Finally, the judge was wrong to find support for his approach in Glencore. Under the DPT regime, it was the ultimate right of appeal to the FTT, at the end of the statutory review period, which provided the suitable alternative remedy and made it

inappropriate to seek judicial review of the charging notice. In APN cases, by contrast, there is no statutory right of appeal to the FTT, and the section 222 procedure was in any event incapable of providing a suitable alternative remedy because it is not a judicial process at all.

(2) HMRC's submissions

76. HMRC identify the core issue on the appeal as whether section 222 is a sufficient alternative remedy, with the consequence that either Mrs Archer had to comply with it before starting her judicial review proceedings or she can be penalised in costs for having failed to do so. By a respondent's notice, HMRC also maintain their alternative case that Master Gidden's order should be upheld on the basis of Mrs Archer's litigation conduct, including in particular her material non-compliance with the pre-action protocol and her failure to make representations under section 222 before issuing judicial review proceedings.

77. On the question of alternative remedy, HMRC rely on repeated statements of high authority that judicial review should be a remedy of last resort: see, for example, Kay v Lambeth London Borough Council [2006] UKHL 10, [2006] 2 AC 465, at [30] per Lord Bingham, and R (Cart) v Upper Tribunal [2011] UKSC 28, [2012] 1 AC 663, at [33] per Lord Phillips.

78. Mr Yates QC goes on to draw a distinction between two different categories of case where an alternative remedy to judicial review may be held to exist. The first category comprises cases where judicial review may in principle still be available, but alternative remedies must normally be exhausted before it is invoked. The second category comprises cases where the alternative remedy (typically a statutory right of appeal) is normally the only remedy available, because permission for judicial review will not be granted at any stage in the absence of exceptional circumstances.

79. HMRC submit that the present case is an example of the former type, whereas the second category of case is exemplified by Glencore, although it has the distinguishing feature that the statutory right of appeal is postponed during the year-long review period.

80. Assistance may also be gained, says Mr Yates, from the approach of the courts to the question of when time begins to run for bringing a judicial review challenge to the grant of planning permission. Does time begin to run only from the formal grant of permission, or from the adoption of an earlier resolution authorising the grant of outline permission subject to conditions precedent, which had been satisfied by the date when actual permission was granted? In R (Burkett) v Hammersmith London Borough Council [2002] UKHL 23, [2002] 1 WLR 1593, the House of Lords decided that time did not begin to run until the latter date. This did not mean, however, that the court would lack jurisdiction to entertain a challenge to the prior resolution, either before or after its adoption. As Lord Steyn said, at [42]:

> "The court has jurisdiction to entertain an application by a citizen for judicial review in respect of a resolution before or after its adoption. But it is a jump in legal logic to say that he *must* apply for such relief in respect of the resolution on pain of losing his right to judicial review of the actual grant of planning permission

> which does affect his rights. Such a view would also be in tension with the established principle that judicial review is a remedy of last resort."

81. Lord Steyn then amplified the point in the next paragraph:

> "43. At this stage it is necessary to return to the point that the rule of court applies across the board to judicial review applications. If a decision-maker indicates that, subject to hearing further representations, he is provisionally minded to make a decision adverse to a citizen, is it to be said that time runs against the citizen from the moment of the provisional expression of view? That would plainly not be sensible and would involve waste of time and money. Let me give a more concrete example. A licensing authority expresses a provisional view that a licence should be cancelled but indicates a willingness to hear further argument. The citizen contends that the proposed decision would be unlawful. Surely, a court might as a matter of discretion take the view that it would be premature to apply for judicial review as soon as the provisional decision is announced. And it would certainly be contrary to principle to require the citizen to take such premature legal action. In my view the time limit under the rules of court would not run from the date of such preliminary decisions in respect of a challenge of the actual decision."

82. Mr Yates also relies on the principle that parties must act responsibly and make every effort to avoid litigation if at all possible: see the passages from Cowl which I have already quoted, at [48] to [50] above.

83. More generally, HMRC submit that Mrs Archer's arguments fail to recognise the pragmatic approach which the courts adopt to judicial review as a remedy. Thus, the fact that judicial review might in theory lie in relation to the original decision to issue an APN does not mean that the court would not normally regard such a challenge as premature, or that the court would ignore what occurred during the statutory review process. Indeed, there is no good reason why the review decision itself should not be amenable to judicial review. Nor is it right to say that the section 222 procedure is "optional" in the sense suggested by Mrs Archer. While it is true that the taxpayer is given the right, but is not obliged, to challenge the decision to issue the APN (not least because the taxpayer may decide to accept it), this does not mean that the taxpayer can bypass the section 222 procedure in favour of litigation without adverse consequences. Parliament must be taken to have intended the taxpayer to seek to resolve any issues with HMRC first through the section 222 machinery. Moreover, there is no substance to Mrs Archer's complaint that she had no notice of the guidance prospectively offered by Green J in his judgment at [44]. The principles in cases such as Burkett and Cowl were of long standing, as was rightly recognised by Hickinbottom J in Zahid.

84. HMRC also do not accept that Mrs Archer's claim was, on analysis, a joint one with her husband. The basis of her claim, as presented in the detailed grounds at paragraph

5.1, was that she did not use DOTAS arrangements and had not claimed a tax advantage. Accordingly, on her case, Conditions B and C in section 219 of FA 2014 were not satisfied, and these were also points which clearly fell within the scope of the representations procedure in section 222. None of this had anything to do with the tax position of Mr Archer.

85. As to Glencore, HMRC accept that the statutory scheme there in issue has important differences from the APN regime, but much of the guidance given by Sales LJ (including the passages which I have quoted above at [68]) is equally applicable to both regimes, and provides cogent reasons in support of the judge's approach.

Discussion and conclusion

86. In considering these submissions, I will begin with what is agreed to be the central issue raised by the appeal. Does the section 222 machinery provide a suitable alternative remedy, which the taxpayer should normally be expected to pursue before beginning judicial review proceedings to challenge an APN? And if that is the general rule, is there any reason why the Master was wrong to apply it as he did, by depriving Mrs Archer of her costs of the judicial review, even though she was prima facie entitled to a costs order in her favour as the successful party?

Does section 222 provide a suitable alternative remedy?

87. With the benefit of the full and helpful submissions we have received, I see no reason to depart from the provisional views which I outlined at [17] above. The APN legislation must be construed and applied as a whole, in the light of its general purpose and underlying principles of tax law and procedure. So viewed, section 222 forms an integral part of the primary legislative scheme contained in sections 219 to 229 (Chapter 3 of Part 4) of FA 2014. The right thus conferred on the taxpayer to send written representations to HMRC is unqualified, so long as the representations fall within the scope of the section, and the taxpayer is given a generous period of 90 days within which to exercise it. HMRC are then under a duty to consider the representations, and to respond to them in one or more of the ways specified in section 222(4). Depending on the circumstances, the response may be to withdraw the APN altogether, or to confirm it with or without amendment, or to confirm or vary the amount of the accelerated payment. While this process runs its course, the obligation to make the payment specified in the APN is suspended, and the amount which the taxpayer will eventually have to pay under section 223 depends on the outcome of the process.

88. On a point of detail, I should note that, as originally enacted and as in force during the period in late 2014 with which we are concerned, section 222(4) did not expressly authorise amendment of the notice so as to specify the amount payable as nil, or removal from the notice of the amount specified under section 220(2)(b). Express provision to this effect was then made by amendments introduced by FA 2015. Whether these amendments were strictly necessary, or whether it was always open to HMRC to "specify a different amount" of zero under the subsection in its original form, is not a question which we need to decide. In the case of Mrs Archer, the only issue was whether her APN should be withdrawn; and when it was, her obligation to make any payment under the notice obviously came to an end.

89. Leaving aside that point of detail, it seems clear to me that Parliament must have intended taxpayers to take advantage of the machinery in section 222 in all cases where it was available, before having resort to judicial review proceedings. The principle that judicial review is a last resort is of long standing, and has been reiterated in judicial pronouncements at the highest level. Having decided not to provide a statutory right of appeal, Parliament must have appreciated that the lawfulness of an APN could only be tested in the courts by means of judicial review (or perhaps as a public law defence to penalty or other enforcement proceedings arising from the APN). Parliament must also have realised that very many taxpayers in receipt of APNs would be likely to wish to challenge them, given their novel and unusual features, and the change in the economic benefits of tax avoidance which they were designed to bring about. Against that background, the representations machinery in section 222 fulfils an obvious purpose, by providing a relatively cheap and simple way for a taxpayer to challenge an APN, without incurring the cost of court proceedings or adding to the already very heavy burdens on the resources and expertise of the Administrative Court.

90. Indeed, it seems to me all but self-evident that section 222, read in its context, was intended by Parliament to provide the primary recourse for a taxpayer dissatisfied with an APN, which should normally be exhausted before judicial review proceedings are set in motion. I agree with HMRC that the observations of Sales LJ in Glencore, particularly in [55] and [56] quoted above, are very much in point on this issue, despite the differences in the statutory scheme which he was considering. To adopt his language, section 222 is in my view a good example of "the provision which Parliament has made to cater for the usual sort of case" in terms of procedures and remedies, and "the court should be slow to conclude in its discretion that the public interest is so pressing that it ought to intervene to exercise its judicial review function along with or instead of that statutory procedure." Furthermore, to treat judicial review as a remedy of last resort, in the present case as in Glencore, is to respect "Parliament's judgment about what procedures are appropriate", it "avoids expensive duplication of the effort which may be required if two sets of procedures are followed in relation to the same underlying subject matter", and it "saves the High Court from undue pressure of work so that it remains available… where its intervention really is required."

91. I am unimpressed by Mr McDonnell's argument that Glencore should be distinguished on the basis that the true alternative remedy under the DPT regime lay in the statutory right of appeal to the FTT after expiry of the review period. That is of course a very significant difference from the APN regime, but does not meet the point that the remedial machinery provided by Parliament, whatever its precise nature and scope, should normally be exhausted before recourse is had to the last resort of judicial review.

92. I am equally unimpressed by the argument that the strict three month time limit for judicial review leaves the taxpayer with no realistic option except to begin judicial review proceedings within three months of the date of the APN, even if representations are also made under section 222. The authorities show that, although the time limit in CPR 54.5(1) is indeed strict, it is not applied unthinkingly, and in a suitable context the courts are willing to adopt a flexible and pragmatic approach, as exemplified in cases such as Burkett. Where Parliament has provided a potential alternative remedy, such as that in section 222, the court will if necessary ensure that the taxpayer is not prejudiced by taking advantage of it. So, for example, in a case where the taxpayer has in good faith made representations under section 222, and HMRC's response is not notified to

the taxpayer until more than three months from the date of the APN, I would expect the court to proceed on the basis that time does not begin to run for judicial review purposes until the date of the notification. In practical terms, the sensible course would normally be for the taxpayer, when making his representations, to seek HMRC's agreement that time for judicial review purposes should not begin to run until the section 222 procedure has been completed. Absent exceptional circumstances, I cannot imagine that HMRC would refuse such a request, and if they did so without justification, I would expect any subsequent objection to judicial review on the grounds of delay to receive short shrift from the court. As the guidance in Cowl emphasises, both sides are under a duty to act responsibly and to take all reasonable steps to ensure that judicial review proceedings are not prematurely pursued while other forms of dispute resolution are in progress.

93. In agreement with the judge, I would also emphasise that it is not a satisfactory solution to this problem for the taxpayer to initiate judicial review proceedings within three months of the APN, and then ask for them to be stayed (either by agreement or court order) until the section 222 procedure has been completed. The difficulty with this approach, as the facts of the present case well illustrate, is that very considerable expenditure may have been incurred in preparing the judicial review, when the whole point of the section 222 procedure is that it may lead to a result which either makes legal action unnecessary (because the APN is withdrawn) or at least narrows and refines the issues in dispute. All of these factors point strongly to the conclusion that judicial review proceedings should not be begun on a precautionary basis, and then stayed, but rather that they should be held in reserve as a true remedy of last resort, to be deployed (if at all) only when the section 222 procedure has left the taxpayer still dissatisfied, and even then the focus of the challenge should be on the APN as it stands at the end of the process rather than as it was originally issued (unless of course it has simply been upheld without variation).

94. At various points in his submissions, Mr McDonnell seemed to suggest that the right to make representations under section 222 is of little or no practical value, because HMRC could not be expected to depart from their original views, nor would they bring an independent mind to bear on the issues. Indeed, at times he came close to implying that HMRC could not be trusted to engage with the representations in good faith. We were provided with no empirical evidence to support such a suggestion, and I have no hesitation in rejecting it. The duties imposed on HMRC by section 222 are heavy ones, particularly in the absence of any statutory appeal to the FTT, and it would be quite wrong for us to assume that HMRC would be likely to treat the exercise as a formality. Clearly, it is their duty to give serious and careful consideration to the representations which are made, supplemented if necessary by HMRC's acknowledged duty to deal in good faith with proper representations made to them by taxpayers, whether or not falling strictly within the scope of the APN.

95. As to the proper scope of objections which may be raised under section 222, I have already made it clear that the section should in my view be given a broad and non-technical construction, with the aim of enabling all objections to the application of the three conditions, or to the amount of the accelerated payment, to be covered if at all possible by the representations. Thus, for example, I see no reason why representations made on behalf of Mr and Mrs Archer could not refer to their joint involvement in the tax avoidance scheme, or the alleged reasons why it was unfair for HMRC to seek to recover an accelerated payment of approximately £6 million from both of them. I accept

that there will be some high level public law challenges to the APN regime which, even on the most benevolent construction, fall outside the scope of section 222, including for example most of the challenges on human rights grounds which this court considered in Rowe. Now that the general lawfulness of the APN regime has been established, however, I would expect such challenges to be relatively rare; and I am certainly unconvinced that any of the grounds relied on by the Archers were of such a nature as to render them incapable of resolution under the section 222 procedure.

96. For these reasons, it will be seen that I am in broad agreement with the conclusion reached by both courts below that section 222 does in general provide an alternative means of redress for the taxpayer in receipt of an APN which should normally be exhausted before the commencement of judicial review proceedings.

97. I should make it clear, however, that I would not endorse all of the comments made by Green J about the provisional or "inchoate" status of an APN, pending completion of the section 222 procedure. Mr McDonnell is in my opinion right to submit that the APN as originally served, and the amount of the understated tax stated in the notice, are final and conclusive, and give rise to immediate obligations on the taxpayer, subject only to the suspensory effect of section 222 if the taxpayer decides to invoke it. Some of the comments made by Green J in his description of the system were, with respect, perhaps more apt to the statutory scheme relating to DPT which he had previously considered in Glencore, than to the APN regime in the present case. For present purposes, however, nothing turns on this minor point of disagreement.

Is there any reason why the general rule should not apply to Mrs Archer's claim?

98. On the assumption that section 222 does normally provide an adequate alternative remedy, is there any reason why it could not do so in Mrs Archer's case? Mr McDonnell's submissions on this issue centre on the allegedly joint nature of her claim, and the practical need to ensure that judicial review proceedings are brought in good time. To a large extent, I have already dealt with these submissions. I need to say a little more, however, about the supposedly joint nature of her claim.

99. In short, I do not accept that Mrs Archer's claim had to be brought jointly with her husband's, or that the nature of the relief sought somehow made the section 222 review machinery inappropriate. Although the Archers participated in a single tax avoidance scheme, there is no necessary connection between the liability to income tax which Mr Archer was hoping to avoid and the question whether Mrs Archer became liable to CGT following her disposal of the option for its full market value. If the scheme worked as intended, Mr Archer would obtain an allowable loss for income tax purposes of around £6 million and Mrs Archer would incur no liability to CGT. On the other hand, if the scheme failed, it was in principle perfectly possible for Mr Archer not to acquire any allowable loss, and for Mrs Archer to be liable to CGT on a gain of a similar amount.

100. It is true that in the course of the prolonged negotiations between 2007 and 2014 HMRC seem to have changed their mind on the technical issues, and they also indicated at various times that they would be prepared to settle the case on the basis that either the income tax or the CGT limb of the scheme was ineffective; but I do not understand it to be argued that the Archers ever had an enforceable legitimate expectation to that effect, which as a matter of public law would have prevented HMRC from seeking to enforce full liability against both of them, in the absence of a settlement. Thus there

was no underlying reason why the potential tax liabilities of Mr and Mrs Archer arising from their participation in the scheme had to be regarded as two sides of the same coin, or why one could not in principle exist without the other.

101. The most that could be said, in my view, was that in light of the unfortunate and prolonged history of the matter, it might have been difficult for HMRC to satisfy the statutory conditions for both APNs to the requisite high standard, and it might have been oppressive to pursue both Mr and Mrs Archer for approximately twice the amount of the tax which Mr Archer originally hoped to avoid. The precise reasons which led HMRC to withdraw Mrs Archer's APN must remain obscure, in the absence of evidence about the "best practice" referred to in their letter of 22 December 2014 to KPMG. None of this, however, leads to the conclusion that there was a necessary linkage between the two APNs such that any challenge to them had to be brought by the Archers jointly, with time running for that purpose from service of the first APN on Mr Archer.

102. Furthermore, it is a striking feature of the detailed statement of grounds that Mrs Archer had independent grounds of challenge to her APN, which fell clearly within the areas of challenge permitted by section 222, and had nothing to do with Mr Archer's grounds of challenge, apart from their common origin in the same tax avoidance scheme. Against that background, it seems to me that the alleged joint nature of the Archers' judicial review proceedings is largely spurious, and in any event insufficient to justify the refusal in Mrs Archer's case to make representations under section 222 before embarking upon judicial review. Whatever the position may have been in relation to Mr Archer, Mrs Archer should have engaged with the section 222 procedure as a first resort, and her failure to do so clearly entitled the Master to exercise his discretion in relation to her costs as he did.

Mrs Archer's litigation conduct

103. In view of the conclusion I have reached, it is not strictly necessary to consider whether the Master's order should also be upheld on the alternative ground that it was justified by Mrs Archer's conduct of the litigation. It is not entirely clear how far the Master treated this as a separate ground for his decision, or whether it did no more that reflect his judgment that section 222 provided an alternative remedy of which Mrs Archer should have taken advantage. Nevertheless, to the extent that the Master took an adverse view of Mrs Archer's litigation conduct, he was in my view fully entitled to do so. The fact of the matter is that no serious attempt was made by KPMG to comply with the pre-action protocol for judicial review, and far from being given a reasonable time within which to respond, HMRC were in substance presented with the commencement of judicial review proceedings as a *fait accompli* on 28 November 2014. As I have already pointed out, this was the first response from KPMG to the APNs served on the Archers, and the proceedings were in fact issued on the same day, although they were not served until 2 December. Far from judicial review being a last resort, here it was being employed as the first line of attack, and the very substantial costs of preparing the proceedings had already been incurred.

Conclusion

104. For all these reasons, I would dismiss Mrs Archer's appeal.

Flaux LJ:

105. I agree.

Floyd LJ:

106. I also agree.