Neutral Citation Number: [2020] EWCA Civ 562

Case No: A3/2019/1420

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE UPPER TRIBUNAL (Mr Justice Arnold and Judge Jonathan Cannan)
[2019] UKUT 0101 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:29 April 2020

Before :

SIR ERNEST RYDER
LORD JUSTICE MOYLAN
and
LADY JUSTICE SIMLER

- -

Between :

DAVID BEADLE	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondent**

- -
- -

Mr Keith Gordon and Ms Ximena Montes Manzano (instructed by **Jefferies Essex LLP**) for the **Appellant**
Ms Aparna Nathan QC and Ms Marika Lemos (instructed by **HMRC Solicitor's Office**) for the **Respondent**

Hearing date: 25 March 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 28 April 2010 at 10.30am

Lady Justice Simler:

Introduction

1. The appellant, Mr Beadle, is a taxpayer who participated in a tax avoidance scheme through a partnership, Ingenious Film Partners LLP ("the LLP"), which was involved in investments in films, in the year ending 5 April 2005. The LLP entered into arrangements (that were "DOTAS arrangements" for the purposes of s.219(5) Finance Act 2014 ("FA 2014")) by which it claimed to realise a trading loss for that (and other) years. Mr Beadle claimed as a partner of the LLP, to carry back his share of that loss to reduce his taxable income for the tax year ending 5 April 2002 and he obtained relief by way of a repayment to him from The Commissioners for Her Majesty's Revenue and Customs ("HMRC") of approximately £100,000 calculated by reference to income tax he had originally paid for that tax year. HMRC enquired into the LLP's tax return for (among other years) the tax year ending 5 April 2005, and on 30 November 2012 issued the LLP with a closure notice reducing the LLP's trading loss to nil. An appeal against the closure notice by the LLP is ongoing.

2. This appeal concerns two decisions of the First-tier Tribunal (Tax) (the "FTT") made in the course of an appeal by Mr Beadle against a penalty notice for non-payment of a Partner Payment Notice (referred to below as a "PPN"). The first decision by FTT Judge Jonathan Richards held that the FTT did not have jurisdiction in a penalty appeal to entertain a challenge to the lawfulness or validity of the underlying PPN. The second decision by FTT Judge Rupert Jones held that Mr Beadle had neither a reasonable excuse for late payment of the sum required by the PPN, nor were there special circumstances justifying a reduction in the penalty.

3. Mr Beadle's appeals to the Upper Tribunal (Arnold J and Judge Jonathan Cannan, the "UT", [2019] UKUT 0101 (TCC)), were dismissed. Mr Beadle now appeals to this court, with permission granted by the UT.

4. It was and remains common ground that the decision by HMRC to serve a PPN is a public law decision by a public body and is in principle amenable to challenge by the recipient of the PPN on public law grounds by way of judicial review. As with any public law decision, in general, a PPN once given is presumed valid unless and until successfully challenged and in the event of a successful challenge (in a court of competent jurisdiction), it will be recognised as having had no legal effect. Furthermore, the FTT is a statutory tribunal and has no inherent jurisdiction, nor any jurisdiction to grant judicial review. However, that does not mean that the FTT never has jurisdiction to determine public law questions. A tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have: see for example the discussion in Oxfam v HMRC [2009] EWHC 3078 (Sales J at [68]).

5. The central question on this appeal is whether the FTT does have jurisdiction to determine the validity of the underlying PPN in the penalty appeal proceedings with which this court is concerned. This depends on whether the general rule (derived in O'Reilly v Mackman [1983] 2 AC 237 at 285) that it is an abuse of the process of the court to permit a person to challenge a public law decision by means other than judicial review, applies here as HMRC contend, to prevent Mr Beadle from challenging the validity of the underlying PPN in the penalty notice appeal; or

whether this is a case where the validity of the PPN arises as a collateral issue in what are essentially enforcement proceedings, so that fairness requires that the exclusivity principle does not apply, as Mr Beadle contends.

6. For the reasons which follow, I consider that the FTT and the UT came to the right conclusions in each of the impugned decisions. Accordingly, if the other members of the court agree, Mr Beadle's appeal should be dismissed.

The statutory provisions

7. I set out first the statutory provisions relevant to the accelerated (and partner) payment notice regime that are necessary for an understanding of this appeal.

8. The core legislation is contained in sections 219-233 and Schedules 32-33 FA 2014. The provisions enable HMRC to require accelerated payments to be made by taxpayers on account of disputed or unresolved tax liabilities in certain prescribed circumstances. Section 219(1) FA 2014 provides that HMRC may give an "accelerated payment notice" to a taxpayer if Conditions A-C (set out at section 219(2) – (7)) are met. Where the taxpayer is or was a member of a partnership, Schedule 32 FA 2014 provides a parallel regime for the making of a PPN to each relevant partner of the partnership if the same Conditions A-C are met (Schedule 32, paragraph 3). For present purposes, there is no material distinction between accelerated payment notices and PPNs. Schedule 32 paragraph 3 provides:

> "3. Circumstances in which partner payment notices may be given
>
> 3(1) Where a partnership return has been made in respect of a partnership, HMRC may give a notice (a "partner payment notice") to each relevant partner of the partnership if Conditions A to C are met.
>
> 3(2) Condition A is that—
>
> (a) a tax enquiry is in progress in relation to the partnership return, or
>
> (b) an appeal has been made in relation to an amendment of the return or against a conclusion stated by a closure notice in relation to a tax enquiry into the return.
>
> 3(3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage ("the asserted advantage") results from particular tax arrangements ("the chosen arrangements").
>
> 3(4) …
>
> 3(5) Condition C is that one or more of the following requirements are met –
>
> (a) HMRC has given (or, at the same time as giving the partner payment notice, gives) the representative partner, or a successor of that partner, a follower notice under Chapter 2 –
> (i) in relation to the same return or, as the case may be, appeal, and
> (ii) by reason of the same tax advantage and the chosen arrangements;
> (b) the chosen arrangements are DOTAS arrangements (within the meaning of section 219(5) and (6));
> (c) the relevant partner in question has been given a GAAR counteraction notice……

> 3(6) "GAAR counteraction notice" has the meaning given by section 219(7)."

9. The PPN in this case was given under Schedule 32 paragraph 3 on the basis that the LLP had made a tax appeal in relation to income tax that had not yet been determined (paragraph 3(2)(b)); the appeal was made on the basis that a tax advantage resulted from chosen arrangements, namely the Ingenious Film Partners scheme (paragraph 3(3)); and the arrangements are DOTAS arrangements (paragraph 3(5)(b)).

10. The PPN regime confers no statutory right of appeal to a specialist tribunal against a PPN, but a partner who receives a PPN is entitled, pursuant to Schedule 32, paragraph 5, to make written representations to HMRC objecting to the PPN. Having considered the representations, HMRC must decide whether to confirm the PPN with or without amendment or withdraw it. There is no fixed period in which HMRC must complete its investigations and make a decision:

> "5 Representations about a partner payment notice
>
> 5(1) This paragraph applies where a partner payment notice has been given to a relevant partner under paragraph 3 (and not withdrawn).
>
> 5(2) The relevant partner has 90 days beginning with the day that notice is given to send written representations to HMRC—
>
> (a) objecting to the notice on the grounds that Condition A, B or C in that paragraph was not met, or
>
> (b) objecting to the amount specified in the notice under paragraph 4(1)(b),
>
> 5(3) HMRC must consider any representations made in accordance with subparagraph (2).
>
> 5(4) Having considered the representations, HMRC must—
>
> (a) if representations were made under sub-paragraph (2)(a), determine whether—
>
> (i) to confirm the partner payment notice (with or without amendment), or
>
> (ii) to withdraw the partner payment notice, and
>
> (b) if representations were made under sub-paragraph (2)(b) (and the notice is not withdrawn under paragraph (a)), determine whether a different amount ought to have been specified as the understated partner tax, and then—
>
> (i) confirm the amount specified in the notice, or

> (ii) amend the notice to specify a different amount, and notify P accordingly".

11. A partner who has been given a PPN is required to make an accelerated partner payment to HMRC of the amount specified in the PPN before the end of the relevant "payment period" as set out in Schedule 32, paragraph 6 as follows:

> "6 Effect of partner payment notice
>
> 6(1) This paragraph applies where a partner payment notice has been given to a relevant partner (and not withdrawn).
>
> 6(2) The relevant partner must make a payment ("the accelerated partner payment") to HMRC of the amount specified in the notice in accordance with paragraph 4(1)(b).
>
> 6(3) The accelerated partner payment is to be treated as a payment on account of the understated partner tax (see paragraph 4).
>
> 6(4) The accelerated partner payment must be made before the end of the payment period.
>
> 6(5) 'The payment period' means—
>
> > (a) if the relevant partner made no representations under paragraph 5, the period of 90 days beginning with the day on which the partner payment notice is given;
> >
> > (b) if the relevant partner made such representations, whichever of the following ends later -
> >
> > > (i) the 90 day period mentioned in paragraph (a);
> > >
> > > (ii) the period of 30 days beginning with the day on which the relevant partner is notified under paragraph 5 of HMRC's determination…"

12. The effect of a PPN is accordingly that the taxpayer must pay the amount stated within the 90 day period specified (unless representations are made, in which case the period is extended). The PPN sum paid is treated as paid on account of the understated partner tax (which forms part of the tax in dispute in the underlying appeal). The aim is, as Arden LJ explained in R (Rowe and others) v HMRC [2017] EWCA Civ 2105, [2018] STC 462 at [1]:

> "to change the financial benefit of tax avoidance arrangements by ending the economic benefit to taxpayers of retaining an amount equal to the disputed tax until the issue is finally

> determined against them (if the arrangements are ultimately held to be ineffective)."

13. Accordingly the PPN regime is designed to deter people from entering into tax avoidance schemes by removing the cash flow benefit from the taxpayer during a lengthy statutory appeals process, and giving it to HMRC pending determination of the correct tax treatment of the scheme.

14. The ordinary, generally applicable penalty regime is incorporated by reference into the PPN regime. Penalties are imposed by Schedule 32 paragraph 7, which applies section 226 FA 2014, for failure to pay a PPN before the end of the payment period. The initial penalty is 5% of the amount of the accelerated payment, with further penalties of the same amount becoming payable if the accelerated payment remains unpaid after five and 11 months respectively. Paragraph 7 and section 226 provide as follows:

> "7 Penalty for failure to comply with partner payment notice
>
> Section 226 (penalty for failure to make accelerated payment on time) applies to accelerated partner payments as if
>
> (a) references in that section to the accelerated payment were to the accelerated partner payment,
>
> (b) references to P were to the relevant partner, and
>
> (d) 'the payment period' had the meaning given by paragraph 6(5)."

15. Section 226 FA 2014 provides, so far as relevant:

> "Penalty for failure to pay accelerated payment
>
> (1) This section applies where an accelerated payment notice is given by virtue of section 219(2)(a) (notice given while tax enquiry is in progress) (and not withdrawn).
>
> (2) If any amount of the accelerated payment is unpaid at the end of the payment period, P is liable to a penalty of 5% of that amount.
>
> (3) If any amount of the accelerated payment is unpaid after the end of the period of 5 months beginning with the penalty day, P is liable to a penalty of 5% of that amount.
>
> (4) If any amount of the accelerated payment is unpaid after the end of the period of 11 months beginning with the penalty day, P is liable to a penalty of 5% of that amount.
>
> (5) 'The penalty day' means the day immediately following the end of the payment period.

> …
> (7) Paragraphs 9 to 18 (other than paragraph 11(5)) of Schedule 56 to FA 2009 (provisions which apply to penalties for failures to make payments of tax on time) apply, with any necessary modifications, to a penalty under this section in relation to a failure by P to pay an amount of the accelerated payment as they apply to a penalty under that Schedule in relation to a failure by a person to pay an amount of tax."

16. A statutory right of appeal against the imposition of a penalty (to the FTT) is conferred by provisions contained in Schedule 56 to the Finance Act 2009 ("FA 2009"). These provide for a penalty to be assessed in the first instance by HMRC (see paragraph 11). HMRC must assess the penalty, notify the taxpayer and state in the notice the period in respect of which the penalty is assessed. Paragraph 11(3) provides that an assessment to penalty is to be treated in the same way as an assessment to tax and may be enforced as if it were an assessment to tax. There is power, if HMRC think it right because of "special circumstances", for HMRC to reduce a penalty as follows:

> "9 Special reduction
>
> 9(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.
>
> 9(2) In sub-paragraph (1) 'special circumstances' does not include—
>
> (a) ability to pay, or
>
> (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another. …"

17. A right of appeal against a decision that a penalty is payable (and/or the amount) is conferred by Schedule 56, paragraph 13. Paragraph 14 provides that a penalty appeal is to be treated in the same way as an appeal against an assessment to the tax concerned, including "by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal". On a penalty appeal the FTT may affirm HMRC's decision, or substitute for HMRC's decision another decision that HMRC had power to make (see paragraph 15).

18. Paragraph 16 of Schedule 56 provides for a taxpayer to be excused liability for a penalty if they have a "reasonable excuse" as follows:

> "16 Reasonable excuse
>
> 16(1) If P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for a failure to make a payment—

> (a) liability to a penalty under any paragraph of this Schedule does not arise in relation to that failure, and
>
> (b) the failure does not count as a default for the purposes of paragraphs 6, 8B, 8C, 8G and 8H.
>
> 16(2) For the purposes of sub-paragraph (1)—
>
> (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,
>
> (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and
>
> (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased."

The facts

19. There is no dispute about the facts, which can be summarised as follows.

20. As already stated, Mr Beadle was a member of the LLP which entered into DOTAS arrangements which it considered resulted in a trading loss, including for the tax year ending 5 April 2005 when Mr Beadle was a member. He claimed to carry back his share of partnership losses from the LLP's marketed film scheme in the year ending 5 April 2005, and by virtue of that claim, received a repayment from HMRC of approximately £100,000 calculated by reference to income tax he had originally paid for the tax year ending 5 April 2002.

21. HMRC enquired into the LLP's tax return for the year ending 5 April 2005 and on 30 November 2012, HMRC issued the LLP with a closure notice reducing its trading loss to nil. There is an appeal against the closure notice.

22. By letter dated 3 October 2014, HMRC informed Mr Beadle that he would soon be receiving a PPN in relation to his involvement in the LLP scheme in the 2004/05 tax year. The letter enclosed an information sheet entitled "CC/FS24 - Tax avoidance schemes - accelerated payments" which set out the consequences of non-payment of PPNs.

23. By letter dated 17 October 2014, HMRC issued Mr Beadle with the PPN. The document stated it was a notice issued under Part 4 Chapter 3 and Schedule 32 FA 2014 for the year ended 5 April 2005. It specified that certain conditions were met, thereby entitling HMRC to give the notice, including that the film scheme arrangements are DOTAS arrangements: Schedule 32, paragraph 3 (5) (b) FA 2014. It specified that payment of £100,054.80 was required to be made by 20 January 2015, or on a later date if representations were made under Schedule 32, paragraph 5.

24. The notice made clear that the recipient had no right to apply to postpone the payment of any understated partner tax to which the notice relates; and had no right to appeal

against the PPN to a court or tribunal. However it set out the right under Schedule 32, paragraph 5 to make "representations to us objecting to the notice and/or the amount of the accelerated partner payment if you believe that … one or more of the conditions shown earlier in this notice for issuing this notice have not been met [and/or] the amount shown on the notice is not correct …". The deadline for doing so was identified as no later than 20 January 2015. The notice explained the financial consequences for not paying on time and set out the liability to "surcharges" (in other words penalties).

25. A letter dated 5 December 2014 was sent by HMRC to Mr Beadle reminding him of the deadline for payment of the sum due pursuant to the PPN. The letter also stated that late payment would result in additional amounts being due.

26. By letter dated 5 January 2015 Mr Beadle made representations challenging the validity of the PPN on the basis that: (i) the amount of "understated tax" specified in the notice (which determined the amount due under the PPN) was not due as a matter of law; and (ii) condition B in Schedule 32 paragraph 3(3) was not met (a contention that was not in the event pursued before the UT).

27. By letter dated 14 May 2015 HMRC informed Mr Beadle that his representations were rejected and the PPN was confirmed. No judicial review challenge to the PPN or its confirmation has ever been pursued by Mr Beadle.

28. On 16 July 2015 HMRC issued Mr Beadle with a penalty notice in the amount of £5,002.74 for the year ending 5 April 2005, this being 5% of the tax due under the PPN which had not been paid by the due date. Shortly after receipt of the penalty notice Mr Beadle paid the sum demanded by the PPN in full.

29. By letter dated 23 August 2015 Mr Beadle appealed the penalty for late payment of the amount due under the PPN. He asserted that he had a "reasonable excuse" based on legal advice that his claims to carry back losses were valid and effective and the amount payable under the PPN could therefore only lawfully be zero so that no late payment would have occurred.

30. By letter dated 4 September 2015 HMRC responded to his letter of appeal giving their view of the matter and offering him a review of the decision. The offer of a review was accepted by letter dated 15 September 2015. HMRC's review concluded that Mr Beadle had no reasonable excuse for late payment of the PPN and upheld the penalty. This outcome was communicated by HMRC to Mr Beadle by letter dated 18 March 2016. HMRC also rejected Mr Beadle's submissions on special circumstances/special reduction.

31. On 4 April 2016 Mr Beadle appealed to the FTT against the penalty notice contending among other things, that the PPN was a nullity in law and/or the amount payable under the PPN should have been zero so that the penalty should also have been zero. A preliminary hearing took place in June 2017 to address a disclosure application pursued by Mr Beadle relating to the calculation of the PPN amount and giving rise to questions as to the scope of the FTT's jurisdiction in an appeal against a penalty imposed for failure to pay an amount due under a PPN. By a decision dated 5 July 2017, Judge Jonathan Richards decided that the FTT had no jurisdiction in a penalty appeal to consider the validity of the underlying PPN in order to determine whether

the figure of understated partner tax stated on the PPN is the lawful figure, and if not, to assess the lawful figure.

32. The substantive appeal against the penalty notice was heard by Judge Rupert Jones in October 2017. Mr Beadle relied on his belief about the unlawful calculation of the PPN liability as amounting to a reasonable excuse for non-compliance with the PPN and, in the alternative, a special circumstance which would permit any penalty to be reduced. By a decision dated 17 November 2017 the appeal was dismissed. The FTT gave permission to appeal against both decisions to the UT.

The UT judgment below

33. The UT dealt with a broader range of issues than are raised on this appeal. So far as relevant to this appeal, on the question of the FTT's jurisdiction, having considered the nature and purpose of the PPN regime and a number of authorities, starting with O'Reilly v Mackman [1983] 2AC 237 and Wandsworth LBC v Winder [1985] 1AC 461, the UT held that Judge Richards was correct to hold in the present case that the FTT had no jurisdiction to entertain Mr Beadle's challenge to the PPN in the penalty appeal. Two broad reasons were given as follows:

> "44. In our judgment Judge Richards was correct to hold in the present case that the FTT had no jurisdiction to entertain the Appellant's challenge to the PPN for the following reasons. First, we accept that the authorities establish the exception or limit to the exception to the exclusivity principle which we have stated in paragraph 30 above, but we do not accept counsel for the Appellant's argument that the availability of a defence to enforcement action on public law grounds can only be excluded by express statutory language. In our judgment, the availability of such a defence can also be excluded by necessary implication from the statutory scheme. This is in effect what the Divisional Court and the House of Lords respectively concluded in *Quietlynn Ltd v Plymouth City Council* [1988] QB 114 and *R v Wicks* [1998] AC 93 as analysed by the House of Lords in *Boddington*; and see also *R & J Birkett v Revenue and Customs Commissioners* [2017] UKUT 89 (TCC) at [30] (Upper Tribunal).
>
> 45. Secondly, in the present case we consider that the statutory scheme concerning PPNs and penalty notices does by necessary implication exclude the possibility of a challenge by the taxpayer to a PPN on public law grounds in the context of an appeal to the FTT against a penalty notice. This is for two reasons. The first is the fact that Parliament has provided rights of appeal against the underlying tax assessment and against a penalty notice, but not against a PPN. In the case of a PPN, Parliament has only provided a right to make representations (within a specified time limit) which HMRC are required to consider. In our view, the absence of a right of appeal against PPNs is a clear indication that Parliament does not intend taxpayers to be able to challenge PPNs on appeal

> to the FTT. If taxpayers cannot do so directly, then it would be very odd to permit them to do so indirectly by way of an appeal against a penalty. The second reason, which reinforces the first, is that permitting such a challenge would be contrary to the design and purpose of the PPN regime, as to which we agree with the observations of Judge Gargan we have quoted above."

34. The contention that Mr Beadle had a reasonable excuse for late payment of the sum required by the PPN or alternatively that there were special circumstances justifying a reduction in the penalty, because he reasonably believed that the tax to which he was assessed was not payable and that the PPN was therefore unlawful was rejected by Judge Jones on the substantive appeal against the penalty.

35. The appeal to the UT was advanced on the basis that Judge Jones wrongly failed to make a determination as to whether Mr Beadle subjectively believed the arguments as to the unlawfulness of the PPN to be reasonable. The UT rejected that submission, holding that Judge Jones explained clearly why he did not make that determination. Judge Jones concluded that even if Mr Beadle had a reasonable belief, subjectively, objectively or both, and based upon professional advice, that he was not liable to pay the understated partner tax liability, this could not form a reasonable excuse for the failure to pay the PPN within the payment period. Rather, a reasonable taxpayer in that position would make payment of the sum under the PPN within the payment period and pursue whatever challenge was available to the underlying liability in the meantime, irrespective of his or her reasonable belief as to the merits of the substantive challenge.

The appeal

36. Mr Beadle appeals against the UT judgment on two grounds. Ground A contends that in the absence of any statutory appeal process against PPNs, collateral challenges to PPNs on public law grounds may be made by a taxpayer in the course of a statutory appeal against a penalty notice for non-compliance with a PPN. Ground B contends that reasonable excuse and special circumstances challenges in the FTT may consider the invalidity and/or the perceived invalidity of a PPN. I deal with each ground in turn.

Ground A

37. Mr Keith Gordon, who appears with Ms Ximena Montes Manzano on behalf of Mr Beadle, submits that a taxpayer who has received a PPN may challenge its underlying validity in the course of an appeal against a penalty imposed for non-payment of the purported PPN, and the UT (and FTT) were wrong to hold otherwise.

38. He submits this case is a further example of cases in a line of authorities (starting with O'Reilly v Mackman) which demonstrate that whilst a citizen may not instigate proceedings, other than by way of judicial review, so as to challenge a public law decision, there is generally no restriction on a public law challenge being made by way of defence to enforcement action taken by the public authority (as happened in Wandsworth LBC v Winder [1985] 1 AC 461). In Winder, a council flat tenant was permitted to defend county court proceedings for possession and arrears of rent by

challenging the validity of Wandsworth LBC's resolution to increase the rent of its tenants as *Wednesbury* unreasonable. Lord Fraser of Tullybelton said at 509E – 510:

> "It would in my opinion be a very strange use of language to describe the respondent's behaviour in relation to this litigation as an abuse or misuse by him of the process of the court. He did not select the procedure to be adopted. He is merely seeking to defend proceedings brought against him by the appellants. In so doing he is seeking only to exercise the ordinary right of any individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff. Moreover he puts forward his defence as a matter of right, whereas in an application for judicial review, success would require an exercise of the court's discretion in his favour……. I find it impossible to accept that the right to challenge the decision of a local authority in course of defending an action for non-payment can have been swept away by Order 53, which was directed to introducing a procedural reform. As my noble and learned friend Lord Scarman said in *R v IRC ex p. Federation of Self Employed and Small Businesses Ltd*… "The new RSC, Ord.53 is a procedural reform of great importance in the field of public law, but it does not – indeed, cannot – either extend or diminish the substantive law. Its function is limited to ensuring 'ubi jus, ibi remedium.' "… Nor, in my opinion, did section 31 of the Supreme Court Act 1981… have the effect of limiting the rights of the defendant sub silentio. I would adopt the words of Viscount Simonds in *Pyx Granite Co. Ltd. v Ministry of Housing and Local Government* [1960] AC 260, 286 as follows:
>
> > "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Courts for the determination of his rights is not to be excluded except by clear words." "

39. Mr Gordon accepts accordingly, that Parliament can limit a citizen's access to the courts in relation to public law challenges, but "clear words" in primary legislation are required to do so. He relies on Boddington v British Transport Police [1999] 2 AC 143, a case concerning a defence in criminal proceedings but submits that is not a distinction with any substance and penalty proceedings have a very similar character. Scrutiny of the particular statutory context is required to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based on arguments of invalidity of subordinate legislation or administrative acts under it; but there is a strong presumption that Parliament does not legislate to prevent fundamental rights of access to the courts, including by way of collateral public law challenges, save by clear words. Accordingly, and contrary to the UT judgment at [44], he submits it can never be the case that the right to raise a public law argument by way of defence to enforcement action can be excluded by necessary implication.

40. Mr Gordon refers to the statutory schemes considered in cases such as Reg. v Wicks [1998] AC 92 and Quietlynn Ltd v Plymouth City Council [1988] 1 QB 114 which

justified a construction limiting the rights of the defendant to rely in criminal or enforcement proceedings on arguments of invalidity of subordinate legislation or administrative acts under it. However he emphasises that, as was observed in Boddington "it was an important feature of both cases that they were concerned with administrative acts specifically directed at the defendants, where there had been clear and ample opportunity provided by the scheme of the relevant legislation for those defendants to challenge the legality of those acts, before being charged with an offence." (see Lord Irvine of Lairg LC at 161G).

41. Mr Gordon accepts that HMRC acts in a public law capacity in issuing a PPN, but that is no bar to the ability of the recipient of the PPN to challenge it in enforcement proceedings. The cases demonstrate that the taxpayer's right is to do nothing on receipt of a PPN and defend the subsequent enforcement action (either through an appeal against a penalty notice or by way of defence in collection proceedings). Mr Gordon also accepts that the FTT, as a creature of statute, has a narrow jurisdiction. Nonetheless, it has jurisdiction to hear an appeal against a penalty notice which depends for its validity on the underlying PPN being lawful. Accordingly, the FTT has the necessary jurisdiction to consider the validity of the underlying PPN itself. This is consistent with a long line of cases in which un-appealable decisions taken by HMRC (or its predecessor body) have been held to be amenable to collateral public law challenge: see for example Kempton v Special Commissioners and Inland Revenue Commissioners [1992] STC 823 which concerned information notices; Pawlowski (Collector of Taxes) v Dunnington [1999] STC 550 which concerned an employee's liability for unpaid PAYE. In each of these cases, the citizen was held entitled to await enforcement action and challenge the public law decision by way of defence to that action. Mr Gordon submits that not only is that a taxpayer's right but any actual or perceived administrative or other inconvenience to HMRC does not outweigh that right of access to the courts. He submits that the constant message in the many cases he cites is that if the statutory scheme does not provide an appeal mechanism and there is no point in the statutory language excluding a collateral public law challenge, there is nothing to prevent such a challenge being made.

42. He submits that PPNs given under the FA 2014 are not subject to any different principles. To the contrary, he relies on R (on application of Haworth) v HMRC [2019] EWCA Civ 747 which emphasised "the draconian nature of these powers conferred on HMRC" as not undermining "the constitutional right of access to the courts [which] is inherent in the rule of law" (see Newey LJ at [36 (v)]). Mr Gordon relies on the absence of any alternative statutory appeal process in the PPN regime and submits that the so-called alternative routes to challenge by way of representations to HMRC and/or judicial review are wholly inadequate. There are no clear words in the statutory scheme that exclude the taxpayer's right to challenge the underlying PPN in the course of defending penalty proceedings. In all these circumstances, a taxpayer who has received a PPN may challenge its underlying lawfulness in the course of an appeal against a penalty imposed for non-payment of the purported PPN.

43. I do not accept the submissions advanced on Mr Beadle's behalf in relation to the PPN regime and agree entirely with the analysis of the UT at paragraphs 44 and 45 set out above.

44. Like the UT, I do not doubt that the exclusivity principle derived in O'Reilly v Mackman is subject to an important limitation which itself has limits as follows. Where a public body brings enforcement action against a person in a court or tribunal (including a court or tribunal whose only jurisdiction is statutory) the promotion of the rule of law and fairness means, in general, that person may defend themselves by challenging the validity of the enforcement decision or some antecedent decision on public law grounds, save where the scope for challenging alleged unlawful conduct has been circumscribed by the relevant statutory scheme, which excludes such a challenge. The question accordingly is whether the statutory scheme in question excludes the ability to raise a public law defence in civil (or criminal) proceedings that are dependent on the validity of an underlying administrative act.

45. Mr Gordon submits that only express statutory language is capable of excluding such a challenge. Like the UT, I disagree. In my judgment the express words used by a statutory scheme looked at in isolation may not be sufficient on their own to restrict or exclude public law challenges, but that may be the clear and necessary implication when the relevant statutory scheme is construed as a whole and in light of its context and purpose. R v Wicks and Quietlynn are cases where in the absence of express statutory language the rights of the defendants in both cases (the first of which self-evidently involved a criminal prosecution) to call into question the legality of administrative acts was limited by necessary implication of the particular statutory schemes. In R v Wicks for example, the House of Lords held that the criminal offence of not taking steps required by an enforcement notice created by s.179 of the Town and Country Planning Act 1990, is embedded in an elaborate statutory code with detailed provisions regarding appeals and as a matter of statutory construction of the words "enforcement notice" in s.179(1), all that was necessary accordingly was a notice issued by the authority which was formally valid and had not been set aside. Both cases were referred to by the House of Lords in Boddington as cases where the particular context in which the administrative act triggered consequences for the purposes of the criminal law and/or enforcement proceedings demonstrated that it was not capable of collateral challenge in criminal or enforcement proceedings.

46. What is necessary in a case where there are competing interests (on the one hand a concern to ensure fairness to those facing enforcement proceedings in having a reasonable opportunity to defend themselves; and on the other, the public interest in the legality of formal acts of a public authority being established without delay to achieve orderly administration) is as the House of Lords made clear in Boddington (Lord Irvine LC at 160C):

> "to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or an administrative act under it. There are situations in which Parliament may legislate to preclude such challenges being made, in the interest, for example, of promoting certainty about the legitimacy of administrative acts on which the public may have to rely."

47. In approaching the question of statutory construction the nature and purpose of the statutory regime and the nature of the rights in issue are the starting point for consideration. There is a strong presumption that Parliament will not legislate to

prevent individuals affected by legal measures promulgated by public bodies from having a fair opportunity to challenge such measures and vindicate their rights in court proceedings. Further, whether the impugned administrative act is specifically directed at the respondent to enforcement proceedings, who in consequence has had clear and ample opportunity to challenge the legality of that act before being pursued in enforcement proceedings, or is of a general character directed to the public at large where there has been no obvious or reasonable opportunity to challenge the validity of the underlying administrative act, is an important consideration.

48. Having regard to all of these considerations, it is a clear and necessary implication of the FA 2014 scheme for PPN (and APN) notices, construed as a whole and in light of its statutory purpose, that the ability to raise a collateral public law challenge to the validity of the underlying PPN is excluded at the penalty and enforcement stages. My reasons for that conclusion follow.

49. First, the PPN regime has as its express purpose deterring marketed tax avoidance schemes by removing the cash flow benefit which would otherwise accrue to taxpayers while such schemes are contested and irrespective of the validity of such schemes. The recipient of a PPN must pay the sum identified as the potential tax advantage within 90 days from the notice being given or, if challenged, within 30 days of receipt of HMRC's response to representations. The whole purpose and policy intention of this detailed statutory scheme would be subverted if it were open to a taxpayer like Mr Beadle not only to sit back without challenging the PPN and await penalty notice or enforcement proceedings before seeking to challenge it; but also to retain the disputed tax during the course of a potentially lengthy and convoluted appeals process that would or might follow. In substance although not in form that would amount to a statutory appeal by the back door against the PPN, for which Parliament has expressly not provided, and during the course of which the disputed tax would be retained by the taxpayer, enabling him to enjoy the cash flow benefits that the scheme is designed to remove.

50. Secondly, the giving of a PPN does not determine what tax is ultimately due, but simply who should hold the disputed tax pending the determination of the underlying tax liability. The PPN is in that sense an interim decision determining where the disputed tax should sit, which may be rescinded (and the monies obtained repaid with interest) if the final decision in the substantive tax dispute is resolved in favour of the taxpayer. In that context the deliberate omission of statutory appeal rights against the PPN itself is both rational and explicable as Ms Aparna Nathan QC and Ms Marika Lemos on behalf of HMRC submit. It is a clear indication that Parliament does not intend taxpayers to be able to make direct challenges to PPNs on appeal to the FTT in circumstances where the underlying tax dispute affords full appeal rights, and by necessary implication, indirect challenges in the course of penalty or other proceedings cannot have been intended either.

51. So far as the underlying tax liability is concerned, full statutory appeal rights (to the FTT, UT and onwards) apply. The availability of full appeal rights in relation to the underlying tax liability is not undermined, as Mr Gordon submits, by the fact that where a limited liability partnership is the vehicle used for the purposes of the tax avoidance scheme in question, the appeal is conducted in the name of the LLP rather than the individual partners themselves. As Ms Nathan submits, the LLP falls to be treated for income tax purposes as if it were a partnership, and is therefore transparent

for income tax purposes and not itself subject to income tax or corporation tax. Instead, the individual partners (who are members of the LLP) are liable to income tax (or obtain relief from income tax) in respect of their proportionate share of the LLP's profits or losses. The scheme of the legislation ensures that any dispute as to matters in the LLP's tax return are dealt with at the partnership level (by means of full rights of appeal afforded to the LLP in respect of any amendment made or conclusion expressed in the partnership return closure notice). The outcome of that dispute is then required to be reflected in mandatory adjustments to the partners' individual tax returns under section 28B(4) of the Taxes Management Act 1970 that are not subject to a separate right of appeal to the FTT. There is no unfairness in that (as this court made clear in R (on application of Rowe) v HMRC [2017] EWCA Civ 2105, [2018] 1 WLR 3039, Arden LJ at [96]).

52. Thirdly, the PPN does nonetheless give rise to immediate obligations on the individual taxpayer to whom it is specifically directed. The taxpayer is told in clear and certain terms the basis on which the PPN is given, what is required to be done and when, and how the PPN can be challenged. Although the scheme confers no statutory right of appeal from the giving of a PPN, there is an unqualified right conferred by the scheme to send written representations to HMRC within 90 days objecting to the giving of the PPN or to the amount shown on the notice, and a corresponding duty on HMRC to consider the representations and to respond to them as appropriate. While this process runs its course, the obligation to make the payments specified in the PPN is suspended and the amount which the taxpayer will eventually have to pay depends on the outcome of that process.

53. I do not accept Mr Gordon's submission that the right to make representations is of little real value because HMRC is not an independent judicial body. As this court held in R (on application of Archer) v HMRC [2019] EWCA Civ 1021, [2019] 1WLR 6355 (Henderson LJ at [94]):

> "The duties imposed on HMRC by section 222 are heavy ones, particularly in the absence of any statutory appeal to the FTT, and it would be quite wrong for us to assume that HMRC would be likely to treat the exercise as a formality. Clearly, it is their duty to give serious and careful consideration to the representations which are made, supplemented if necessary by HMRC's acknowledged duty to deal in good faith with proper representations made to them by taxpayers, whether or not falling strictly within the scope of the APN."

54. Those observations apply with equal force in this context. Moreover, although the right to make representations is the primary recourse provided by the scheme for challenging a PPN, a taxpayer dissatisfied with the result of the representation process can also test the lawfulness of the PPN by means of judicial review. In these ways, the statutory scheme provides clear and ample opportunity for the taxpayer who is visited with a PPN to challenge it.

55. For all these reasons, and in agreement with both the FTT and the UT, the FTT has no jurisdiction to entertain a public law challenge to the validity of a PPN given pursuant to the FA 2014, in the course of an appeal against a penalty notice, and I have not found it necessary to address the further arguments raised by HMRC's Respondent's Notice.

Ground B

56. Mr Gordon contends that the FTT was wrong to decide Mr Beadle's penalty appeal without regard to his genuine belief about the unlawfulness of the calculation underlying the PPN. He submits that the tribunals below should not have shut their eyes to the reason for non-payment and even if unlawfulness of a PPN does not constitute a reasonable excuse, an unlawful demand by a government department for a substantial sum must fall squarely within the meaning of a "special circumstance" so as to lead to the cancellation or reduction of the penalty for non-payment.

57. I can deal with this ground more shortly. In my judgment the FTT was correct to hold that the invalidity or alleged invalidity of PPNs are not matters that could properly be considered in the context of a reasonable excuse defence to penalties for non-compliance with PPNs or in the context of a claim for a reduction of penalty by reason of "special circumstances"; and the UT was accordingly correct to uphold that decision.

58. Like the UT I do not accept that the FTT wrongly failed to make a determination as to whether Mr Beadle subjectively believed the arguments as to the unlawfulness of the PPN to be reasonable. The reasons Judge Jones gave for not making that determination are set out by the UT and for convenience I set them out here as follows:

> "202. There is no need to conduct this exercise. Even if the appellant had a reasonable belief, subjectively, objectively or both, and based upon professional advice, that he was not liable to pay the understated partner tax liability, this could not form a reasonable excuse for the failure to pay the PPN within the payment period.
>
> 203. Applying the test in the *Clean Car Company*, a reasonable taxpayer in the appellant's position would make payment of the sum under the PPN within the payment period and make whatever challenges (whether statutory or extra statutory) to the underlying liability he or she chose to do in the mean-time. This would be the case, whatever his or her reasonable belief as to the merits of his substantive challenge. If such a challenge were successful then the appellant would receive a refund or repayment but this cannot reasonably excuse [not] making a payment [of] the sum due under the PPN that Parliament has required should be made in the interim.
>
> …
>
> 209. The appellant's reasoning, if accepted, would permit any taxpayer to circumvent the evident intention of Parliament as to who should hold the tax pending the final determination of the tax liability by allowing taxpayers to institute multiple proceedings in different fora. It would also result in the Tribunal entertaining collateral challenges to the underlying tax liability in penalty proceedings which cannot have been the

> Parliamentary intention. The statute requires that the taxpayer [pay the tax] in the interim while the underlying liability, if challenged, can be resolved. If the taxpayer is successful in their challenge to the liability they will receive the appropriate rebate from HMRC.
>
> …
> 210. For same reasons explored above in relation to reasonable excuse, the Tribunal considers that HMRC's view that the appellant's circumstances did not constitute special circumstances was not flawed. …"

59. I can see no error of law in that approach. To the contrary, I agree with it. Nor does that reasoning reflect any misunderstanding of the decision in R (on application of Dunne) v Revenue and Customs Commissioners [2015] EWHC 1204 (Admin), in which Elisabeth Laing J held at [25] as follows:

> "…If the judicial review were to fail then the liability to penalties would not be removed but there would be a statutory right of appeal to the First-tier Tribunal if HMRC were not satisfied that the existence of the judicial review proceedings was a reasonable excuse for not paying the penalties. The taxpayers would have the opportunity first of all to make representations to HMRC and, if those fail, to appeal to the First-tier Tribunal in order to persuade the First-tier Tribunal that they had a reasonable excuse for not paying the penalties. It seems to me that whether or not the claimants accede to the PPN and pay the sum which is said to be due, pending the outcome of the judicial review, or do not pay it, in neither case is the judicial review rendered nugatory."

60. Mr Gordon submits that had the judge considered that the invalidity of a PPN could not be the basis of a penalty appeal, she would have said so in this passage. Furthermore it is implicit in her judgement that such a challenge can be made in the FTT as otherwise, the penalty appeal procedure would not have been a reason to refuse interim relief sought before the High Court. He submits accordingly that the FTT was wrong to decide Mr Beadle's appeal without regard to his genuine belief about the unlawfulness of the calculation underlying the PPN.

61. Again I do not accept this submission and agree with the UT that Elisabeth Laing J was not suggesting that the bringing of an unsuccessful judicial review would constitute a reasonable excuse for not paying penalties or that the taxpayer's contention that the PPN was unlawful would constitute a reasonable excuse in the absence of any application for judicial review. Rather, what she said was simply that it would be open to taxpayers to appeal to the FTT on the question of reasonable excuse in the event of an unsuccessful application for judicial review.

62. In these circumstances, in my judgment, the FTT made no error of law in holding that Mr Beadle had no reasonable excuse and that the circumstances did not constitute special circumstances in this case.

63. For all the reasons given above, if my Lords agree, I would dismiss this appeal.

Lord Justice Moylan:

64. I agree.

Sir Ernest Ryder:

65. I also agree.