Neutral Citation Number: [2023] EWCA Civ 626

Case No: CA-2022-000890

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
MRS JUSTICE JOANNA SMITH AND JUDGE JONATHAN CANNAN
[2022] UKUT 00061 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 June 2023

Before :

LADY JUSTICE SIMLER
LADY JUSTICE WHIPPLE
and
LADY JUSTICE FALK

- -

Between :

WILLIAM ARCHER	**Appellant**
- and -	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Amanda Brown KC and Conrad McDonnell (instructed by **KPMG**) for the **Appellant**
Julian Ghosh KC and Michael Ripley (instructed by **Solicitor and General Counsel to the Commissioners for HMRC**) for the **Respondents**

Hearing dates : 25 - 26 April 2023

- -

Approved Judgment

LADY JUSTICE WHIPPLE:

INTRODUCTION

1. The appellant is William Archer. He appeals against notices of surcharge issued to him by HMRC, the respondents, in the total amount of £1,403,181.78 for failure to pay tax. I granted permission for this second appeal.

2. The appellant says he had a reasonable excuse for not paying the tax due as a result of closure notices issued by HMRC, and that he paid the tax without unreasonable delay once that reasonable excuse came to an end. The essence of his case is that his application for judicial review gave him a reasonable excuse for as long as it remained extant, including on appeal to the Court of Appeal and while the application for permission to appeal to the Supreme Court was outstanding. Once his application to the Supreme Court for permission was refused (at which point his appeal rights were exhausted) he paid the tax within days. By his application for judicial review, he sought to challenge the validity of the closure notices issued to him by HMRC. He says there was an obvious defect in the closure notices, that he was entitled to apply for judicial review, that payment of the tax would have undermined the judicial review proceedings and it was reasonable not to pay the tax until the judicial review was finally concluded and his appeal rights were exhausted.

3. The appellant was unsuccessful in those arguments in the FTT. The UT held that the FTT's reasoning was wrong in law and set aside the FTT's decision. It remade the decision against the appellant. The appellant argues in this Court that the UT erred in law in three ways, which overlap:

   (1) **The subjective evidence issue**: the UT erred in requiring a taxpayer to give evidence of his subjective belief as to the strength of his judicial review and that his belief in the merit of those proceedings was the cause of not paying the tax.

   (2) **The existence of the judicial review**: the UT failed to appreciate that the judicial review, which was supported by interim relief granted by the Court prohibiting HMRC from seeking to enforce the closure notices, which was then replaced by an agreement with HMRC not to enforce the closure notices while the judicial review remained extant, was in and of itself a reasonable excuse for non-payment. Specifically, for the appellant to have paid the tax while those proceedings were pending would have rendered them nugatory, and was anyway contrary to the expectation of HMRC.

   (3) **The postponement issue**: the UT's reasoning was internally inconsistent in concluding that if the matter had been litigated in the FTT, the tax would not have been payable until the conclusion of the appeal proceedings, but then holding that the appellant did not have a reasonable excuse for not paying the tax at the outset of his judicial review proceedings. In any event, the UT's consideration of a hypothetical appeal to the FTT was misplaced because the Court of Appeal had confirmed that the appellant was entitled to seek a judicial review. The issue of postponement was only relevant by analogy, if at all.

4. HMRC resist all three grounds. They have filed a Respondents' Notice seeking to uphold the decision of the UT for the reasons given by the UT and further inviting this Court to remake the decision in the same way if this Court finds that the UT did err in law.

5. In this Court, the appellant was represented by Amanda Brown KC and Conrad McDonnell (both of whom represented the appellant in the UT, although Mr McDonnell was alone for the appellant in the FTT). HMRC were represented by Julian Ghosh KC (who did not appear below) and Michael Ripley who appeared for HMRC in the UT. The case was expertly presented by both sides, and I am grateful for all the written and oral submissions this Court has received.

LEGAL FRAMEWORK

Legislation

6. The case concerns the existence (or not) of a reasonable excuse for non-payment of tax. In the background are other legislative measures which provide for closure notices, postponement of tax in the context of an appeal to the FTT and Accelerated Payment Notices ("APNs"). I shall set out the key provisions and simply describe the effect of other provisions.

(i) Reasonable Excuse

7. Section 59C of the Taxes Management Act 1970 ("TMA") (a provision which has since been repealed) imposed surcharges for non-payment of tax. In the relevant years, the provision applied to any income tax or capital gains tax which had become payable in accordance with sections 55 or 59B of the Act. If the tax remained unpaid 28 days from the due date, the taxpayer was liable to a surcharge equal to 5% of the unpaid tax. If the tax remained unpaid after 6 months, the taxpayer was liable to a further surcharge equal to 5% of the unpaid tax. Surcharges carried interest from 30 days after the date of imposition until payment (section 59C(6)). An appeal could be brought within 30 days of imposition (section 59C(7)). The provisions of the TMA in relation to appeals against assessments applied to appeals against surcharge notices (section 59C(8)).

8. Section 59C(9) and (10) TMA are in issue in this appeal. At the relevant time, they provided:

> "(9) On an appeal … the tribunal may-
>
> (a) if it appears that, throughout the period of default, the taxpayer had a reasonable excuse for not paying the tax, set aside the imposition of the surcharge; or
>
> (b) if it does not so appear, confirm the imposition of the surcharge.
>
> (10) Inability to pay the tax shall not be regarded as a reasonable excuse for the purposes of subsection (9) above."

The reference to the tribunal should here be read as a reference to the FTT (see section 47C TMA), which can set aside the surcharge if satisfied that throughout the period of default the taxpayer had a reasonable excuse for not paying the tax, noting that inability to pay is not to be regarded as a reasonable excuse.

9. Section 118(2) TMA provided that:

> "(2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased."

Therefore, a person who has a reasonable excuse is deemed not to have failed to pay the tax due if he paid it "without unreasonable delay" after the excuse ceased.

(ii) Closure Notices

10. Section 28A of the TMA, as it was in force at the relevant time, provided that where an officer of HMRC had opened enquiries under section 9A(1), he or she could issue a closure notice to complete those enquiries; a taxpayer could apply to the FTT for a direction compelling issue of a closure notice (section 28A(4)), as in fact had occurred in this case. Section 28A(2) required a closure notice to state either that no amendment of the taxpayer's return was required or to "make the amendments of the return required to give effect to" the officer's conclusions (section 28A(2)(b)). The appellant's judicial review challenged the efficacy of the closure notices issued by HMRC on the basis that they did not make the required amendments because they did not state an amount of tax due.

11. There is a right of appeal to the FTT in relation to any conclusion stated or amendment made by a closure notice, pursuant to section 31 TMA. On an appeal, the FTT has the power to reduce or increase a self-assessment under section 50(6) and (7) TMA.

12. By section 114(1) TMA, an assessment which purports to be made under the TMA can be validated if defective, in certain circumstances.

13. An amount of tax which is payable as a result of an amendment by a closure notice to a self-assessment return is payable within 30 days: section 59B(5) TMA read with Schedule 3ZA.

(iii) Postponement

14. Postponement of the requirement to pay tax, where there is an appeal to the FTT, is governed by section 55 TMA. A request for postponement can be made under section 55(3), in the first instance to HMRC and after that to the FTT. The general rule is contained in section 55(6) TMA:

> "The amount of tax the payment of which shall be postponed pending the determination of the appeal shall be the amount (if any) in which it appears that there are reasonable grounds for believing that the appellant is overcharged to tax; …"

15. If postponement is granted, tax is postponed until the appeal to the FTT is determined, at which point HMRC can issue a notice of the total amount payable in accordance with the determination, see section 55(9). To similar effect, section 56(2) provides that

postponement, if granted, ends once the FTT has determined the appeal; at that point, tax must be paid in accordance with the FTT's determination, whether or not the taxpayer is seeking a second appeal.

16. Provisions at section 55(8B)-(8D) create an exception to the general rule, in circumstances where a person has been given an APN or partner payment notice ("PPN") which has not been withdrawn. The obligation to pay the understated tax specified in that notice cannot be postponed, see section 55(8B) and (8C) in particular which provide as follows:

> "(8B) Subsections (8C) and (8D) apply where a person has been given an accelerated payment notice or partner payment notice under Chapter 3 of Part 4 of the Finance Act 2014 and that notice has not been withdrawn.
>
> (8C) Nothing in this section enables the postponement of the payment of (as the case may be)-
>
> (a) the understated tax to which the payment specified in the notice under subsection 220(2)(b) of that Act relates,
>
> (b) the disputed tax specified in the notice under section 221(2)(b) of that Act,
>
> (c) the understated partner tax to which the payment specified in the notice under paragraph 4(1)(b) of Schedule 32 of that Act relates, or
>
> …"

(iv) APN legislation

17. The legislation relating to APNs and PPNs is contained in Chapter 3 of Part 4 of, and Schedule 32 to, the Finance Act 2014 ("FA 2014"). HMRC may give an APN to a taxpayer if certain conditions set out in section 219 FA 2014 are met. A taxpayer has a right to make representations about an APN; HMRC must consider those representations and decide whether to withdraw or confirm, or in certain circumstances, amend the APN, see section 222 FA 2014. If an APN is given while a tax enquiry is in progress, section 220(2)(b) provides that it must, amongst other things, specify the payment which is required to be made "under section 223 and the requirements of that section". Section 223 requires payment before the end of the payment period which is, in a case where representations have been made, the later of 90 days from the date on which the APN was given or 30 days following notification of HMRC's determination of the representations. Non-payment of a PPN or an APN can give rise to penalties, which can be appealed to the FTT which has power to remit the penalty if satisfied that the taxpayer has a reasonable excuse for the failure to pay: see paragraph 16(1) of Schedule 56 to the Finance Act 2009.

Case Law

Reasonable Excuse: General

18. Reasonable excuse is not defined in the legislation but useful guidance on the approach to be adopted by a tribunal was given in *Christine Perrin v HMRC* [2018] UKUT 0156 (TCC), [2018] STC 1302 (UT Judges Herrington and Poole) at [81], in the following terms:

> "When considering a 'reasonable excuse' defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience and relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should be taken into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question 'was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?'
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

19. Reasonableness is to be determined in each case depending on the facts. The analysis of Judge Berner in *Barrett v HMRC* [2015] UKFTT 329 (TC) at [161] is of assistance:

> "The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual's conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different."

20. Inability to pay is not a reasonable excuse (see section 59C(10)), but a tribunal can consider the underlying cause of the taxpayer's default, as was made clear in *C&E Commissioners v Steptoe* [1992] STC 757, where the Court of Appeal upheld the decision of the tribunal that persistent late payment by the trader's largest client, which caused the taxpayer to lack funds, was a reasonable excuse for late payment of VAT. Lord Donaldson MR said that the question was "whether the underlying cause constitutes a reasonable excuse", p 770 d.

The taxpayer must therefore establish that the excuse put forward is the cause of, or real reason for, the non-payment of the tax.

21. The standard to be adopted is that of the responsible trader, explained by Judge Medd QC in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234 as follows:

> "The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

22. The burden of proof is on HMRC to show that the necessary conditions were met for the imposition of a surcharge and that the surcharge was validly imposed under section 59C TMA. If that burden is met by HMRC, the burden shifts to the taxpayer to show, on a balance of probabilities, that he had a reasonable excuse for the late payment of the tax throughout the period of default.

Reasonable Excuse: The APN cases

23. In a number of cases, the tribunals and courts have considered whether a reasonable excuse exists for non-payment of APNs or PPNs. The earliest such case that we were shown is *Francis Chapman v Commissioners for HM Revenue and Customs* [2017] UKFTT 800 (TC), in which the taxpayer had issued judicial review proceedings to challenge an APN and relied on those judicial review proceedings as one of several excuses for not paying the tax. Judge Charles Hellier described the general approach in terms that are not controversial:

> "59. It seems to me that for something to be an excuse it must be such that absent that thing payment would have been made; and that an excuse is a reasonable excuse if, taking into account all the circumstances including those of the taxpayer, it was reasonable for him to have acted or failed to act as he did."

24. Judge Hellier considered the purpose of the APN legislation and concluded that there were circumstances in which it was reasonable to consider an APN to be unlawful and on that basis for a taxpayer reasonably decline to pay it ([71]); but he thought such cases were "exceptional" and would generally only arise in cases where there was an "obvious or gross error in the notice" ([72]); in such cases, for non-payment to be reasonable, it had to be based on a belief that was "robustly based" ([74]).

25. In *Beadle v Revenue and Customs Commissioners* [2020] EWCA Civ 562; [2021] 1 All ER 237, the Court of Appeal held that the alleged invalidity of PPNs was not a matter that the FTT could consider in the context of a reasonable excuse defence to penalties for non-payment of the PPNs ([57], per Simler LJ).

26. In *Sheiling Properties Ltd v Revenue and Customs Commissioners* [2020] UKUT 175 (TCC); [2020] STC 1380 (decided on appeal in relation to different points at [2021] EWCA Civ 1425; [2022] 1 WLR 1298), the UT (Trower J and Judge Thomas Scott) held that a

taxpayer had not shown a reasonable excuse for non-payment of an APN. The UT noted the case of *Perrin* (at [66]). The UT said the "particular question" for them was how to assess reasonableness in the context of a taxpayer's belief that the APN was not valid; more specifically, the question was the extent to which the legislative policy underpinning the APN regime affected that assessment ([68]). The UT drew a distinction between substantive and procedural invalidity at [69] and held that substantive invalidity could not be a reasonable excuse, drawing on *Beadle*; by contrast, procedural invalidity could be a reasonable excuse ([70]-[78]). The UT thought that any taxpayer who believed an APN to be invalid should commence a judicial review, as this taxpayer had done; it was undesirable for the FTT to have to conduct a mini-trial of that judicial review in order to determine the question of reasonable excuse for non-payment ([80]); rather, in this case, the UT assessed the objective reasonableness of the taxpayer's belief that the APN was procedurally invalid (see [81]).

27. In *Exclusive Promotions Ltd v Revenue and Customs Commissioners* [2022] UKFTT 103 (TC); [2022] SFTD 747 (Judge Redston and Ms Corrigan), the appellants had challenged APNs by way of judicial review and had been granted interim relief by the Court on terms that specifically reserved HMRC's ability to impose penalties for non-payment in the event that HMRC succeeded in the judicial review. The FTT relied on *Beadle* and *Sheiling* to conclude that there was no reasonable excuse demonstrated for not paying the APNs while the judicial review progressed.

28. These cases concern non-payment of APNs and PPNs. They raise a particular issue, identified in terms in *Sheiling,* about the way the legislative policy underpinning the APN regime affects the assessment of reasonable excuse in a non-payment case. Given that context, caution is required when considering them in the context of non-APN cases where the context is different.

BACKGROUND

The Facts

29. The FTT heard no oral evidence and neither party served witness statements for the appeal. The appellant had served a witness statement in the course of the judicial review and this was brought to the FTT's attention. The FTT's findings of fact were based on the documentary material before it. The FTT set out its findings at FTT [11]-[51]. Those findings were summarised by the UT at UT [24]-[54]. The following paragraphs are based on those paragraphs in the UT decision, with some clarificatory additions.

30. HMRC opened enquiries into the appellant's tax returns for the tax years 2001-2002 and 2002-2003 on 18 July 2003 and 30 June 2004 respectively. The enquiries concerned the use of two marketed tax avoidance schemes designed to produce tax losses. The first scheme related to Relevant Discounted Securities ("RDS"). The second related to second-hand life assurance policies (known as "SHIPS"). In 2009, the Court of Appeal held that both schemes were ineffective. As regards the RDS scheme, the relevant case was *Astall & Edwards v HMRC* [2009] EWCA Civ 1010 and as regards the SHIPS scheme, the relevant case was *Drummond v HMRC* [2009] EWCA Civ 608.

31. On 30 October 2015 and 15 January 2016, HMRC issued Follower Notices and APNs to the appellant in respect of the tax years under enquiry. The APNs set out in terms the amount of tax which the appellant had, in HMRC's view, understated. On 27 January 2016,

KPMG, acting for the appellant, made statutory representations on his behalf in relation to the APNs. HMRC did not respond.

32. In December 2015 and January 2016, KPMG made applications to the FTT pursuant to section 28(4) TMA for directions that HMRC be required to issue closure notices in respect of the enquiries. On 3 February 2016, before the hearing of those applications, HMRC issued closure notices for the years under enquiry. The closure notices disallowed the losses claimed pursuant to the two schemes.

33. The appellant had until 3 March 2016 to lodge any appeal against the closure notices with HMRC. On 2 March 2016, KPMG notified HMRC that in their view the closure notices did not make any amendments to the appellant's self-assessments for the relevant years because they did not expressly state any amount of tax due (although they did state that the losses were disallowed). KPMG's view was that there was no date for payment of the closure notices under para 5 Schedule 3ZA of the TMA and the closure notices did not create any payment obligation under section 59B TMA; as a result, the original self-assessment stood and there was nothing to appeal.

34. In a letter dated 10 March 2016, HMRC set out the basis on which they maintained that the closure notices were valid. HMRC noted that the appellant had not appealed the closure notices and stated that in their view the tax was due and payable. They said they would commence enforcement proceedings in due course.

35. HMRC's debt management team wrote to the appellant on 11 March 2016 warning of bankruptcy proceedings if the debt of £22,541,746.48 was not paid within seven working days. Discussions via email and telephone ensued between KPMG and HMRC. On 22 March 2016, HMRC confirmed in a telephone call that they would commence bankruptcy proceedings in respect of the closure notices in the week commencing 28 March 2016.

36. KPMG, acting for the appellant, sent a judicial review pre-action protocol letter to HMRC on 24 March 2016. They warned that the appellant intended to issue a claim for judicial review of HMRC's decision to initiate bankruptcy proceedings on the basis that no debt was due. They asserted that HMRC had failed to assess the appellant to tax in the claimed amount, or any amount, in relation to the relevant years. KPMG maintained that the FTT had no jurisdiction to determine the question of whether there was a debt due and payable to HMRC for the purposes of bankruptcy proceedings.

37. The appellant filed a claim for judicial review in the Administrative Court on 29 March 2016. At the same time, he made an application for urgent interim relief to restrain HMRC from issuing a statutory demand or commencing any bankruptcy proceedings until further order.

38. The appellant's application for interim relief was heard by Kerr J *ex parte* on 29 March 2016. The application was granted and HMRC were restrained from issuing or serving a statutory demand or taking steps towards the appellant's bankruptcy in respect of the relevant years until further order. The order was silent on whether HMRC were entitled to impose penalties for non-payment (and thus was in different form from the order considered in, for example, *Exclusive Promotions*). HMRC were given liberty to apply to set aside the interim relief order, but no such application was ever made.

39. A note of the hearing before Kerr J was produced by KPMG and put before the FTT on the appeal against surcharges. Based on this note, the FTT found that Kerr J had expressed some doubt as to whether what he described as a "procedural irregularity" with the closure notices would prevent HMRC from pursing the substantial amount of money involved; he also noted that the letter from HMRC dated 11 March 2016 told the appellant in terms how much tax was owed, so there was no mystery about the figure. However, Kerr J considered that the appellant had raised "a strong prima facie case" that the tax debt of £22 million-odd had not yet crystallised, and even if in the end it may not turn out to be a good point, it was a sufficient basis on which to grant interim relief.

40. Permission for the appellant's judicial review application to proceed was granted by me, sitting in the Administrative Court, on 21 September 2016 on the basis that the claim was arguable. I ordered interim relief to continue on the same terms pending the hearing of the claim.

Litigation History – The Judicial Review

Administrative Court

41. The claim for judicial review was decided by Jay J on 21 February 2017 ([2017] EWHC 296 (Admin), [2017] 1 WLR 2066). In the judicial review, the appellant was represented by David Goldberg QC and Conrad McDonnell, and HMRC were represented by Aparna Nathan and Marika Lemos. Mr Goldberg argued that the closure notices did not amend the appellant's returns and were defective for non-compliance with section 28A(2) TMA; further, the defect was substantive and not merely a matter of form, and could not therefore be cured by section 114(1), relying on *Hallamshire Industrial Finance Trust v IRC* [1979] 1 WLR 620; yet further, it was too late for HMRC now to issue fresh closure notices because the section 9A enquiry was closed. Ms Nathan argued that the appellant had an alternative remedy available in the FTT, but that in any event, the closure notices were valid because they did make amendments to the taxpayer's self-assessment returns and anyway the true figure was well known to the appellant; further in the alternative, any defects were capable of cure under section 114(1) because they were errors of form only and *Hallamshire* was distinguishable; yet further, if the closure notices were defective, HMRC could simply issue new ones because the enquiries would still be open.

42. The judge decided that the closure notices were indeed defective in failing to state the amount of tax due (judgment [54]-[72]), and that section 114(1) did not cure the defect (judgment [73]-[83]). However, he held that the appellant should have appealed to the FTT which would and should have used section 114(1) to correct the defect so that the application for judicial review was an abuse of process (judgment [84]-[101]); at [86] he suggested that the closure notices contained a "gaping hole". In the alternative, he held that HMRC could, if the closure notices were defective, simply issue new ones because it would necessarily mean that the section 9A enquiries were ongoing (judgment [102]-[106]). He concluded at [106]: "my decision on the principal issues means that there is now no possibility of an appeal, and the taxpayer must pay up …".

43. By order dated 21 February 2017, he dismissed the application for judicial review, discharged the order for interim relief and refused permission to appeal giving short reasons which included that "the [appellant] must lose one way or the other" and that the appellant was "having his cake and eating it".

Court of Appeal

44. The appellant sought permission to appeal from the Court of Appeal. That was granted by Henderson LJ on 7 March 2017. Henderson LJ observed that the appeal raised "important questions of principle" and had a real prospect of success. He reinstated interim relief on the same terms as had been ordered by Kerr J until the appeal was determined, saying that:

> "I consider that it would be wrong in principle for HMRC to initiate or pursue bankruptcy proceedings against [the appellant] at a time when, according to the judge, the closure notices were ineffective for failure to specify the amount of tax due, that failure was incapable of remedy under s 114, and there was accordingly no statutory debt due under section 59B of TMA 1970."

45. The full Court heard the appeal on 22 November 2017 and judgment was handed down on 30 November 2022. The Court dismissed the appeal (neutral citation number [2017] EWCA Civ 1962, [2018] 1 WLR 5210). Lewison LJ gave the only judgment with which the other members of the Court (Longmore and Asplin LJJ) agreed. He endorsed Jay J's conclusion that the closure notices were defective because of their failure to amend the taxpayer's self-assessments by stating the amount of tax due (judgment [17]-[31]), but he concluded that the defect could be cured by s 114(1) TMA as "a matter of form rather than substance on the particular facts of this case" ([39], and see [32]-[41]). He then considered the issue of forum which Jay J had found to be determinative and said that the question did not arise in light of his conclusions on s 114(1), but that he could discern no principle on which the taxpayer "could have been compelled to appeal to the FTT entirely against his own interest" ([42]). He noted that the appellant did not dispute the conclusions stated in the closure notices (in relation to which the FTT would have been his "only option"); instead, the appellant wished to take a technical point on whether the closure notices created a debt for the purpose of the Insolvency Act 1986, and that was "not a question for the FTT" ([43]). He continued in the same paragraph:

> "Proceedings to recover an amount of tax said to be due are collection proceedings. The mere fact that some tax issue arises in collection proceedings does not mean that the FTT is the only place that the dispute can be determined. If the dispute does not concern the correctness of HMRC's view about how the tax code applies to the taxpayer's case I do not consider that the civil courts are barred from dealing with that dispute: see *HMRC v Cotter* [2013] UKSC 69, [2013] 1 WLR 3514 at [32]."

46. He said that if the appellant's argument had been correct, the appellant could have applied to the county court or the Chancery Division to set aside any demand for payment, and that it was open instead to challenge the decision to initiate proceedings towards his bankruptcy by judicial review ([44]).

47. Lewison LJ's comment in [42] that the appellant should not be compelled to appeal to the FTT "against his own interest" is to be understood as a reference to section 50 TMA (noted at [6] of the Court of Appeal's judgment, and referred to at para [11] above) which confers on the FTT the power to reduce or increase a self-assessment. The Court of Appeal understood that the FTT would have been likely to exercise that power on the facts of this case to supply the missing figures for the tax due, and if it had done so that would have

marked the end of the appellant's case. The Administrative Court does not possess equivalent powers and was limited to validating the closure notices under section 114, failing which no amendment to the self-assessment returns would have been made.

48. By an order dated 30 November 2017, the Court of Appeal dismissed the appeal, refused permission to appeal to the Supreme Court, discharged the order of Henderson LJ dated 7 March 2017 and refused an application for further interim relief.

Supreme Court

49. On 5 December 2017, the appellant informed HMRC that it intended to apply to the Supreme Court for permission to appeal and interim relief pending permission or the substantive appeal if permission was granted. On 6 December 2017, the appellant served the application for interim relief on HMRC. On the same date, HMRC offered not to apply to bankrupt the appellant for non-payment of the tax whilst the application for leave was being considered by the Supreme Court provided that the appellant agreed in return not to ask the Supreme Court to consider the applications (for permission to appeal and interim relief) on an urgent basis; the appellant by KPMG accepted that offer the following day, 7 December 2017. On 7 December 2017, the appellant filed his application for permission to appeal with the Supreme Court. On 11 December 2017, HMRC filed objections to the appellant's application for interim relief (even though there was now an agreement between the parties which avoided the need for interim relief). That document included the following statement:

> "… [HMRC] have stated that if the [appellant] successfully challenges the [closure notices] issued to him, they will repay the appellant, with interest."

Mrs Brown said that there was no original statement to that effect; further, this was not a representation on which the appellant could rely because it appeared only in a submission by HMRC's counsel and was based on an alleged statement which had in fact never been made.

50. The Supreme Court refused permission to appeal on 13 June 2018 on grounds that the application did not raise an arguable point of law.

51. The appellant paid the tax plus interest, in the total amount of £22,541,746.78, on 22 June 2018.

Litigation History – The Surcharge Notice Appeals

52. HMRC issued surcharge notices on 10 May 2016 and 8 February 2019. There were other surcharge notices issued but they have since fallen away for various reasons which do not need to be set out. The total amount charged by way of surcharge is £1,403,181.78, on which interest continues to accrue.

53. The appellant appealed against the surcharge notices on the basis that he had a reasonable excuse for non-payment of the tax under section 59C(9) TMA. On 16 June 2016, the parties agreed to stand over consideration of the appeals against the surcharges until the conclusion of the judicial review proceedings.

The FTT

54. Once the judicial review was concluded by the refusal of permission by the Supreme Court, the appellant's appeal against surcharges became live and the appeal was reactivated. The FTT (Judge Bowler) dismissed the appeal on 8 July 2020 ([2020] UKFTT 0288 (TC)). Before her, the appellant had contended, amongst other things, that he reasonably believed that no payment was due to HMRC under the closure notices because he reasonably took the view that the closure notices did not make amendments to the self-assessments (see the grounds of appeal, recited at FTT [107]). He relied on his witness statement dated 29 March 2016 filed in the judicial review in which he said (paragraph 8) that he had the funds to pay. He also relied on the judicial review proceedings in which the appellant had been granted interim relief and permission, and on the terms of Jay J's judgment and the grant of permission and interim relief by Henderson LJ (see FTT [68]). HMRC submitted that the appellant could have appealed to the FTT rather than applying for judicial review, further he had failed to give evidence about his subjective belief and reasons for not paying the tax and that was fatal to the appeal (see FTT [65], [67] and [75]).

55. The FTT recognised that the APNs issued to the appellant did not give rise to any debt, because a response to the representations was outstanding, but said that the effect of section 55(8B) was that mere issuance of the APNs meant that the amounts to which they related could not be postponed on an appeal to the FTT; it followed that if there had been an appeal to the FTT against the closure notices, nearly all the £22.5 million would have been payable on appeal of the closure notices (FTT [115]). The FTT held that the payment of the tax by the appellant would have rendered the judicial review nugatory because once the appellant had gone down the judicial review track, he could not pay the tax and continue on that track; that was in contrast to the APN cases where the payment of the APNs could be made without rendering the judicial review of the APNs nugatory (FTT [116]). He could not have pursued his challenge to the bankruptcy threat in the FTT, but he could have appealed the closure notices to the FTT (FTT [117]). As to the reasonableness of the appellant's excuse, the FTT held that there was an "evidential hole" about why the appellant had not appealed the closure notices to the FTT (FTT [129] and [131]); further, there was a gap in the explanation for non-payment between Jay J's judgment on 21 February 2017 and Henderson LJ's grant of permission and interim relief on 7 March 2017 (FTT [130]), and a further gap after the Court of Appeal dismissed the appeal on 30 November 2017 (FTT [133] and [140]). The appellant had not provided sufficient evidence to show that non-payment was a reasonable action for him to take (FTT [141]). The FTT dismissed the appellant's appeal except in relation to those surcharge notices which HMRC conceded were unenforceable and about which there is no issue on this appeal (FTT [143]-[145]).

The UT

56. By the time the appeal came to the UT, the appellant's case no longer rested on any suggestion that the appellant's subjective belief was relevant. Instead, the appellant challenged the FTT's approach as having placed sole or undue focus on the appellant's subjective belief and failing to consider the facts of the judicial review proceedings sufficiently or at all (see UT [7(2)]).

57. The appellant advanced four grounds before the UT. Grounds 3 and 4 have fallen away. But Grounds 1 and 2 have relevance to this appeal. By Ground 1, the appellant argued that the FTT was wrong to conclude that the appellant could have appealed the closure notices to the FTT. In response, the UT held that the FTT had no jurisdiction to consider the "debt

question" which was the subject of the judicial review (ie whether HMRC could serve a statutory demand for the debt, and so initiate a process potentially leading to bankruptcy) although it could have considered whether the closure notices should be amended (UT [76] and [81]). The UT held that the FTT had been in error if, as appeared might have been the case, it took the view that the appellant should have appealed the closure notices to the FTT in order to determine the debt question ([81]).

58. A strand of Ground 1 was the appellant's submission that the FTT had been wrong to conclude that the tax would not have been postponed on a hypothetical appeal to the FTT. The UT held that there was no question of postponement of the tax and the FTT had been in error in its conclusions on postponement (UT [96], [106] and [107]). The UT reasoned that the APNs did not give rise to any obligation to pay the tax because the appellant's representations had never been answered by HMRC (UT [92]-[93]). It then considered the closure notices. The statute provided that payment under the closure notices could not be postponed in so far as the tax payable pursuant to them was the understated tax to which the APNs related, by operation of section 55(8C) TMA; the UT noted that the FTT had found that the payment specified by the APNs was indeed the tax to which the closure notices related (referring to FTT [115]); that meant that the tax to which the closure notices related could not be postponed (UT [98]). However, the UT went on to address the appellant's case that tax was not payable pursuant to the closure notices at all. The appellant's case was unusual. Although closure notices would normally give rise to an obligation to pay tax within 30 days under section 59B(5) TMA, in this case the appellant's case was that there was no tax owing under the closure notices, which the appellant argued were defective for section 55(2) purposes so that section 59B(5) was not engaged (UT [99]). The real issue was whether the closure notices were effective (UT [100]). The UT criticised the FTT which "did not appear to appreciate that it would have been at least arguable, if an appeal had proceeded in the FTT, that no tax was due because of the defect in the closure notices" [UT (106]). The UT held that the FTT had been in error in concluding that the tax would have remained payable despite an appeal against the closure notices (UT [106] and [107(2)]).

59. Ground 1 therefore succeeded and within Ground 1, the UT concluded that in the event of an appeal against the closure notices to the FTT, the appellant would have had an arguable case that the tax was not due. The UT did not determine how that argument would have been resolved by the FTT.

60. The UT turned to Ground 2 by which the appellant argued that the FTT had failed properly to apply *Perrin* when it required the case on reasonable excuse to be supported by subjective evidence of belief. The UT applied guidance given in *Sheiling Properties* at [81] (UT [127]). The UT rejected the appellant's case that no evidence of the appellant's subjective belief was necessary, holding that evidence of subjective belief was necessary to establish the reason for non-payment of the tax (UT [144]). The UT noted that the appellant was not inviting an inference to be drawn as to what the appellant believed as to the need for him to pay the tax (UT [145]). The UT noted HMRC's argument that payment would not have rendered the judicial review nugatory in relation to which HMRC had not lodged a Respondents' Notice to challenge the FTT's conclusion to opposite effect; but in any event, the answer did not much matter because the issue was why the appellant did not pay the tax, and on that the UT lacked evidence (UT [149]). The UT concluded that it would not have allowed the appeal on Ground 2 (UT [151]).

61. The UT set aside the FTT's decision and re-made the decision itself. It held that in the light of its findings on Ground 2 the appeal had to be dismissed because:

> "167. … Notwithstanding the relevant external facts to which Ms Brown drew our attention, there is no evidence as to why Mr Archer did not pay the tax. Without that evidence, we cannot be satisfied as to Mr Archer's reasons for non-payment. We cannot be satisfied that the reason for non-payment was that he was acting on the strength of "robust" professional advice or that he reasonably believed there was no obligation to make payment. We cannot be satisfied that any reason Mr Archer may have had in fact caused the non-payment of tax. Accordingly, and having regard to the guidance in *Perrin* and *Sheiling*, we cannot go on to arrive at the conclusion that he has an objectively reasonable excuse. The available facts are insufficient to enable us to reach such a conclusion."

62. The UT went on to consider the outcome on an alternative hypothesis:

> "168. We also consider that even if (contrary to the conclusion we set out above) Mr Archer did have an objectively reasonable excuse merely by reference to the fact that he was pursuing the JR Proceedings and that he had been provided with some encouragement from the court that he had a reasonably arguable case, there were important evidential gaps in the period immediately after the judgment of Jay J and in the period after the Court of Appeal had refused permission to appeal in respect of which there is no evidence whatever on which to form a view as to whether Mr Archer had an objectively reasonable excuse for failing to pay the outstanding tax. There is no evidence as to the advice he was receiving, or his own beliefs as to the merits of the JR Proceedings between 21 February 2017 and 7 March 2017 or in the period after 30 November 2017."

63. The UT concluded at [172] that the appellant was required to show his belief during these periods and that in the absence of such evidence, the UT could not simply infer that he had a reasonable excuse and that in any event after 30 November 2017 there was an unreasonable delay. The UT dismissed the appeal.

GROUNDS OF APPEAL

Ground (1) – The Subjective Evidence Issue

Submissions

64. The appellant submitted that the UT erred in law in requiring the appellant to give evidence both as to his subjective belief of the strength of his judicial review and that his belief caused him to fail to make payment. The reasonable excuse advanced by the appellant was not based on his subjective belief but on the fact of the judicial review and that it was obvious (stated to be "blindingly obvious") that this was the reason he did not pay the tax until the judicial review was concluded.

65. HMRC emphasised the broad discretion conferred on tribunals to decide whether a reasonable excuse is made out. They submitted that this Court should not interfere with the UT's assessment that, on the facts of this case, subjective evidence of belief and causation was required. The UT was well aware that the test of reasonableness was an objective one and was entitled to conclude on the evidence before it that the test was not met.

Discussion

66. The general approach to questions of reasonable excuse is well established. *Perrin* makes clear that the tribunal's task is to determine whether there are facts which, judged objectively, amount to a reasonable excuse; the tribunal must take account of "all relevant circumstances"; to the extent that an excuse relied on includes assertions as to a taxpayer's state of mind, then the tribunal will have to decide whether that state of mind actually existed, as part of the facts to be determined just like any other facts; once the FTT has found the facts then it must assess whether those facts (including, where relevant, the state of mind of any relevant witness) are sufficient to amount to a reasonable excuse, judged objectively (see [81] of *Perrin,* set out at para [18] above).

67. *Steptoe* establishes that the reason put forward must be the cause of non-payment. *Chapman* illustrates the possibility of a taxpayer citing multiple reasons for non-payment. It is for the tribunal to reach an evaluative judgment, on all the evidence in the case, about whether the taxpayer has shown a reasonable excuse as the reason for non-payment.

68. It is not right, however, to suggest that the taxpayer is *required* to file witness evidence to support his case. A taxpayer will very often want to put evidence in the form of a witness statement before the tribunal to explain the reason for non-payment. This is particularly so where the reason is personal (a death in the family, or a difficulty in the business, as examples). But it is up to the taxpayer to decide how they wish to present their case on reasonable excuse and what evidence they wish to rely on in support of it; much will depend on the particular circumstances of the particular case. Further, there is no *requirement* that a taxpayer must give evidence to the tribunal to establish that the reason they put forward for non-payment is the real reason, and that other reasons (such as impecuniosity) can be discounted. It is open to the taxpayer to invite the tribunal to draw an inference that the reason advanced, whether or not that is evidenced by a witness statement in support, is the real or causative reason for non-payment. Tribunals have power to regulate their own procedure (noting in particular rule 5 of the Tribunal Procedure (FTT) (Tax Chamber) Rules 2009, SI 2009/273) and should not find themselves constrained as to the sort of evidence they can accept when it comes to reasonable excuse, or any other sort of appeal.

69. The UT in this case appears to have thought the appellant was required to produce witness evidence going to his understanding of the merits of the judicial review proceedings and to the cause of his non-payment. This is most clearly stated at [145] where the UT held that the taxpayer was required to disclose details of his personal circumstances and views; and at [167] where the UT dismissed the taxpayer's reliance on "external facts" and said that there was "… *no evidence* as to why Mr Archer did not pay the tax" (emphasis added). Paragraph [168] starts with an alternative hypothesis, "… if (contrary to the conclusion we set out above) Mr Archer did have an objectively reasonable excuse merely by reference to the …. JR proceedings…", but I do not think that signals a different approach because references to the need for subjective evidence continue: for example, there is a reference to evidence of "his own beliefs" at [168], to "Mr Archer's belief as to the merits of his position

based on any advice he was receiving" at [169], to the lack of evidence "as to the view Mr Archer took" at [171], then the troubling conclusion that the appellant "must show what his belief was during these periods together with the foundation for that belief" at [172]. With respect to this experienced tribunal, I think these statements are flawed. The appellant's case before the UT was that judicial review proceedings were the reason for non-payment; there was plenty of evidence about that judicial review in the form of the various orders and judgments of the Administrative Court and the Court of Appeal, as well as the agreement with HMRC in December 2017; the appellant was entitled to rely on that body of material to demonstrate his reason for non-payment. He was not required to file a witness statement giving his personal views of the merits of the judicial review or referring to professional advice received. It is questionable in any event what weight his personal views of the merits would have had. Further, it was open to the appellant to invite an inference that the judicial proceedings were indeed the cause of his non-payment (although I acknowledge that the appellant has only developed that aspect of his case in this Court, so the UT can hardly be criticised for not addressing it). Whether the UT accepted the appellant's case based on the "external" evidence before it is a different matter going to the merits. My concern is that the UT dismissed the appellant's case *in limine* solely and simply on the basis that the appellant had failed to provide subjective evidence by way of witness statement. If it did that, I think it was in error.

70. In fairness to the UT, their approach seems to have followed HMRC's invitation to rely on [81] of *Sheiling* (see UT [137]-[138]) to conclude that it was necessary to take account of the taxpayer's subjective belief as part of the assessment of reasonable excuse (see [140(2)]) and that it was "inevitable" that the taxpayer should give evidence of his or her subjective beliefs (see [144]). But the background facts in *Sheiling* were very different. In that case, the taxpayer's judicial review had been stayed behind other claims and it appears that no decision on permission for judicial review had been made, so that by the time of the reasonable excuse appeal in the tribunal there was no "external evidence" of the merits of the judicial review (see [10] of *Sheiling*). It was for that reason that the UT in *Sheiling* appears to have shifted its focus to the reasonableness of the taxpayer's belief that the APN issued to him was procedurally invalid, in order to avoid a mini-trial of the merits of the taxpayer's case on judicial review (see [81]). This case is different because by the time the reasonable excuse appeal was adjudicated, the judicial review proceedings had concluded. It was on the "external evidence" about the judicial review that this appellant relied; he was entitled to do that. The approach to the evidence advocated in *Sheiling* [81] was not apposite. Further and in any event, *Sheiling* is an APN case, and I am not persuaded that it assists in the resolution of this case, for reasons I will discuss further below.

71. I have concluded that I must set aside the decision of the UT. It was common ground that this Court should, in the event that the UT's decision was set aside, remake the decision itself because there would be no purpose to be served in remitting the case to the UT or FTT, using powers under CPR 52.20(1) and section 14(4)(a) of the Tribunals, Courts and Enforcement Act 2007. This Court is in as good a position as the tribunals to reach a conclusion on the evidence relied on by the appellant and it is appropriate for this Court to remake the decision.

Grounds (2) and (3)

72. I shall deal with the arguments raised under Ground 2, which was predicated on the existence of the judicial review forming the basis of the reasonable excuse, as part of my discussion of how to remake the decision.

73. Ground 3, the postponement issue, largely falls away. By that ground, the appellant challenged an aspect of the UT's reasoning. To the extent that the position on postponement of payment of the tax, assuming a hypothetical appeal to the FTT, is relevant, I shall deal with it within my discussion of how to remake the decision.

REMAKING THE DECISION

Submissions

74. The appellant's case is that he had a reasonable excuse for non-payment given the existence of the judicial review proceedings and the judicial treatment of those proceedings up to 30 November 2017, after which HMRC agreed not to pursue the tax and marked the appellant's account as "payment suspended" pending the outcome of the application to the Supreme Court. Payment of the tax would have frustrated the judicial review, by risking it becoming academic or nugatory, and there was a further risk that the tax would not be repaid by HMRC even in the event of success in the judicial review. In these circumstances, it was reasonable, judged by the standards of the responsible taxpayer with this taxpayer's attributes and in his situation, not to pay the tax. The appellant did pay the tax within a reasonable time after his appeal rights were exhausted.

75. HMRC's case ranged rather wider in this Court than it had done before the UT or the FTT. HMRC argued that the appellant's reliance on the judicial review proceedings to provide a reasonable excuse for non-payment of the tax "cut across" the purpose of the APN legislation which required a taxpayer served with an APN to "pay now, argue later". HMRC also argued that payment of the tax would not have rendered the judicial review nugatory, contrary to the FTT's finding at [116]. The UT had refused to depart from that finding (UT [149]), but in this Court HMRC served a Respondents' Notice inviting departure from the FTT and the UT in this respect; by paragraph [6] of that Notice, HMRC sought a finding that the appellant could have made payment of the tax at any time without rendering the judicial review nugatory or academic. As an adjunct to that point, HMRC argued that the tax, if paid, would have been repayable under the principle established by *Woolwich* if the judicial review had succeeded.

76. HMRC also maintained, in the alternative and regardless of the outcome of these arguments, that the taxpayer had not shown a reasonable excuse for the failure to pay the tax, alternatively had not paid the tax within a reasonable time, because the existence of the judicial review, the appeal and the second attempted appeal, did not in fact amount to a reasonable excuse for not paying the tax and no inference could or should be drawn that the appellant's reason for not paying was indeed the existence of the judicial review.

Approach

77. I shall deal first with HMRC's wider arguments which go to the approach this Court should adopt.

Pay Now, Argue Later

78. A key part of HMRC's case was that the "pay now, argue later" principle was engaged in this case, because APNs had been issued to the appellant. In order to address HMRC's argument, it is necessary to make a number of basic points drawn from the case law on APNs:

a. First, the APN legislation is exceptional in its design and effect. In *R (Rowe and others) v Revenue and Customs Commissioners; R (Vital Nut Co Ltd and Another) v Revenue and Customs Commissioners* [2017] EWCA Civ 2105; [2018] 1 WLR 3039 Arden LJ said that the APN legislation was designed to deprive taxpayers of the benefit of statutory provisions on self-assessment which are "normally" available ([6]); it contained "unusual powers" ([61]); and the "breadth of the powers contained in this regime call for caution" ([50]).

b. Secondly, the purpose of the legislation (and the justification for its exceptional nature) is to deter marketed tax avoidance schemes by removing the cashflow benefit which would otherwise accrue to taxpayers while such schemes are contested (*Beadle* at [49]); the giving of an APN determines who should hold the disputed tax pending determination of the underlying tax liability, namely HMRC (*Beadle* at [50]). This is the "pay now, argue later" principle, as Mr Ghosh characterised it.

c. Thirdly, the legislation incorporates provision for a taxpayer to make representations against an APN to HMRC (section 222 FA 2014); if that occurs, the notice is not payable unless and until the APN has been confirmed by HMRC in answer to those representations (section 223(5) FA 2014). In *Rowe*, the Court recognised the taxpayer's right to make representations as an aspect of the duty of fairness at [110] per Arden LJ, alternatively as a means of satisfying Article 6 ECHR at [214] per McCombe LJ. The need for HMRC to consider representations seriously and carefully was emphasised in *R (on the application of Archer) v Revenue and Customs Commissioners* [2019] EWCA Civ 1021, [2020] 1 All ER 716, [2019] 1 WLR 6355 (a different *Archer* case brought, I believe, by this appellant's wife), by Henderson LJ at [94]:

> "The duties imposed on HMRC by s 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."

d. Fourthly, disagreement with the tax liability shown on the APN is not a reasonable excuse for non-payment: *Beadle*. However, there are some cases, uncertain in their scope, where non-payment of an APN may be reasonable, for example, where the defect is "gross and obvious" (*Chapman*) or where the APN is "procedurally invalid" (*Sheiling*). Mr Ghosh accepted that such cases existed in principle, although he did not endorse the distinction between substantive and procedural invalidity in *Sheiling* (a point which I do not need to decide). Mr Ghosh offered the hypothetical example of an APN which put the decimal point in the wrong place, which he accepted would give rise to a reasonable excuse for non-payment because it was "obviously wrong" on its face.

79. Building on those points, I can safely infer that the legislation does not envisage a category of APNs on which representations have been made but not answered. The reason for that is obvious: HMRC can and should answer the representations in such a case and so perfect the APN in question by confirming it or withdrawing it. In this case, for reasons which are

unknown, HMRC did not answer the appellant's representations. It cannot be argued that HMRC's failure to answer those representations was merely a formality or that the answer was a foregone conclusion, because that would run contrary to the case law in paragraph [78(c)] above.

80. The FTT (at [115]) and the UT (at [93] and [99]) concluded that, in light of the representations going unanswered, no payment was due under the APNs issued to the appellant. There is no appeal by HMRC against that finding (nor could there be: the finding is unavoidable on the legislation). It follows, inevitably in my view, that the "pay now, argue later" principle, by which payment is required in advance of argument (see [78(b)] above), and which is contingent on the existence of an APN which requires payment, does not apply in this case.

81. It also follows that this case is to be resolved by reference to the cases in the *Perrin* line, summarised above. The APN cases (*Chapman, Beadle, Sheiling* and *Exclusive Promotions*) are not helpful because they examine the reasonableness of an excuse for non-payment in the different context of pay now, argue later being applicable.

82. I can answer Mr Ghosh's specific arguments briefly. Mr Ghosh placed particular emphasis on section 55(8C)(a) which he argued was the means by which the "pay now, argue later" principle applied even though the APNs were not confirmed. His construction of that provision was disputed by Mrs Brown, but I do not need to resolve that dispute. The short answer to his point is that section 55(8C) is a provision about postponement of tax, but this case has nothing to do with postponement. Rather, the dispute in this case related to the logically prior question of whether the closure notices were effective (see the UT at [100]), an issue which section 55(8C) does not touch (see UT at [106]).

83. Mr Ghosh suggested that the term "reasonable excuse" as it appears in section 59C(9) should be construed to conform to the "pay now, argue later" principle. This argument inevitably involves reading in additional words or content to section 59C(9) but, given the draconian consequences of the principle on taxpayers who are subject to it, I would not be willing to read it in, even if I thought it was appropriate to do so. That would go far beyond a permissible process of statutory construction.

84. Mr Ghosh invited us to apply the concept of "reasonableness" with the "pay now, argue later" principle in mind. Mrs Brown correctly accepted that the APN formed part of the background facts. But I would go no further; it is not right to start from the position, when considering whether non-payment was reasonable, that the appellant was under an obligation to "pay now" pursuant to the APN regime – he was not.

Nugatory or academic judicial review

85. Mr Ghosh submitted that the judicial review would not have become nugatory if the tax was paid. I am not persuaded of that. To the contrary, I am satisfied that payment of the tax would have been detrimental to the appellant's case on judicial review, at least at first instance, and that there was a risk that the judicial review would have become nugatory. There are a number of reasons for reaching that conclusion. First, payment of the tax would have undermined the appellant's case for taking the judicial review in the Administrative Court rather than going to the FTT, because it would have taken away the threat of bankruptcy. Of course, an appeal to the FTT would have suited HMRC, but it would have been against the appellant's interests, as the Court of Appeal held. Secondly, there was a

risk that once the tax was paid, the Administrative Court would have declined to hear the claim, on the basis that there was no longer a live issue to determine. I accept that Elisabeth Laing J decided in *R* (*Dunne and Gray) v HMRC* [2015] EWHC 1204 (Admin) that a judicial review of an APN would not be rendered nugatory if the tax was paid (see [25]), but that is just one case on its own facts. The broad discretion which vests in the public law jurisdiction to determine whether a case has become academic and if so, whether it should still be heard, is emphasised in *R (L, M P) v Devon County Council* [2021] EWCA Civ 358 and the cases cited therein. Thirdly, there was at least some risk, although I think it small, that the tax would not be repaid by HMRC in the event that the judicial review succeeded. As Mr McDonnell submitted, there would have been differences between this case and *Woolwich* not least in the fact that in this case there was a liability to pay the tax – the issue was a technical one as to whether the closure notices made it payable – which was the opposite of *Woolwich* where the tax liability did not exist, which was what led to the fashioning of a remedy to enable recovery of that money.

Conclusions

86. I am not therefore persuaded of HMRC's wider arguments and I turn to the specifics of this appeal. The reasons which are relied on by the appellant changed over time, as the judicial review progressed. I think the narrative naturally falls into three distinct periods: first, the period from issue of the closure notices until the determination of the judicial review by Jay J on 21 February 2017; secondly, the period following Jay J's decision until the determination of the appeal by the Court of Appeal on 17 November 2017; thirdly, the period from the dismissal of the appeal by the Court of Appeal until the payment of the tax on 22 June 2018. For the purposes of this judgment, I take the periods in reverse order.

The Third Period

87. On any view, the appellant should have paid the tax by, say, mid-December 2017. In fact, the appellant paid the tax on 22 June 2018, over six months later. That is fatal to this appeal, because that period of delay cannot be viewed as reasonable. On 17 November 2017, the Court of Appeal concluded that the defects in the closure notices were cured by section 114(1); interim relief was discharged and permission to appeal was refused. At that point the tax was due pursuant to the closure notices as validated pursuant to section 114. It might have been reasonable for the appellant not to have paid the tax forthwith, not least because section 118(2) envisages a taxpayer having a reasonable time to make the payment once the reasonable excuse ceases, and a period of a week or two would not seem unreasonable in the context of this long-running case and given the amounts involved. But after that, the appellant's arguments run dry. The appellant was not reasonably entitled to rely on HMRC's agreement not to enforce the debt as a basis for continued non-payment. That agreement amounted to an administrative act by HMRC, reached on a pragmatic basis. It carried no assurance that surcharges would not be imposed. The marking of his account as "payment suspended" was consequential on HMRC's agreement, and was simply an internal measure, again for administrative purposes. It carried no assurance that surcharges would not be imposed.

88. In this period, the appellant was seeking permission for a second appeal to the Supreme Court, to try to overturn a unanimous and compelling judgment of the Court of Appeal which told him in clear terms that he owed the tax. He was entitled to seek that second appeal of course, but it does not provide him with a reasonable excuse for continued non-payment.

89. By mid-December 2017, a responsible taxpayer, especially one who benefited from expert legal advice as this taxpayer did, would have paid the tax. Any concerns which the appellant might at one point have harboured about the judicial review becoming nugatory in the event of success had receded in significance, given that the prospects of success in the judicial review were now looking remote. Further, HMRC had offered to repay the tax if the appellant was successful in the Supreme Court and at the very least, investigation of alternative ways of safeguarding the appellant's position in the event of success was required. It was not reasonable or responsible simply to sit back and wait for the Supreme Court's permission decision. These were not the actions of a responsible trader conscious of and intending to comply with his obligations regarding tax, applying *Clean Car*. Further, it could not simply be inferred by this point that the real reason for non-payment was the continued understanding or belief that the tax was not payable because of the defective closure notices; there was a real possibility that the appellant just did not want to pay the tax or that he wished to retain the cashflow benefit of keeping hold of the money for a bit longer.

The Second Period

90. I consider next the second period (ie, from the decision of Jay J until the hand-down of the Court of Appeal's decision on 30 November 2017). There was a short time of around 2 weeks in February/March 2017 when no permission or interim relief was in place, but I would not base my decision on the existence of that relatively short gap which can, I think, be bridged by section 118(2). The key feature of this period is that the appellant now had a judgment against him, expressed by Jay J in trenchant terms, suggesting that he should pay up because one way or another he was going to lose. It is true that by 7 March 2017 he also had an order granting permission to appeal (on the standard necessary for a second appeal) as well as interim relief, and that Henderson LJ's order was expressed in terms which might have given cause for optimism. It is also true that the risk remained that the judicial review (now on appeal) might be jeopardised by payment of the tax, although that was surely now a smaller concern, simply because success in the judicial review looked less likely.

91. There are factors going both ways in this period. I have concluded that on balance the loss of the case at first instance meant that it was no longer permissible for the appellant simply to point to the existence of the judicial review, without more. If, however, the appellant had adduced some further evidence for this period, to fill in the gaps and explain why payment was not made, and to establish that the judicial review as it was ongoing really was the reason for non-payment, it might have been possible to reach a conclusion in his favour.

The First Period

92. For the first period, which runs from the service of the closure notices, through the issue of the judicial review claim on 29 March 2016, up to the point at which Jay J dismissed the judicial review, I would accept that on a balance of probability the appellant had an objectively reasonable excuse for non-payment. There was an obvious problem with the closure notices which did not contain amendments to the taxpayer's self-assessed returns. The appellant's judicial review was described by Kerr J as having a real prospect of success and by me as being arguable. Kerr J granted interim relief to prohibit HMRC from seeking to enforce the tax debt while the judicial review proceeded. The whole point of the judicial

review was to establish whether the tax was payable at all, and there was a risk that the judicial review would be undermined or rendered nugatory if the tax was paid.

93. I would not have required any more evidence than is currently before this Court to reach that conclusion. Specifically, I would have been willing to infer that the judicial review was the appellant's reason for non-payment. There is evidence, in the form of the appellant's statement in the judicial review, to establish that he had the funds available to pay, at least at this stage.

94. I am reassured that my conclusion is not out of line with day to day practice in the FTT by *Sokoya v Revenue and Customs Commissioners* [2009] UKFTT 163 (TC); [2009] SFTD 480, a decision of Judge Roger Berner, to the effect that a taxpayer had a reasonable excuse for non-payment of a penalty while the notice of penalty was being challenged in the courts, in circumstances where no evidence to that effect was submitted and the FTT simply drew the necessary inferences (see [23]).

95. Further, I think there is some reassurance to be derived from the general rule on postponement of tax in the FTT, which provides that in cases not involving APNs, the tax does not need to be paid until the outcome of the appeal to the FTT is known, but becomes payable after that in any event, whether or not the taxpayer is seeking a second appeal (see paras [14]-[15] above, referring to sections 55 and 56 TMA). That general rule is relevant only by way of analogy, and an imperfect one at that, because the appellant did not in fact pursue his challenge in the FTT (leaving aside the issue of whether, if he had done so, the tax would not in any event have been amenable to postponement given the APNs). However, there is some value in acknowledging that in a case where the "pay now, argue later" principle is not engaged, as I conclude it was not in this case, a taxpayer with a reasonable case in the FTT will not have to pay the tax until after the appeal is determined, but is required to thereafter if the appeal is determined against him.

SUMMARY

96. The appellant did not have a reasonable excuse throughout the period of default, and his delay in paying the tax was unreasonable once the reasonable excuse had come to an end. Thus, the outcome of this appeal is no different from that arrived at by both tribunals below, although the approach I have adopted and my reasons for getting there are in some respects different.

97. I would dismiss this appeal.

LADY JUSTICE FALK:

98. I agree.

LADY JUSTICE SIMLER:

99. I also agree.