Neutral Citation Number: [2019] EWCA Civ 1719

Case No: A3/2018/0765 and C1/2018/3074

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS (REVENUE LIST)
Sir Nicholas Warren

AND ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Ouseley

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 October 2019

Before:

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE HENDERSON
and
LORD JUSTICE MOYLAN

- -

Between:

BARRY KNIBBS & OTHERS	**Appellants**
- and -	
COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

And between

THE QUEEN on the application of ROBERT ASTLEY & OTHERS	**Appellants**
-and-	
COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

David Ewart QC and **Charles Bradley** (instructed by **Jefferies Essex LLP**) for the **Appellants**
Vikram Sachdeva QC and **Marika Lemos** (instructed by **HMRC Solicitors Office**) for the **Respondents**

Hearing dates: 11-13 June 2019

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Approved Judgment

Lord Justice David Richards (giving the judgment of the court):

Introduction

1. This is the judgment of the court to which all members of the court have contributed.

2. There are before the court (i) an appeal, brought with permission granted by Lewison LJ, against an order of Sir Nicholas Warren dated 16 April 2018 striking out proceedings brought under CPR Part 7 in the High Court, and (ii) an application for permission to appeal against an order of Ouseley J dated 5 December 2018 whereby he refused permission to proceed with an application for judicial review. Knowing that permission to appeal had been given in the Part 7 proceedings, Ouseley J sensibly followed Sir Nicholas' decision without analysing the issues independently.

3. Both cases raise essentially the same substantive issues of tax law, and the six applicants in the judicial review proceedings were claimants in the Part 7 proceedings. Following a four-day hearing, Sir Nicholas Warren concluded in a substantial and fully reasoned judgment that the claims in the Part 7 proceedings were not sustainable. He accordingly struck out the claims. He also struck out the claims on the ground that it was an abuse of process by the claimants to pursue claims in Part 7 proceedings rather than by statutory appeal to the First-tier Tribunal (FTT) or, where such an appeal would not be available, by way of judicial review.

4. On considering the application for permission to appeal in the judicial review proceedings on the papers, Singh LJ directed that the application should be listed with the appeal in the Part 7 proceedings, with the court free to decide, if permission were granted, whether to hear the application for judicial review itself or to remit it to the Administrative Court.

5. The claimants in both cases are taxpayers who participated in tax avoidance schemes, either directly or through partnerships, mainly involving investments in films. It has been held in other proceedings that the relevant schemes failed to generate the intended losses for set-off against taxable income. Nonetheless, it is the claimants' case that, as a result of what is said to have been the failure of the Respondents (HMRC) to make the requisite enquiries within the applicable time limits, they are entitled to the benefit of their claims for loss relief, such that HMRC either must repay tax that has been paid or are not entitled to require payment of the tax that is otherwise due.

6. The claimants made claims to set losses (purportedly) sustained in one year of assessment (Year 2) against income of one or more previous years (Year 1) (carry-back claims). They allege that HMRC did not enquire into these claims under schedule 1A to the Taxes Management Act 1970 (TMA), while it is HMRC's case that in some cases they did so. It is the claimants' case that, in the absence of such enquiries within the relevant time limits, the carry-back claims became final and HMRC were obliged to give effect to them. Those claimants whose claims had not been allowed by HMRC claimed declarations that HMRC were obliged to give effect to them and orders for payment of sums due as a result of doing so. The claimants whose claims had been given effect by HMRC claimed declarations that HMRC were not entitled to reverse them.

7. Following the hearing but before Sir Nicholas Warren gave judgment, the Supreme Court delivered judgment in *The Queen (on the application of De Silva) v Revenue and Customs Commissioners* [2017] UKSC 74, [2017] 1 WLR 4384 (*De Silva*), affirming the decision of this court. The parties made submissions in writing on the decision. HMRC's position on this appeal is that the Supreme Court's decision is conclusive in their favour and that they are entitled to enquire into the carry-back claims by means of enquiries under section 9A of TMA into the claimants' self-assessment tax returns for Year 2 or under section 12AC into partnership returns. The claimants accept that *De Silva* binds this court to reject the appeals of those claimants whose Year 2 was 2006/07 or earlier, but they submit that it does not apply to those claimants whose Year 2 was 2007/08 or later, as a result of the Income Tax Act 2007 (ITA).

8. The actions in the High Court were very oddly constituted. Six sets of proceedings were issued, each with a large number of claimants. The total number of claimants runs into the hundreds. Two further claims were issued by a named claimant "for and on behalf of the Affected Taxpayers (as defined in the particulars of claim)". None of the facts relevant to each claimant was pleaded. The justification was said to be that the cases raised generic issues applicable to all the claimants. If this is indeed the case, the obvious course would have been to make one or more group litigation orders and to identify lead cases. Those lead cases would have been fully pleaded.

9. In this judgment, we address first the procedural issue, whether the claimants' Part 7 claims were an abuse of process, and, second, the substantive issues of tax law raised by the appeal.

Procedural issues

10. The appropriate procedure to be adopted by the claimants in challenging HMRC's refusal to give effect to their carry-back claims is to be judged by reference to the claims asserted by them in the High Court proceedings, together with any other relevant information.

11. The claims, although made in some six separate proceedings on behalf of a large number of claimants, were in generic and common form. It was pleaded in the particulars of claim that the carry-back claims fell within schedule 1A to TMA and that in all cases the claims were made by letter or by filling in boxes on their self-assessment tax return forms (whether by amendment or otherwise) for a prior year or for Year 2. In some cases, the claimants' income tax self-assessments for the year in which the loss was said to have been suffered included relief in respect of the loss.

12. The particulars of claim pleaded that none of the claimants had received a notice of enquiry pursuant to paragraph 5(1)(a) of schedule 1A to TMA and that the periods in which such notices could have been issued had expired pursuant to paragraph 5(2). If such notices had been given, the obligation (if any) to give effect to the claims would have been suspended under paragraph 4(1) until the "day on which, by virtue of paragraph 7(1) below, the enquiry is completed". They allege that, as no enquiry under schedule 1A had been opened, HMRC were obliged to give effect to the claims. In failing to do so, HMRC were in breach of statutory duty. Declarations and orders for payment, where repayments of tax were said to be due, were claimed.

13. The particulars of claim referred to the notices of enquiry under section 9A of TMA, and deemed notices under section 12AC, received by some claimants. It was pleaded that those enquiries could not relate to the carry-back claims as they were not made within a return for the purposes of the relevant provisions of TMA (sections 8(1), 9, 9A and 42(11)(a)), even if the claims were made by filling in boxes in tax return documents.

14. There is no dispute that enquiries were not opened under schedule 1A in most cases. It is thus apparent that the real dispute was whether HMRC were entitled to open enquiries under sections 9A and, in the case of partnership claims, under section 12AC.

15. Having opened enquiries under section 9A into individual returns, an officer of HMRC is obliged by the statutory scheme to complete the enquiry and issue a closure notice under section 28A of TMA, stating the officer's conclusions. The closure notice must either state that no amendment of the return is required or make the amendments required to give effect to the conclusions. Unreasonable delay in the issue of a closure notice can be dealt with by an application to the FTT for a direction requiring the officer to issue a closure notice: section 28A(4)-(6).

16. If the taxpayer is dissatisfied with the results of a closure notice, an appeal lies to the FTT.

17. It is well established that if Parliament has laid down a statutory appeal process against a decision of HMRC, a person aggrieved by the decision and wishing to challenge it must use the statutory process. It is an abuse of the court's process to seek to do so through proceedings in the High Court or the County Court. In *Autologic Holdings plc v Inland Revenue Commissioners* [2005] UKHL 54, [2006] 1 AC 118, Lord Nicholls of Birkenhead, giving the majority judgment, said:

> "11. In resolving this question of jurisdiction the starting point is to note two basic principles. The first concerns the exclusive nature of the appeal commissioners' jurisdiction to decide certain types of disputes arising in the administration of this country's tax system. The present disputes concern claims for group relief. The way a taxpayer claims group relief depends on whether the claim relates to an accounting period before or after 1 July 1999. Before that date the corporation tax (pay and file) system was in force. This has now been replaced by the corporation tax (self-assessment) system. For present purposes this difference is immaterial. What matters is that, whichever system is applicable, an assessment which disallows a group relief claim cannot be altered except in accordance with the express provisions of the tax legislation. Statute so provides: see, in respect of the pay and file system, section 30A of the Taxes Management Act 1970 and, in respect of the self-assessment system, paragraphs 47(2) and 97 of Schedule 18 to the Finance Act 1998. Further, the statutory code makes its own provision for appeals. Under both the 'pay and file' system and the self-assessment system a taxpayer has a right of appeal to the appeal commissioners against assessments of tax, including

> amendments made by the revenue to a taxpayer's tax return. The appeal commissioners' findings of fact are final. In appropriate cases a further appeal lies to the High Court by way of case stated on a point of law. Where the appeal commissioners reduce the amount of an assessment, any overpaid tax must be repaid to the taxpayer, with a repayment supplement by way of interest as provided in section 825 of the ICTA.
>
> 12. Clearly the purpose intended to be achieved by this elaborate, long established statutory scheme would be defeated if it were open to a taxpayer to leave undisturbed an assessment with which he is dissatisfied and adopt the expedient of applying to the High Court for a declaration of how much tax he owes and, if he has already paid the tax, an order for repayment of the amount he claims was wrongly assessed. In substance, although not in form, that would be an appeal against an assessment. In such a case the effect of the relief sought in the High Court, if granted, would be to negative an assessment otherwise than in accordance with the statutory code. Thus in such a case the High Court proceedings will be struck out as an abuse of the court's process. The proceedings would be an abuse because the dispute presented to the court for decision would be a dispute Parliament has assigned for resolution exclusively to a specialist tribunal. The dissatisfied taxpayer should have recourse to the appeal procedure provided by Parliament. He should follow the statutory route.
>
> 13. I question whether in this straightforward type of case the court has any real discretion to exercise. Rather, the conclusion that the proceedings are an abuse follows automatically once the court is satisfied the taxpayer's court claim is an indirect way of seeking to achieve the same result as it would be open to the taxpayer to achieve directly by appealing to the appeal commissioners. The taxpayer must use the remedies provided by the tax legislation. This approach accords with the views expressed in authorities such as Argosam Finance Co Ltd v Oxby (Inspector of Taxes) [1965] Ch 390, In re Vandervell's Trusts [1971] AC 912 and, more widely, Barraclough v Brown [1897] AC 615."

18. In those cases where HMRC had opened an enquiry, the approach re-affirmed in *Autologic* requires the claimants to pursue appeals to the FTT and renders any attempt to litigate their liability to tax or their right to a repayment in Part 7 or 8 civil proceedings an abuse of the court's process.

19. Mr Ewart QC on behalf of the claimants submits that there exist special circumstances in this case that mean that such proceedings are not an abuse of process.

20. First, Mr Ewart points out that in some cases the claimants are now out of time to appeal the conclusions stated in or amendments made by closure notices issued by

HMRC. We cannot see that this can justify a challenge by civil proceedings. Parliament has laid down an exclusive appeal process and time limits for invoking it. If those time limits have expired, and are not or cannot be extended, the clear legislative intention is that it is too late to make any challenge. There is no sensible basis for reading the statutory provisions as permitting an alternative route of challenge once the time limits for an appeal to the FTT have expired. In *Autologic*, the House of Lords were prepared to countenance the possibility of civil proceedings once a statutory appeal was no longer possible only because it was a means of vindicating the taxpayer's EU law rights. There is no parallel with the present case.

21. Second, Mr Ewart submitted that, if HMRC are not entitled to open an enquiry under sections 9A and 12AC, a closure notice is a nullity and its conclusions or amendments cannot be the subject of an appeal to the FTT. It seems to us that the FTT is competent on an appeal to decide whether HMRC had the statutory power to invoke the procedure which led to the closure notice under appeal. A lack of power to issue a closure notice is as much a ground of appeal against its conclusions or amendments as any other ground of challenge. Even if that were wrong, civil proceedings issued to determine this issue would remain an abuse, because for the same reasons as given below as regards a notice under section 28B, the appropriate mode of challenge would be by way of judicial review.

22. Third, Mr Ewart submitted that it was necessary for those claimants seeking repayments of tax to issue proceedings so as to prevent their claims becoming time-barred under the Limitation Acts. Mr Ewart was suggesting that if a claimant successfully appealed against the conclusions in or amendments made by a closure notice, HMRC might refuse to make any repayment on account of a potential limitation defence. We found startling the idea that, having lost on an appeal against the effects of a closure notice, HMRC would decline to give effect to the FTT's decision and refuse to repay the tax that HMRC had no right to retain. If, contrary to all principles of public administration, HMRC did seek to adopt this position, we do not consider that their stance would be well-founded in law. Paragraph 4 of schedule 1A to TMA requires HMRC to give effect to a claim "as soon as practicable after a claim…is made". Time for limitation purposes would not start to run until it became practicable to give effect to the claim. While an appeal to the FTT is pending, and the entitlement of the taxpayer to the claim has yet to be determined, it cannot be said to be "practicable" to give effect to the claim.

23. As earlier noted, many of the claimants participated in the tax schemes through partnerships. In those cases, HMRC have opened or intend to open enquiries into the partnership returns under section 12AC. Giving notice of enquiry is deemed to include the giving of notice of enquiry under section 9A to each partner who has made a return: section 12AC(6). Upon completion of the enquiry, HMRC issue a closure notice to the partnership and, if the partnership return is amended by the closure notice, HMRC must give each partner a notice amending the partner's return: section 28B(4). The partnership can appeal against the conclusions in or amendments made by the closure notice, but the individual partners have neither that right nor a right to appeal the notice given to them under section 28B(4).

24. Mr Ewart accepts that individual partners are entitled to seek to challenge the notices given to them by way of judicial review, but he submits that it is not an abuse of process for claimants to seek to do so in ordinary civil proceedings. There have been

many cases since *O'Reilly v Mackman* [1983] 2 AC 237 in which the circumstances in which a claimant may raise public law issues in ordinary civil proceedings, rather than by way of judicial review, have been considered, although none of them has been in the context of tax. For the purposes of this appeal, we do not consider it necessary to review those authorities.

25. We are satisfied that, in the present case, the correct procedure for individual partners to challenge the amendments made to their returns was by judicial review, and not by ordinary civil proceedings. There are a number of reasons for this. First, there are no private law rights involved. This is not, for example, a case where a claimant is seeking to enforce a contractual right. Second, the time limits are a strong factor in favour of judicial review being the correct procedure. Both appeals to the FTT and applications for permission to pursue judicial review are subject to short time limits. It makes no sense at all that an individual taxpayer or a partnership has a period of 30 days in which to appeal to the FTT against a closure notice, but an individual partner should have six years in which to make what is, in effect, the same challenge to a notice given under section 28B(4). Third, the challenges in these cases affect a large number of people and raise no issues of fact that might be unsuitable for determination in judicial review proceedings. Fourth, the requirement for permission to pursue judicial review does not make it an unsuitable procedure in the circumstances of this case, any more than in the many other cases (tax and non-tax) to which it applies. It is no more than a filter to weed out groundless cases.

26. We are accordingly satisfied that the judge was right in his conclusion that, irrespective of the merits of the substantive issues of law arising in these cases, the Part 7 proceedings should be struck out as an abuse of the process of the court.

Substantive issues

27. We now turn to the substantive issues of tax law raised by both cases. At the heart of the dispute, as we have already noted, is the question whether the only way in which HMRC could enquire into the claimants' carry-back claims to Year 1 was by means of a notice of enquiry given under paragraph 5(1)(a) of schedule 1A to TMA, or whether it was also open to HMRC to enquire into the claims under section 9A of TMA, as part of an actual or deemed enquiry into the claimants' self-assessment returns for Year 2 (i.e. the year of assessment in which the claimed losses arose). Any notice under paragraph 5 of schedule 1A must be given before expiry of the relatively short time limits stipulated by paragraph 5(2), which means, relevantly for present purposes, by 31 January in the second calendar year after the end of the Year 2: see sub-paragraph (2)(b). Since, on the assumed facts of all the cases, no enquiries under schedule 1A were opened by HMRC before the time limit expired, it is critical to determine whether, as the claimants contend, the carry-back claims were ones which fell within the exclusive ambit of schedule 1A. If so, it would then also be necessary to decide whether HMRC's failure to enquire into the claims in good time has the consequence that the claims must be allowed in full (or, if effect has already been given to them, that the claims cannot later be reversed), even though the tax avoidance schemes which were designed to generate the trading losses available for carry-back have now been held ineffective.

28. Following the decision of the Supreme Court in *De Silva*, it is common ground (as we have explained) that this court is bound to dismiss the appeals of those claimants

whose Year 2 was 2006/07 or earlier. Under the relevant legislation in force in those years, before ITA came into effect, the Supreme Court has answered the critical question identified in the previous paragraph adversely to the claimants. There is no requirement for HMRC to open an enquiry into a carry-back claim under schedule 1A in order to challenge the claim. The claimant taxpayer is in any event obliged to include the claim in his return for Year 2, and the claim may then be challenged by an enquiry into that return.

29. The position is different, says Mr Ewart, for those claimants whose Year 2 is 2007/08 or later. Although the relevant provisions of TMA remain unchanged from those considered by the Supreme Court in *De Silva*, the substantive and computational provisions of ITA differ in material respects from the legislation previously in force, and (so he submits) at least arguably lead to the conclusion that these carry-back claims are not defeated by the reasoning in *De Silva*, with the result that they should not be struck out as unsustainable.

30. Finally, although accepting that the claims of the pre-2006/07 Year 2 claimants cannot succeed in this court, Mr Ewart submits that the Supreme Court may wish to revisit and depart from its decision in *De Silva* in the light of his submissions on the statutory scheme of ITA and the presumption that (as part of the Tax Law Rewrite Project) it was not intended by Parliament to make more than minor changes of a substantive nature to the pre-existing law.

31. In order to do justice to these submissions, and place them in context, we must begin by setting out the main statutory provisions on which the issues turn. They are unfortunately of considerable complexity and give rise to difficult questions of construction which have already led to three cases reaching the Supreme Court: the first in time was *Revenue and Customs Commissioners v Cotter* [2013] UKSC 69, [2013] 1 WLR 3514 (*Cotter*); the second was *De Silva*; and the most recent, in April 2019, and thus more than a year after Sir Nicholas Warren gave his judgment, is *The Queen (on the application of Derry) v Revenue and Customs Commissioners* [2019] UKSC 19, [2019] 1 WLR 2754 (*Derry*).

32. As a preliminary observation, we note that the difficulties largely stem from the need to adapt the rules for making and determining claims by taxpayers to the machinery of self-assessment. Thus the basic procedure for making claims is still set out (as it was in the days of direct assessments to tax made by officers of HMRC) in section 42 of TMA, but the section has been extensively amended, and is also supplemented in crucial respects by two schedules (schedule 1A and schedule 1B) which (although enacted at different times) both came into effect from 1996/97, at the same time as the modern self-assessment regime for individual taxpayers.

(i) Trade loss relief

33. Section 64 of ITA enables a person to make a claim for trade loss relief against general income, as follows:

> "(1) A person may make a claim for trade loss relief against general income if the person—
>
> (a) carries on a trade in a tax year, and

(b) makes a loss in the trade in the tax year ("the loss-making year").

(2) The claim is for the loss to be deducted in calculating the person's net income—

(a) for the loss-making year,

(b) for the previous tax year, or

(c) for both tax years.

(See Step 2 of the calculation in section 23.)

(3) If the claim is made in relation to both tax years, the claim must specify the tax year for which a deduction is to be made first.

(4) Otherwise the claim must specify either the loss-making year or the previous tax year.

(5) The claim must be made on or before the first anniversary of the normal self-assessment filing date for the loss-making year.

…"

The loss may therefore be utilised either "sideways", against other income for the loss-making year, or retrospectively, against general income for the previous tax year, or in a combination of both ways. It also follows that two tax years will be involved (the current loss-making year, and the previous tax year), unless the taxpayer elects to claim all the relief in the current year.

34. The relief conferred by section 64 is the main form of relief for trade losses dealt with in Chapter 2 of Part 4 of ITA. Because the relief may involve two tax years, it is important to note section 60(2) which provides that:

> "This Chapter is subject to paragraph 2 of Schedule 1B to TMA 1970 (claims for loss relief involving two or more years)."

35. Before 2006/07, the right for a trader to claim relief for trade losses against his other income was conferred in materially similar terms, but in more old-fashioned language, by section 380 of the Income and Corporation Taxes Act 1988 (ICTA).

(2) Tax returns and self-assessment

36. The basic obligation to submit an annual tax return is imposed by section 8(1) of TMA. By virtue of section 8(1AA)(a), "the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return". Subsections (1B) and (1C) then provide that, in the case of a partnership, the return

submitted by a partner must include his share of the partnership income etc as stated in a "relevant statement" made under section 12AB.

37. Section 9(1) of TMA provides that every return under section 8 must include a self-assessment, defined as:

> "(a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person making the return is chargeable to income tax and capital gains tax for the year of assessment; and
>
> (b) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax deducted at source…"

38. Section 9A empowers HMRC to open an enquiry into a return under section 8, within specified time limits. By virtue of subsection (4):

> "An enquiry extends to –
>
> (a) anything contained in the return, or required to be contained in the return, including any claim or election included in the return…"

Section 28A then provides that, on completion of the enquiry, HMRC may amend the return by a closure notice, against which the taxpayer has a right of appeal to the FTT under section 31.

39. Partnership returns are dealt with by section 12AA. HMRC may give notice to the partnership to file a separate partnership return. Because the partnership is not itself a taxable entity, a partnership return does not include a self-assessment, but under section 12AB the partnership return must include a "partnership statement", which as we have seen is then reflected in the returns made by the individual partners.

40. Section 12AC enables HMRC to enquire into a partnership return, and by virtue of subsection (6)(a) any such enquiry is deemed to be an enquiry under section 9A into the returns of the individual partners. Upon completion of the enquiry, section 28B empowers HMRC to amend the partnership return and to make consequential amendments to the individual partners' returns: see subsection (4)(a). There is no right of appeal to the FTT against an amendment made under section 28B(4)(a), so it is agreed that any challenge to it has to be made by way of judicial review.

(3) Claims and carry-back claims

41. Section 42 of TMA relevantly provides as follows:

> "(1) Where any provision of the Taxes Acts provides for relief to be given, or any other thing to be done, on the making of a

> claim, this section shall, unless otherwise provided, have effect in relation to the claim.
>
> …
>
> (2)…where notice has been given under section 8… or 12AA of this Act, a claim shall not at any time be made otherwise than by being included in a return under that section if it could, at that or any subsequent time, be made by being so included.
>
> …
>
> (11) Schedule 1A to this Act shall apply as respects any claim or election which –
>
> (a) is made otherwise than by being included in a return under section 8… or 12AA of this Act…
>
> (11A) Schedule 1B to this Act shall have effect as respects certain claims for relief involving two or more years of assessment."

42. It will be appreciated that the effect of section 42(2) is that, in all cases where a taxpayer is required to submit a personal or partnership tax return, any claim that *could* be included in the return *must* be so made, and cannot (for example) be made outside the return by means of a letter. It is therefore only when a claim is made outside a return, and could not be included in a return, that the provisions of schedule 1A come into play.

43. Paragraph 4(1) of schedule 1A provides that:

> "… an officer of the Board or the Board shall, as soon practicable after a claim other than a partnership claim is made… give effect to the claim… by discharge or repayment of tax."

That provision is, however, subject to sub-paragraph (3)(a), which provides that where an enquiry is opened into the claim, the obligation to give effect to the claim under sub-paragraph (1) "shall not apply until the day on which, by virtue of paragraph 7(1) below, the enquiry is completed".

44. Paragraph 5 then provides that HMRC may enquire into a schedule 1A claim within specified time limits, and paragraph 7(2) provides that on the completion of the enquiry, HMRC may amend the claim. Effect must then be given to the amendment under paragraph 8 "by making such adjustment as may be necessary", whether by way of assessment on the claimant (if the claim has been found to be excessive) or by discharge or repayment of tax (if the claim is upheld). By virtue of paragraph 9(1), the taxpayer may appeal to the FTT against any such amendment.

45. Schedule 1B is headed "Claims for relief involving two or more years". As we have already noted, claims for loss relief involving two or more years, i.e. carry-back

claims, are expressly made subject to paragraph 2 of schedule 1B by section 60(2) of ITA.

46. Paragraph 2 of schedule 1B is headed "Loss relief" and materially provides as follows:

> "2(1) This paragraph applies where a person makes a claim requiring relief for a loss incurred or treated as incurred, or a payment made, in one year of assessment ("the later year") to be given in an earlier year of assessment ("the earlier year").
>
> (2) Section 42(2) of this Act shall not apply in relation to the claim.
>
> (3) The claim shall relate to the later year.
>
> (4) Subject to sub-paragraph (5) below, the claim shall be for an amount equal to the difference between –
>
> > (a) the amount in which the person is chargeable to tax for the earlier year ("amount A"); and
> >
> > (b) the amount in which he would be so chargeable on the assumption that effect could be, and were, given to the claim in relation to that year ("amount B").
>
> …
>
> (6) Effect shall be given to the claim in relation to the later year, whether by repayment or set-off, or by an increase in the aggregate amount given by section 59B(1)(b) of this Act, or otherwise."

47. It follows from these provisions that, where a taxpayer wishes to make a carry-back claim for loss relief, the claim does not need to be included in a return, because section 42(2) of TMA is disapplied by paragraph 2(2). The effect of sub-paragraphs (3) and (4) was explained by Lord Hodge in *De Silva* at [19]:

> "Paragraph 2 of Schedule 1B thus is concerned with relief sought for a loss incurred in the later year (which I will call "Year 2") by carrying it back to the earlier year ("Year 1"). Significantly, paragraph 2(3) makes it clear that the claim relates to Year 2. The quantification of the claim is governed by paragraph 2(4): the claim is the difference between amount A and amount B on the counterfactual assumption that effect could have been and was given to the claim in Year 1. That assumption is counterfactual because paragraph 2(3) and paragraph 2(6) relate the claim and the giving effect to the claim to Year 2."

(4) The calculation of liability to income tax under ITA

48. For 2007/08 onwards, the calculation of a person's liability to income tax for a tax year is prescribed in exhaustive detail by Chapter 3 of Part 2 of ITA (sections 22 to 32). There was no direct equivalent to these provisions in the previous legislation. The explanatory notes to section 23 of ITA explain that the section "is based on many provisions in the source legislation, in particular section 835 of ICTA".

49. We gratefully adopt the following summary of the provisions in the skeleton argument of counsel for the claimants:

> "Section 23 sets out a series of steps which are to be taken "*to find the liability of a person ("the taxpayer") to income tax for a tax year"; "the result* [of these steps] *is the taxpayer's liability to income tax for the tax year."*
>
> In summary, Step 1 is to identify the amounts of income (e.g. trading income, employment income etc) on which the taxpayer is charged to income tax for the tax year. Steps 2 and 3 are to deduct from these amounts of income the amounts of any relief (pursuant to the provisions listed in s 24) that the taxpayer is entitled to for the tax year in question or allowances (which are set out in Chapter 2 of Part 3). Steps 4 and 5 are to calculate the applicable rates of tax on these net amounts and to add the resulting amounts of tax together. Step 6 is to deduct from this amount of tax any applicable tax reductions (which are listed in s 26).
>
> Finally, Step 7 is to add in any amount of tax for which the taxpayer is liable under the miscellaneous charging provisions listed in s 30. The common feature of the provisions listed in s30 is that they impose liabilities to income tax that are not based on any actual amount of income. (For example, where a member of a registered pension scheme receives an "unauthorised payment", the unauthorised payment is not strictly speaking "income" of any description, but the member is liable to an "unauthorised payments charge" under s 208(2)(a) of the Finance Act 2004 in an amount equal to 40% of the unauthorised payment.)
>
> ITA 2007, ss 22(2) and 32 list provisions imposing liability to income tax that do not feed into the calculations in s 23. As explained in the explanatory note to s 32, these liabilities arise in connection with the recovery of excessive relief where the taxpayer's self-assessment for the tax year in question is final; deduction of tax at source where the liability is not in respect of the person's own liability; and certain "stand-alone" charges, such as under the "transactions in securities" regime, which require some kind of administrative action to be taken by the Revenue in order to come into existence at all. Such liabilities

> therefore cannot in general be "self-assessed" by the taxpayer…".

50. We would add two points to the above summary. The first is that the list of reliefs deductible at Step 2, set out in section 24(1), includes trade loss relief against general income pursuant to section 64 of ITA. The second point is that the "sum of the amounts of the components left after" Step 2 is defined in section 23 as "net income". This was an innovation, which brought about "a welcome degree of precision and clarity in place of the previous non-statutory concept of "net statutory income" representing total income less allowable deductions": see the judgment of Lord Carnwath (with whom the other members of the court agreed) in *Derry* at [12].

The Supreme Court decisions in Cotter, De Silva and Derry

51. Having set the statutory scene, we can now review the decisions of the Supreme Court in *Cotter, De Silva* and *Derry*. For present purposes, we can deal quite briefly with *Cotter* and *Derry*, but *De Silva* will need a more detailed analysis.

(1) *Cotter*

52. Reduced to its essentials, the case concerned a claim by Mr Cotter to have sustained an employment-related loss of £710,000 in 2008/09 (Year 2), which he claimed to carry back and set against his income of the previous tax year (Year 1). The claim was made on the face of his (amended) tax return for Year 1, by making appropriate entries in boxes on the form. HMRC opened an enquiry into the claim under TMA schedule 1A, which as we have seen applies only to claims *not* included in a return. Mr Cotter therefore argued that schedule 1A did not apply, because his claim had been made on the face of his return for Year 1. He further argued that the appropriate course would have been for HMRC to open an enquiry into his return for Year 1 under TMA section 9A.

53. The Supreme Court rejected Mr Cotter's arguments, and accepted HMRC's submission that a claim is included in a "return" for the purposes of sections 8(1), 9, 9A and 42 of TMA only if it affects the calculation of tax payable in respect of the year of assessment for which the return was made. As Lord Hodge explained, at [25]:

> "The word "return" may have a wider meaning in other contexts within TMA. But, in my view, in the context of ss 8(1), 9, 9A and 42(11)(a) of the TMA, a "return" refers to the information in the tax return form which is submitted for "the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax" for the relevant year of assessment and "the amount payable by him by way of income tax for that year" (s 8(1) TMA)."

54. It was common ground that Mr Cotter's carry-back claim did not affect his self-assessment for Year 1, because by virtue of paragraph 2 of schedule 1B the claim related to Year 2, and effect had to be given to it in Year 2, even though the amount of the claim was ascertained by the counterfactual calculation mandated by paragraph 2(4). Accordingly, Mr Cotter's claim did not form part of his return for Year 1, and

could not be affected by an enquiry into that return under TMA section 9A. As Lord Hodge said, at [26]:

> "The Revenue was accordingly entitled and indeed obliged to use Sch 1A of TMA as the vehicle for its enquiry into the claim (s 42(11)(a))."

(2) *De Silva*

55. The background to *De Silva* is concisely set out in the headnote at [2017] 1 WLR 4384:

> "The two taxpayers invested in and became limited partners of various limited partnerships in implementation of marketed tax avoidance schemes. The schemes aimed to take advantage of statutory tax incentives by accruing trading losses, through investment in films, which could be set off against amounts which the taxpayers would otherwise have had to pay as income tax in that year or any of the previous three years [*pursuant to the provisions of sections 380 and 381 of ICTA*]. The partnerships lodged tax returns for various tax years, claiming that they had suffered substantial trading losses and claiming relief. The revenue initiated inquiries into the partnerships' tax returns under section 12AC(1) of [*TMA*], as substituted, and disallowed certain claims for expenditure. The partnerships' appeals were compromised by an agreement under section 54(1) whereby the partnerships' losses were stated at much reduced levels. The revenue then wrote to the taxpayers stating that their claims to carry back the partnership losses in their personal tax returns would be amended in line with the lower figures for the partnership losses stated in the partnership settlement agreement. The taxpayers brought a claim for judicial review, contending that the revenue was obliged to give effect in full to their claims because it had not opened an inquiry into those claims under paragraph 5 of Schedule 1A to [*TMA*], as inserted, within the relevant time limit and, therefore, could no longer do so".

56. One point which does not emerge from the above summary is that the carry-back claims were made on the face of the claimants' returns for Year 2. Their main argument, based on *Cotter*, was that the carry-back claims did not form part of their "returns" for Year 2, because the claims fell within TMA schedule 1B and as such could not affect the amounts in which they were chargeable to income tax for either Year 1 or Year 2, but were instead free-standing claims for an amount quantified by paragraph 2(4) of schedule 1B. If that analysis was correct, it would follow that the claims could not be the subject of a deemed section 9A enquiry into the claimants' Year 2 returns, or an amendment to those returns made under section 28B(4)(a).

57. One of the claimants, Mr De Silva, had a further argument. Effect had been given to his carry-back claim in full, before the partnerships' losses were reduced pursuant to the partnership settlement agreement. He argued that, even if the main argument failed, there was in any event no statutory authority for HMRC to recover the relief from him by requiring him to repay an equivalent amount.

58. Lord Hodge rejected the taxpayers' main argument, in a passage which we need to set out in full:

> "26. Whether a taxpayer submits his tax return for Year 2 within the time limits of section 9(2), so that HMRC assess the sums in which he is chargeable to income tax and the amount payable, or includes in the return the self-assessment in terms of section 9(1)(a), he must provide information in his return for Year 2 to establish what proportion, if any, of his share of the partnership loss incurred in Year 2 is to be offset against his other income in Year 2.
>
> 27. If a taxpayer wished to claim to offset all of his share of partnership losses in Year 2 against his other income in Year 2 by invoking section 380(1)(a) of ICTA… he would have to include that claim in his return for Year 2. Schedule 1B would not apply as the claim for relief would involve only one year of assessment. Section 8(1AA)(a) would allow him relief, for which he had included a claim in the return, giving rise to the net sum in which he would be chargeable to income tax for that year.
>
> 28. If a taxpayer wished to carry back part of the losses incurred in Year 2 to set off against his income of Year 1 by invoking section 380(1)(b) of ICTA…, he would also have to make the claim in his return for Year 2. This is the combined effect of section 8(1AA)(a) and Schedule 1B, paragraph 2(3)(6). As shown in para 18 above, those paragraphs provide that the claim for relief relates to Year 2 and effect is to be given to that claim in relation to Year 2. If HMRC had already given effect to part of the claim under Schedule 1A in Year 1 by giving relief, for example by repayment, the return for Year 2 would still have to state the loss, the claim and the relief already given in order to establish the amounts in which the taxpayer is chargeable to income tax in Year 2. Similarly, if the taxpayer had already received full relief under Schedule 1A in Year 1, he would have to state the same information as to the loss, the claim and the relief already given. By so doing he enables the return to "take into account", as section 8(1AA)(a) requires, both the relief which is claimed in the return and that which he has already received. In each case that information is a necessary part of his return for Year 2 as it is information required "for the purpose of establishing the amounts" in which the taxpayer is chargeable to income tax for that year of assessment: section 8(1).

> 29. In summary, section 8(1AA)(a) defines the amounts in which a person is chargeable to income tax in a year of assessment as net amounts taking account of any relief, a claim for which has been included in the return. The claims to carry back losses relate to Year 2 and effect is given to them in relation to that year: Schedule 1, paragraph 2(3)(6). It follows, therefore, that the taxpayer must make a claim in his tax return in respect of Year 2 and state the extent to which the relief claimed has already been given in order to establish the amounts in which he is chargeable to income tax for that year of assessment. If too much has already been given as relief, the self-assessment can take that into account by adjusting the amount in which the taxpayer is chargeable to income tax for Year 2: section 9(1)(a).
>
> 30. HMRC may inquire into a return under section 8 or 8A if an officer gives notice of his intention to do so (section 9A(1)) and that enquiry may extend to anything contained in the return, or required to be contained in the return, including any claim: section 9A(4). HMRC were therefore empowered under section 9A to inquire into the taxpayers' carry back claims contained in their Year 2 tax returns. HMRC were not required to institute an inquiry under Schedule 1A in order to challenge the taxpayers' claims."

59. This reasoning therefore provides clear authority, at the highest level, that where a claim to carry back trading losses is made, the taxpayer must make a claim in his tax return in respect of Year 2, and state the extent to which the relief claimed has already been given: see [29]. This obligation, one might think, is a natural corollary (our wording, not Lord Hodge's) of the fact that the carry-back claim relates to Year 2, and effect must be given to it in relation to that year: ibid. The obligation is reinforced by the further fact that, if the taxpayer wishes to carry back only part of the losses incurred in Year 2, it is obviously necessary for him to make the claim in his Year 2 return, because only thus can the amount in which the taxpayer is chargeable to income tax in Year 2 be ascertained: see [28]. The same also applies even if the taxpayer has already received full relief in Year 1, by means of a claim under schedule 1A, because that information still forms a necessary part of the Year 2 return. Only in this way can the "net amounts" referred to in section 8(1AA)(a), for which the taxpayer is chargeable to tax in Year 2, be ascertained: ibid.

60. Lord Hodge also rejected Mr De Silva's further argument that HMRC were not entitled to recoup the relief previously given to him in respect of Year 1. Lord Hodge gave three reasons for doing so, in [31]:

> "First, in relation to a Schedule 1B claim, the obligation in paragraph 4 of Schedule 1A to give effect to the claim as soon as practicable after the claim is made applies to a claim to which effect is given in relation to Year 2 and in relation to which HMRC can institute an inquiry under section 9A. Schedules 1A and 1B operate in tandem in this context. A claim to carry back loss relief made early under Schedule 1A

may need the Year 2 losses to be established before effect is given to the claim. The relevant time limit for inquiring into the claim in paragraph 5 of Schedule 1A operates from Year 2, to which the claim relates, and what is practicable in giving prompt effect to a claim must be assessed in that context. Secondly, the mechanisms in paragraph 2(6) of Schedule 1B for giving effect to a claim in Year 2 are not confined to repayment, set off and the increase in the aggregate of payments on account, none of which would alter the tax chargeable for Year 2. Paragraph 2(6) includes the words "or otherwise", which open the door to an adjustment of the amount chargeable to income tax by virtue of both section 8(1AA)(a), which provides that the amounts in which a person is chargeable "take into account any relief … a claim for which is included in the return" and section 9(1)(a) which makes similar provision for the self-assessment. Where relief has already been given in error, it would in my view be open to HMRC, in completing an enquiry, to amend the return (for example, under section 28A(2) TMA (as inserted by section 188 of the Finance Act 1994)) by altering the amount chargeable to income tax for Year 2 in order to recover the sums which were wrongly paid as relief. Thirdly, section 59B(5) provides for payment of income tax which is payable as a result of an amendment of a self-assessment under section 28A on completion of an enquiry into a personal tax return."

61. It will be noted that the second reason given by Lord Hodge relies upon the words "or otherwise" in paragraph 2(6) of schedule 1B, which (in his words) "open the door to an adjustment of the amount chargeable to income tax" for Year 2. Mr Ewart complained that this part of Lord Hodge's reasoning did not reflect the arguments of either party, and was also inconsistent with HMRC's previous position, from which they did not resile at the hearing, to the effect that the words "or otherwise" do not permit an adjustment to the tax chargeable for Year 2: see the Self-Assessment Claims Manual at paragraph SACM11020. It appears, however, from the beginning of [31], that Lord Hodge was here concentrating on submissions made by Cotter Solutions Limited, which had been given permission to intervene on the appeal by written submissions only. The fact that the point may not have been dealt with in oral submissions, which we are content to accept from Mr Ewart since he was counsel for the taxpayers in *De Silva*, does not mean that it was not properly before the court. Presumably it was raised in the written submissions of Cotter Solutions Limited. In any event, on an intricate question of this nature, Lord Hodge was not in our respectful opinion obliged to confine all aspects of his reasoning to matters which had been the subject of oral argument, and still less was he obliged to agree with HMRC's published guidance in the self-assessment manual.

(3) *Derry*

62. *Derry* was not a case about trade loss relief, under Chapter 2 of Part 4 of ITA, but rather about share loss relief, under Chapter 6 of Part 4. Entitlement to share loss relief is conferred by section 131, and arises where an individual incurs an allowable

loss for capital gains tax purposes on the disposal of qualifying shares, by way of a bargain made at arm's length or in certain other specified circumstances. The machinery for making such a claim is set out in section 132, in terms very similar to those of section 64 relating to trade loss relief. The claim may thus be carried back, in whole or in part, to the previous tax year. If the taxpayer chose to make a carry-back claim, it might therefore be thought that the provisions of schedule 1B to TMA would similarly come into play; but, in contradistinction to Chapter 2 of Part 4, no express cross-reference to schedule 1B is to be found in Chapter 6. In other words, there is no equivalent to section 60(2): see [34] above.

63. In the 2010/11 tax year (Year 2), Mr Derry sold shares that he had bought during the previous tax year (Year 1), making a capital loss of £414,500. In his online tax return for Year 1, he claimed share loss relief for that amount against his income for that year. HMRC later made a demand under section 60 of TMA for income tax alleged to be due for Year 1, on the footing that Mr Derry's right to deduct the share loss relief in calculating his net income and consequent tax liability for that year was overridden by paragraph 2 of schedule 1B, with the result that the loss had to be treated as relating to Year 2. Mr Derry then sought judicial review of the decision to issue the demand.

64. For present purposes, the relevant issue was whether Mr Derry's claim to share loss relief under section 132 of ITA was subject to the provisions of schedule 1B, notwithstanding the absence of any cross-reference or "signpost" to that schedule in Chapter 6 of Part 4 of ITA. In disagreement with this court, the Supreme Court held that the absence of a signpost was indeed fatal, and that this court had been wrong to start with the clear wording of schedule 1B, which as it stood was clearly apt to cover carry-back claims under section 132, rather than with the comprehensive and self-contained code for the treatment of a claim to such relief in sections 23 and 132 of ITA. In those circumstances, the claim to relief had properly formed part of Mr Derry's return for Year 1, and it could only have been challenged by a notice of enquiry served within time under section 9A of TMA.

65. It is unnecessary for us to explore that issue any further, because the present case does not concern share loss relief, but rather trade loss relief under Chapter 2 of Part 4, in respect of which there is an express cross-reference to schedule 1B in section 60(2) of ITA. It is, however, relevant to note the guidance given by Lord Carnwath and Lady Arden in relation to the interpretation of ITA, given its genesis as part of the Tax Law Rewrite Project. In that context, Lord Carnwath, at [9] and [10], endorsed the guidance given by Sales J (as he then was) in *Eclipse Film Partners (No 35) LLP v Revenue and Customs Commissioners* [2014] STC 1114 at [96], where Sales J had likened the correct approach to that appropriate to a consolidation statute (as explained by the House of Lords in *Farrell v Alexander* [1977] AC 59), and said:

> "When construing a consolidating statute, which is intended to operate as a coherent code or scheme governing some subject matter, the principal inference as to the intention of Parliament is that it should be construed as a single integrated body of law, without any need for reference back to the same provisions as they appeared in earlier legislative versions. … An important part of the objective of a consolidating statute or a project like the Tax Law Rewrite Project is to gather disparate provisions

> into a single, easily accessible code. That objective would be undermined if, in order to interpret the consolidating legislation, there was a constant need to refer back to the previous disparate provisions and construe them."

66. We should also refer to some of the comments made by Lady Arden at [84] to [90], which Lord Carnwath said should be read with the guidance given by Sales J quoted above. After noting that the Preamble to ITA says that its purpose was "to restate, with minor changes, certain enactments relating to income tax; and for connected purposes", Lady Arden continued:

> "86. So, ITA is not a pure or "straight" consolidation Act. However, as the Explanatory Notes cited by Lord Carnwath JSC confirm, it is not (except for the minor changes) intended to change the law. That is a matter which the courts must in my judgment respect when interpreting the new legislation. In this regard it is of some significance in interpreting consolidation statutes that they receive less Parliamentary scrutiny than other primary legislation. The respect to which I have referred for giving effect to Parliament's intention where it is possible to do so is often expressed in terms of a presumption, in relation to consolidating statutes, that Parliament did not intend to change the law.
>
> 87. It would often be laborious for a court to investigate what provisions had been consolidated in any particular provision of a consolidating statute. It would be wrong in general for it to do so. The process of drafting a consolidation statute requires specialist techniques and skills and can be very complex.
>
> 88. But the position is different in relation to prior case law. The restraint required by the House of Lords in *Farrell v Alexander* [1977] AC 59 relates to legislative history, and not to relevant antecedent case law. Moreover, in practice, even where a statute is a consolidation statute, courts often look at previous case law on provisions that are consolidated to assist them interpret the new provision where there is any doubt or simply to confirm the view that they have formed. This is good sense in the interest of the consistency of the law, the fulfilment of Parliament's presumed intention and the efficient use of judicial resources.
>
> …
>
> 90. Reference back to the earlier case law does not undo the good work done by the consolidation, or run counter to it, since Parliament is likely to have had the previous case law in mind in any event when enacting the consolidating statute without any pre-consolidation amendment."

Discussion

67. The claimants accept, we repeat, that in this court we are bound by *De Silva* to dismiss the appeals of those claimants whose Year 2 was 2006/07 or earlier, before the coming into force of ITA. For the pre-2007 claimants, *De Silva* is clear authority, at the highest level, for the propositions that:

> (a) full information about the taxpayer's carry-back claim must be included in his Year 2 return, even if he has previously made the same claim in Year 1 under schedule 1A to TMA, and even if HMRC have already given effect to that earlier claim without opening an enquiry into it under schedule 1A; and
>
> (b) HMRC may then institute an actual or deemed enquiry into the Year 2 return under section 9A of TMA, in which all aspects of the claim can be examined, and if it emerges upon completion of the enquiry that relief has been given in error, the Year 2 return may be amended so as to recoup the sums wrongly paid (in reliance on the words "or otherwise" in paragraph 2(6) of schedule 1B to TMA).

How, then, do the claimants contend that the enactment of ITA makes all the difference for the post-2007 claimants?

68. In short, their central argument, skilfully advanced by Mr Ewart, is that the words "or otherwise" in schedule 1B paragraph 2(6) cannot authorise an adjustment to the amount chargeable to income tax in Year 2, where Year 2 is a tax year to which ITA applies. For those years, section 23 and the other provisions contained in Chapter 3 of Part 2 of ITA set out exhaustively how a taxpayer's liability to income tax for Year 2 is to be calculated. Paragraph 2(6) of schedule 1B is not listed in section 24 of ITA as a provision conferring a relief deductible at Step 2; nor is it included in section 26, as conferring a tax reduction deductible at Step 6; and nor again is it included in section 30, as a provision imposing a charge to income tax to be added in at Step 7. Accordingly, submits Mr Ewart, on the true construction of Chapter 3 of Part 2 Parliament did not intend the calculation of liability to income tax for a tax year to be affected in any way by paragraph 2(6) of schedule 1B.

69. Mr Ewart goes on to submit that this conclusion need occasion no surprise. It is clear, he says, from the provisions of schedule 1B itself that a claim under that schedule is a claim for a free-standing amount quantified on the basis of a counterfactual assumption as to the amount chargeable in Year 1. It is not a claim to reduce the amount actually chargeable in either Year 1 or Year 2. Nor can this point be circumvented by arguing that the relieving provisions listed in Chapter 3 of Part 2 deal only with the right to relief, whereas paragraph 2(6) of schedule 1B is concerned with the different question of the mechanism giving effect to that relief. The relevant question is not whether paragraph 2(6) is concerned with the way in which effect is given to the carry-back claim (which it plainly is) but, rather, whether the paragraph is capable of affecting the amount chargeable for Year 2 in circumstances where that amount is prescriptively determined by Chapter 3 of Part 2 of ITA.

70. In our view, this argument breaks down at the first stage. We do not accept that the admittedly highly prescriptive scheme for calculation of income tax liability in Chapter 3 of Part 2 of ITA must be construed as excluding from its ambit the

operation of paragraph 2(6) of schedule 1B, in circumstances where a carry-back claim for trade loss relief has been made by the taxpayer. On the contrary, it seems clear to us that Parliament intended paragraph 2(6) to continue to apply to such claims, and that effect should therefore be given to them in the context of the Chapter 3 calculation of tax liability. Our reasons for coming to this conclusion are as follows.

71. In the first place, the list of reliefs deductible at Step 2 in section 24(1) of ITA includes trade loss relief against general income under section 64. (The list also includes early trade losses relief under section 72, to which we have not given separate consideration in this judgment because it is agreed that it engages the same general principles as section 64. The main difference is that the relief may be spread over the first four years in which the trade is carried on).

72. Section 64 (like section 72) is contained in Chapter 2 of Part 4 of ITA. The relief is therefore expressly made subject to paragraph 2 of schedule 1B to TMA, by virtue of section 60(2). This subsection in our view provides the necessary link between trade loss relief under ITA and schedule 1B, and shows beyond doubt that Parliament must have intended paragraph 2 of that schedule to have full force and effect for the purposes of Chapter 2 of Part 4 (loss relief) in all cases where the claim requires the relief (or part of it) to be given in Year 1. In other words, the provisions of paragraph 2 will apply for the purposes of any claim to trade loss relief under ITA which is not confined to a "sideways" claim for relief in Year 2 alone.

73. The explicit incorporation of paragraph 2 of schedule 1B, via section 60(2), means that there is no scope for an argument of the kind that ultimately prevailed in *Derry*, to the effect that Parliament could not have intended that paragraph to apply in the absence of an express cross-reference or "signpost" in ITA saying that it should do so. By virtue of paragraph 2 of schedule 1B, the carry-back claim "shall relate to" Year 2, its amount must be calculated by the counterfactual computation in paragraph 2(4), and effect must be given to it in Year 2 in one of the ways specified in paragraph 2(6). The first three methods specified in that sub-paragraph are repayment, set-off or an increase in the aggregate amount given by section 59B(1)(b), i.e. "the aggregate of payments on account of income tax deducted at source in respect of that tax year": see *De Silva* at [18], per Lord Hodge. It is common ground that none of those methods would alter the tax chargeable for Year 2, even where excessive relief had already been given in error pursuant to a claim in Year 1 under schedule 1A to TMA: see *De Silva* at [31], in the sentence beginning "Secondly". On the other hand, effect may also be given to the claim in Year 2 "otherwise", which the Supreme Court has construed as authorising an alteration in the amount chargeable to income tax for Year 2 in order to recover sums wrongly paid as relief: see again *De Silva* at [31], penultimate sentence.

74. In our view, it would clearly be wrong to construe sections 23 and 24 of ITA in hermetic isolation from the rest of ITA, when section 24 itself requires one to look at section 64, and section 64 is expressly made subject to paragraph 2 of schedule 1B where the claim to trade loss relief has a carry-back element. Accordingly, the calculation of the taxpayer's income liability for Year 2 under section 23 must, where appropriate, take account of and give effect to the provisions of paragraph 2 of schedule 1B. Equally, the taxpayer must give full information about the claim in his Year 2 return, precisely because it may impact on the amount of tax for which he is liable in that year; and HMRC may then open an actual or deemed enquiry into the

Year 2 return under section 9A of TMA. All of this was settled by the Supreme Court in *De Silva*, and once the necessary link to schedule 1B has been identified within ITA itself, we can see no possible basis for distinguishing post-2007 claims from pre-2007 claims.

75. Mr Ewart accepted that, if his submissions were correct, the consequence would be that a carry-back claim could never be made in a Year 2 return where Year 2 is 2007/08 or later. Although apparently logical, this would in our view be a strange and unrealistic conclusion to have to reach, bearing in mind the express link to schedule 1B which we have identified. Since the claim must of necessity relate to, and be given effect in, Year 2, and since on any view the claim would have to be made in the Year 2 return if it involved no carry-back element, and since the losses available for carry-back must also be entered in the Year 2 return, it would indeed seem paradoxical if the carry-back claim itself had to be treated as a standalone claim which fell outside the scope of the Year 2 return. It seems to us that these wider considerations form an important part of the approach and reasoning of Lord Hodge in *De Silva*, and we would be most reluctant to conclude that the statutory scheme of Chapter 3 of Part 2 of ITA somehow made them irrelevant.

76. Moreover, our approach to the construction of ITA must be guided by the principles helpfully restated by the Supreme Court in *Derry*. We can see no proper basis for holding that such a radical change in the effect of paragraph 2 of schedule 1B on carry-back claims to trade loss relief was ever contemplated by Parliament. It is worth emphasising that the provisions of paragraph 2 of schedule 1B have remained unchanged since their introduction with the advent of self-assessment in 1996/97. It would in our view be most surprising if the restatement of income tax law in ITA, pursuant to the Tax Law Rewrite Project, had by a side wind brought about such a radical change in the way paragraph 2 applies to carry-back claims, and in the requirement for the taxpayer to enter full details of the claim in his Year 2 return.

77. Although we have stated our conclusions in our own words, we think that our approach and reasoning do not differ in any significant respect from that of Sir Nicholas Warren in the judgment under appeal at [106] to [112]. One of Mr Ewart's arguments was that Sir Nicholas had been guilty of a non-sequitur when he rightly said, in [110], that sections 23 and following of ITA are prescriptive, in laying down how the amount chargeable to income tax is to be ascertained, but immediately went on to say that "they do not preclude the amount arrived at by applying those provisions being adjusted by HMRC as one way of giving effect to the carry-back claim." For the reasons which we have given, we do not consider that there is any inconsistency between those statements. If ITA is read and construed as a whole, it can be seen that, in the specific case of carry-back claims to which schedule 1B still explicitly applies, the machinery of Chapter 3 of Part 2 of ITA, prescriptive though it undoubtedly is, must also be construed as allowing for modification of the amount chargeable to tax in Year 2 when giving effect to the carry-back claim.

78. We also respectfully agree with what the judge went on to say in the next two paragraphs:

> "111. If paragraph 2(6) Schedule 1B had stated expressly that one of the methods of giving effect to carry-back relief was to adjust the amount of the chargeable income shown in a

> taxpayer's self-assessment return, there could, in my view, be no doubt about this conclusion. The reasoning of Lord Hodge would be equally applicable in this case as to the cases of Mr De Silva and Mr Dokelman. In particular, what Lord Hodge says in [28] would be precisely in point. Thus if a taxpayer wished to carry back part of the losses incurred in Year 2 (to which ITA applies) to set off against his income of Year 1 by invoking section 64, "he would" as Lord Hodge puts it "have also to make the claim in his return for Year 2 [that is to say in and as part of the return, not simply on the return form]". The reason which Lord Hodge goes on to give, that is to say that this is the combined effect of section 8(1AA)(a) and paragraphs 2(3) and (6) Schedule 1B, applies equally to the case where Year 2 is a year to which ITA applies as where it does not. This analysis demonstrates that there is no inconsistency between the prescriptive provisions of sections 23*ff* and an adjustment to the amount chargeable to income tax by an amendment to the Year 2 tax return.
>
> 112. Mr Ewart's argument could succeed only if the words "or otherwise" are now to be given a more restricted meaning than that given to them in the context of a case where Year 2 is a year to which ITA does not apply. I do not consider that those words have that result. The words "or otherwise" in paragraph 2(6) are, on their face, perfectly general and Lord Hodge has interpreted them as including an adjustment to the amount of income tax chargeable. I do not consider that sections 23*ff* require that wide *prima facie* meaning to be restricted."

Conclusion

79. For all these reasons, we are satisfied that Mr Ewart's arguments on behalf of the post-2007 claimants must be rejected. Accordingly, even if we were wrong in concluding that their Part 7 proceedings should be struck out as an abuse of the process of the court, we would conclude that they should in any event be struck out as unsustainable in law. The substantive issues of law involved are questions of statutory construction, upon which we have heard full submissions and upon which we have reached a firm conclusion. Accordingly, there is no reason why the claims should be permitted to go to trial.

80. As will also be apparent, Mr Ewart's submissions have not persuaded us that there is any good reason to question the reasoning and conclusions of the Supreme Court in *De Silva*, on the assumption that it were open to us to do so. We would therefore not wish to give any encouragement to the notion that there was any reasonable prospect of that court being persuaded to depart from its recent decision in *De Silva*. The correct position, in our view, is that the claims of both the pre-2007 and the post-2007 claimants are unsustainable in law, and must therefore be struck out.

81. We therefore dismiss the appeal against the order of Sir Nicholas Warren striking out the Part 7 proceedings. We consider it right to give permission to appeal against Ouseley J's refusal of permission to bring judicial review proceedings. We have heard

full argument on the substantive tax issues which are common to both the Part 7 and judicial review proceedings and have decided those issues against the appellants. As our decision would be binding on the Administrative Court, no purpose would be served by remitting the judicial review applications to that court and we have decided to hear the applications ourselves and to dismiss them.