Neutral Citation Number:[2018] EWCA Civ 315

Case No: C1/2016/1074

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HON. MRS JUSTICE WHIPPLE
[2016] EWHC 107 (ADMIN)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/03/2018

Before:

LORD JUSTICE LONGMORE
LORD JUSTICE HENDERSON
and
LORD JUSTICE HOLROYDE

- -

Between:

(1) CITY SHOES (WHOLESALE) LIMITED **(2) JATO DYNAMICS LIMITED** **(3) SHU & COMPANY LIMITED** **(4) DANIEL KATZ LIMITED**	**Appellants**
- and –	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

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Mr Keith Gordon & Ms Ximena Montes Manzano (instructed by **Sharpe Pritchard LLP**) for the **Appellants**
Mr Timothy Brennan QC & Mr Akash Nawbatt QC (instructed by **the General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing date: 5 December 2017

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Judgment Approved

Lord Justice Henderson:

Introduction

1. The central issue on this appeal is whether the Commissioners for Her Majesty's Revenue and Customs ("HMRC") acted with such conspicuous unfairness as to amount to an abuse of power when by decisions dated 14 August 2014 ("the Decisions") they curtailed the benefits available under the so-called Liechtenstein Disclosure Facility ("the LDF") to the nine claimants in these judicial review proceedings, in relation to certain employee benefit trust ("EBT") arrangements which they had operated and which were under investigation by HMRC.

2. The claimants were all advised by the same firm of chartered accountants, BDO LLP ("BDO"), and had applied for registration under the LDF on various dates between 30 August 2013 and 18 November 2013. The applications were all "put on hold" by HMRC, pending the outcome of an internal review by HMRC of the manner in which the LDF had in practice come to be operated since its introduction in August 2009. BDO were informed of the existence of this review on 31 July 2013, before the dates on which the claimants made their applications to be registered.

3. By the Decisions, which were signed by Geoff Lewis, an Assistant Director in HMRC's Specialist Investigations Offshore Co-Ordination Unit, the claimants were informed as follows:

> "That review has now been completed. As no changes have been made to criteria for entering the LDF your client will be allowed to register if they choose to proceed with their application. However, all of the changes that are being made to the criteria for being eligible for the LDF's full favourable terms will apply to your client.
>
> In relation to your client, there was at the time that they applied to enter the LDF an ongoing enquiry into their EBT arrangements which began more than 3 months earlier. It therefore follows that they will not be able to access the full favourable terms offered by the LDF in relation to their EBT arrangements. To be clear, the full favourable terms that will not be available are those that can lead to a reduction to the amount paid to HMRC. These are:
>
> - A 10 per cent fixed penalty on the underpaid liabilities (for periods to 5 April 2009)
>
> - Assessment period limited to accounting periods/tax years commencing on or after 1 April 1999
>
> - The option to choose whether to use a single composite rate of 40 per cent or to calculate actual liability on an annual basis (or for some years after 2008/09, a Single Charge Rate)

> There will be no restrictions on access to the limited favourable terms:
>
> - assurance about criminal prosecution
> - single point of contact for disclosures
>
> I appreciate that you and your client may be disappointed with this news. I am willing to meet with you to discuss this matter and clarify any issues…"

4. The terms of the Decisions reflected the Fourth Joint Declaration issued on the same day, 14 August 2014, by HMRC and the Government of Liechtenstein announcing restrictions to the LDF in certain cases, including those:

> "where the issue being disclosed has already been subject to an intervention that started more than three months before the date of application"

The Declaration went on to say that, in such cases, "the person making the disclosure will not be eligible for the shorter limitation period, the fixed penalty or the composite rate option under the LDF." The effect of the Decisions was thus to preclude the claimants from relying on the principal benefits of the LDF in relation to their EBT arrangements.

5. BDO were unable to persuade HMRC to modify their stance adopted in the Decisions, so on 12 November 2014 the claimants began proceedings seeking judicial review of the Decisions. Permission was initially refused on paper by Rose J, who understood the claims to be based solely on alleged breach of the claimants' legitimate expectations. At an oral renewal hearing, however, on 10 March 2015, permission was granted by Collins J, who expressed the view that the case turned not on any question of legitimate expectation, but on whether it was fair for HMRC to act in the way that they did, and in particular by failing to give any prior notice of their intention to withdraw the specified favourable treatment under the LDF. Collins J therefore required the claimants to amend their grounds in order to rely on unfairness, in accordance with the well-known principles expounded by the Court of Appeal in the Unilever case (R v Commissioners of Inland Revenue *ex parte* Unilever plc (1996) 68 TC 205, [1996] STC 681).

6. There is a dispute between the parties, to which I will need to return, about the steps which were then taken by the claimants to amend (and later re-amend) their statement of facts and grounds, but in due course the application came on for substantive hearing before Whipple J on 12 and 13 November 2015. By that stage, the grounds for review were pleaded in terms of "manifest unfairness", and it was contended that HMRC's decision not to register the claimants' applications, and "to deliberately prevent them from enjoying the benefits (available to others in the same position) of the full favourable terms" of the LDF, was manifestly unfair and amounted to an abuse of power for a number of reasons which were then set out. The parties were represented by the same counsel as have appeared before us, Mr Keith Gordon leading Ms Ximena Montes Manzano for the claimants, and Mr Timothy Brennan QC leading Mr Akash Nawbatt (now also QC) for HMRC.

7. In her full and careful reserved judgment, handed down on 26 January 2016, Whipple J dealt in turn with the four aspects of conspicuous unfairness which she understood to be relied on by the claimants, together with some associated criticisms of HMRC's decision-making process. She rejected all of the claimants' arguments, and therefore dismissed the application for judicial review. The neutral citation of her judgment is [2016] EWHC 107 (Admin), and it is reported as R (on the application of City Shoes Wholesale Limited) v Revenue and Customs Commissioners at [2016] STC 2392.

8. Permission to appeal to this court was refused by the judge and by Gloster LJ on the papers, but was granted at an oral renewal hearing by Patten LJ on 24 January 2017. He granted permission on all grounds, but on the express basis that the argument would be "principally directed to the discrimination issue", in respect of which Mr Gordon submitted to him that the judge had misunderstood the claimants' argument and had based her analysis on too narrow a comparison with other categories of taxpayers.

The appellants

9. The appellants are four of the original claimants, namely City Shoes (Wholesale) Limited, Jato Dynamics Limited, Shu & Company Limited and Daniel Katz Limited. The pleadings and evidence in support of the judicial review application are singularly uninformative about the precise nature of the EBT arrangements which they had undertaken and were under investigation by HMRC. The statement of facts and grounds merely says that on various dates between 6 November 2002 and 8 December 2010 the claimants "entered into an employee options arrangement as advised by BDO", and that in giving this advice "BDO had sought the advice of leading tax counsel". It is well known, however, that EBT arrangements of various kinds have been widely used as vehicles for tax avoidance schemes, typically designed to enable companies to remunerate their employees through arrangements involving the use of third parties and offshore trusts in a way that it was hoped would avoid liability to income tax and national insurance contributions ("NICs"), while enabling the company to obtain an immediate deduction in computing its profits for the money so expended. Part 7A of the Income Tax (Earnings and Pensions) Act 2003, headed "Employment Income Provided Through Third Parties", was inserted by the Finance Act 2011 in order to combat a number of schemes of this nature. Earlier versions of the legislation have given rise to leading cases such as MacDonald v Dextra Accessories Ltd [2005] UKHL 47, [2005] STC 1111, UBS AG v Revenue and Customs Commissioners [2016] UKSC 13, [2016] 1 WLR 1005, and RFC 2012 plc v Advocate General for Scotland [2017] UKSC 45, [2017] 1 WLR 2767. But by no means all of the schemes have been litigated, and Mr Gordon told us that the schemes adopted by the present claimants were all as yet untested in the tax tribunals.

10. Although counsel's skeleton argument in support of the appeals said that the relevant schemes did not involve EBTs at all, but HMRC had "treated them as if they did", Mr Gordon explained at the start of his oral submissions to us that the schemes involved share options and an offshore trust, and had some generic similarity to those in the UBS case. I think we may safely infer, therefore, that the schemes were ones of the general nature which I have indicated, designed to provide indirect remuneration to employees while escaping the liability to income tax and NICs which direct remuneration through the payroll would normally entail. If the claimants were unhappy about their schemes being assimilated by HMRC with other EBTs, and if

they wished to argue that this gave rise to any material distinctions, it would in my view have been incumbent on them to provide detailed evidence of the precise nature of the schemes, and the respects in which they allegedly differed from EBTs properly so-called.

The LDF and the EBT Settlement Opportunity

11. As the judge explained in her judgment at [3] to [11], two policy statements published by HMRC are relevant to this case. The first is the LDF, and the second is the "Employee Benefit Trust (EBT), Settlement Opportunity", which was supplemented by a set of "Frequently asked questions" ("FAQs") published in August 2012.

The LDF

12. On 11 August 2009, the Government of the Principality of Liechtenstein and HMRC entered into a Memorandum of Understanding ("MOU") relating to co-operation in tax matters for a stated period of five years. On the same day, the Governments of the United Kingdom and Liechtenstein also entered into an agreement on tax information exchange and agreed to begin talks about a comprehensive double taxation agreement between the two States based on the OECD Model of 18 July 2008.

13. The Preamble to the MOU included the following provisions:

> "D. HMRC will make available a special disclosure facility to each person who notifies HMRC pursuant to the taxpayer assistance and compliance programme. Where it is determined that the person is liable to taxation in the United Kingdom, the basis for assessment will be on the terms of the special disclosure facility limiting the penalty and the applicable period of assessment and offering a composite rate in certain defined circumstances.
>
> E. The special disclosure facility will be available to all persons with new or existing fiduciary, company or other holding structures or financial accounts in Liechtenstein during the five-year period subject to the following:-
>
> (a) any person already under investigation by HMRC as of the date of signing of this MOU cannot participate in the disclosure facility;
>
> …
>
> G. It is the parties' intention that by the conclusion of the five-year taxpayer assistance and compliance programme under this MOU, there will, as a result of the procedures contemplated by this MOU, be no relevant persons with a beneficial interest in relevant property who are liable to taxation in one party but are using the laws of the other party to disguise such liability without paying appropriate tax in the manner contemplated by this MOU. The measures which the parties intend to take and

> which are described in this MOU are intended to achieve that objective."

14. As the judge commented at [5], it is evident from paragraph G of the Preamble that:

> "the purpose of the LDF, at the outset at least, was to bring into tax in the UK liabilities which were "disguised" by the laws of Liechtenstein. These would, by their nature, be liabilities of which [*HMRC*] were not aware, unless and until they were disclosed under the LDF."

15. By Part 3 of the MOU, HMRC undertook to make available the terms of the disclosure facility from 1 September 2009 to persons who were eligible to participate in it according to Schedule 7, and to issue certificates in accordance with the specified certification procedure. Part 4 provided that either party could terminate the MOU by giving six months' prior notice in writing, and by virtue of paragraph 15 in Part 6 amendments to the terms of the MOU could be made "only by agreement in writing between the parties."

16. Schedule 1 to the MOU contained widely drawn definitions of "eligible person", "relevant person" and "relevant property", one effect of which was that any company incorporated or resident for tax purposes in the UK which had a beneficial interest in "a bank or financial (portfolio) account in Liechtenstein" was eligible to participate in the LDF. Schedule 4 then set out the certification procedure, by which a person who knew or had reason to believe that he was a relevant person with respect to relevant property would notify HMRC of their intention to apply for disclosure under the LDF at a specified address, and within 60 days of receipt by HMRC of such notification, HMRC would assign a disclosure reference number and issue a registration certificate to the applicant, and would thereafter deal with the registered person according to the terms of the LDF.

17. Schedule 7 contained a summary of the terms of the disclosure facility, and made clear that it would be available from 1 December 2009 for relevant persons with an asset or an interest in an asset in Liechtenstein acquired before the final compliance date. Furthermore, by virtue of paragraph 2 of Schedule 7, an eligible person was entitled to participate in the disclosure facility "with respect to all and any assets and income in respect of which UK tax may apply" from the date when the MOU was signed until the final compliance date. The detailed terms included: (a) a cut-off date which precluded any liability to UK tax in respect of previously undisclosed liabilities incurred before 5 April 1999; (b) a fixed penalty of only 10% of the tax payable (excluding interest); (c) an option to pay a single composite rate of UK tax at 40% in lieu of all UK taxes otherwise exigible; (d) remission of any penalty at all in cases of "innocent error", defined as "one that a reasonable person would have made"; and (e) an assurance that a relevant person who made full, accurate and unprompted disclosure under the LDF would not be subject to criminal investigation by HMRC for any tax-related offence, unless the source of the funds from which the relevant person had benefited constituted "criminal property" within the meaning of section 340 of the Proceeds of Crime Act 2002. Detailed provision was also made for the level of disclosure required by HMRC from eligible persons, and applicants were offered a "bespoke service" which included initial anonymous contact by a

professional adviser to discuss the circumstances of an eligible person with HMRC on a "no names" basis.

18. The MOU was supplemented by published FAQs, containing guidance for taxpayers, and a series of joint declarations between HMRC and the Government of Liechtenstein provided updates on the working of the LDF. As I have already said, the Fourth Joint Declaration was issued on 14 August 2014, and it was the terms of this update which rendered the claimants ineligible to obtain the main fiscal benefits of the LDF because their cases had already been subject to an intervention by HMRC for more than three months before the dates of their applications for registration.

The EBT Settlement Opportunity

19. We were not told when the EBT Settlement Opportunity ("the EBTSO") was first introduced, nor indeed were we shown a copy of it, but it is common ground that it was in force during the period with which we are concerned, and that its purpose was to facilitate settlement of cases involving EBT arrangements, or other arrangements of a similar nature. It did not, however, offer any fiscal incentives to settle such as those contained in the LDF. On the contrary, HMRC made it clear that any settlement would have to be based on the "right tax liability", and would have to be consistent with their Litigation and Settlement Strategy, a document published by HMRC which set out their policy on litigation and the settlement of tax disputes. As the judge rightly commented, at [10]:

> "The EBTSO did not offer any shortened limitation period, fixed penalty or composite rate option as an incentive to settle, and was very different in character from the LDF."

20. The EBTSO was supplemented by FAQs published in August 2012, one of which referred to the LDF as follows:

> "**1.10 I want to use the Liechtenstein Disclosure Facility (LDF) to settle my EBT liabilities – what should I do?**
>
> If you think your case meets the criteria you should contact the LDF Helpdesk in the normal way and they can discuss the appropriate terms of settlement with you."

A link to the Helpdesk was then provided.

21. Finally, on 14 August 2014, the same day as the Fourth Joint Declaration and the impugned Decisions by HMRC, a closing date for settlements under the EBTSO was also announced. Taxpayers had to register their intention to settle under the EBTSO by 31 March 2015, and to finalise settlements by 31 July 2015.

Evidence

22. The evidence for the claimants before the judge consisted of two witness statements made by Lynne Pearson, a tax principal at BDO, to which she exhibited the correspondence between BDO and HMRC and other related material leading up to the making of the Decisions on 14 August 2014.

23. For their part, HMRC relied on three statements dated 16 October 2015 made by:

    (a) Christopher Barlow, an officer of HMRC and Co-ordinator of the LDF up to November 2013;

    (b) Geoffrey McDonald Lewis, an officer of HMRC who took over from Mr Barlow in that role from December 2013 and was the author of the Decisions; and

    (c) Edward (now Sir Edward) Troup, who was then a Commissioner of HMRC with specific responsibilities as Tax Assurance Commissioner and Second Permanent Secretary.

24. Subject to one minor issue, which the judge resolved at [47] to [48] of her judgment, and on which nothing now turns, there was no dispute before her about the facts, which she proceeded to set out in some detail from [13] to [46].

25. At [70], the judge drew a contrast between the lack of evidence filed by HMRC to demonstrate their reasons for a change of policy in 2009, in a case in which she had handed down judgment on the day before the present hearing before her began (R (Hely-Hutchinson) v Commissioners for HM Revenue and Customs [2015] EWHC 3261 (Admin), [2016] STC 962), and the much fuller evidence provided to her in this case. As she said:

> "In this case, by contrast, the Commissioners provided a full and frank account of their internal discussion leading up to the change of policy in 2014, on which revised policy they relied in making the Decisions under challenge, and so I had a clear view of the underlying policy and the reasons for changing it. This evidence was important to both parties' arguments, and to my overall evaluation of the merits of the case. Where comparative unfairness is alleged, the Court is likely to be heavily dependent on the evidence provided by the Commissioners. The evidence provided in this case provides the better working model."

I respectfully agree with that observation.

Facts

26. Since the judgment is readily available, both online and in the specialist law reports, I do not need to set out the judge's account of the facts at any length. What follows is a summary of the main steps which led to the Decisions, starting with the discussions between BDO and HMRC, and moving on to the internal discussions within HMRC.

Discussions between BDO and HMRC

27. (1) In 2011, BDO first asked HMRC whether the LDF could be used to settle disputed tax liabilities arising out of EBT schemes eligible for settlement under the EBTSO. Although the LDF had originally been designed to counter the avoidance of UK tax by holding undeclared assets in Liechtenstein, it had by this time become more widely used, with HMRC's consent, as a means of regularising UK tax liabilities for those with assets held anywhere offshore.

(2) Following a meeting on 7 December 2011, and correspondence on a technical tax issue concerning the allowance of a tax credit if the option structure within the EBTs was unwound, the then head of the unit dealing with the LDF, Steve Symonds, sent an email on 5 April 2012 to BDO which was framed in encouraging terms and recommended taking full advantage of the LDF bespoke service.

(3) In June 2012, BDO submitted a first sample report on a "no-names basis" to Mr Symonds, with a view to arranging a meeting to discuss whether this was the correct way of approaching the "test cases". The foreshadowed meeting took place on 2 July 2012, when there was a wide-ranging discussion of the composite rate option, interest and penalties.

(4) On 18 July 2012, a telephone conference call took place between representatives of BDO and HMRC, at which it was noted that BDO's clients had three options open to them: settlement under the LDF, settlement under the EBTSO, or litigation. It was noted that there was some difference of view within HMRC as to whether the LDF could be used to settle tax liabilities for EBTs.

(5) Later in July 2012, BDO sent HMRC details of two more cases on a no-names basis, with commentary on the application of the LDF to them. At a further telephone conference call on 26 July 2012, those cases were discussed, and Mr Symonds is recorded as having said:

> "Lobby in HMRC keen to develop enquiries through EBT process & aghast that LDF available. <u>But</u> it is available. Entirely possible that could be changed in the future …"

(6) Following the submission of four further cases on a no-names basis, and further discussions, agreement was reached in November 2012 that BDO could now proceed to submit clients' reports on an agreed basis. Later in her judgment, at [77], the judge referred to this as "the November 2012 green light". BDO then submitted reports for five of its clients on a "named" basis, all of whom were subsequently registered within the LDF and received registration certificates from HMRC by the end of 2012.

(7) Early in 2013, HMRC raised certain problems with the LDF applications submitted by BDO. Many of these concerns were resolved quite quickly, and the outstanding points were dealt with by the beginning of July. This was confirmed in an email from Joseph Cavanagh of HMRC on 4 July 2013, at the end of which he expressed the hope that "it brings all issues up to date". It is clear, however, that some issues must have remained outstanding, because on 29 July 2013 Mr Cavanagh

emailed BDO with a further update on what the judge called "certain outstanding issues": see the judgment at [28]. This email was not included in our bundles, but this did not deter counsel for the appellants from describing the position thus reached, in their written and oral submissions, as "the formal green light". It should be noted that this was not the same as the November 2012 green light identified by the judge.

(8) Two days later, on 31 July 2013, Ms Pearson of BDO received a telephone call from Mr Cavanagh, informing her that the availability of the composite rate option under the LDF and other issues were "under review". According to an internal email sent by Mr Cavanagh to colleagues on 2 August 2013, the wording which he had used to inform BDO of the ongoing discussions was:

> "We are currently reviewing if the CRO [*composite rate option*] is allowable as a CT [*corporation tax*] deduction within the LDF terms. Other issues are also under review. In view of this we are not in a position to advise on these issues or further cases registering in LDF."

The judge did not quote this email, but she was clearly correct to say at [29] that the suggestion of a review "marked a shift in [*HMRC's*] approach".

(9) As I have already said (at [2] above) the claimants then submitted their applications for registration under the LDF on various dates between 30 August and 18 November 2013. These applications were then put "on hold" pending completion of HMRC's review. None of the claimants received a registration certificate within 60 days, or at any time before the Decisions were issued, without any prior warning, on 14 August 2014.

HMRC's internal discussions

28. (1) On 3 July 2013, Mr Barlow (who was then the co-ordinator for the LDF) expressed the view, in response to a question from a senior colleague (Judith Knott, the then Director of Corporation Tax, International, Stamp and Anti-Avoidance) that the LDF was available for EBT settlements. Following further discussions, mostly by email, about the availability of the LDF in such cases, and the management of EBT cases if there was now to be a review by HMRC, Mr Barlow said in an email of 28 August 2013 that he remained "strongly of the opinion" that under the current published guidance there was nothing to prevent taxpayers from registering under the LDF to resolve EBT issues, and expressed the view that HMRC would "surely be open to [*judicial review*]" if they sought to apply a different treatment in the case of a particular class of taxpayers, before HMRC had revised their guidance. He also said:

> "What concerns me most is the possibility of having to back track on the BDO cases, although I remain hopeful we won't have to do that."

(2) When the first two of the claimants' applications were submitted by BDO on 30 August 2013, Mr Barlow gave this advice to the relevant team leader:

> "Hold fire please. This is tricky. I imagine BDO are looking to come in because of the treatment we have previously indicated they would get in the cases that are already in. I thought they were aware that recent developments have thrown that treatment into doubt but by the sound of it we need to have another conversation with them…"

(3) It was then decided that the matter should be considered at a meeting of the Business Tax Contentious Issues Panel and the Personal Tax Contentious Issues Panel. Mr Barlow prepared a paper for the meeting, which took place on 6 November 2013, in which he maintained his recommendation that the full benefits under the LDF should be available for EBT users. The judge (at [39]) quoted this extract from his paper:

> "… the fact is that since the LDF commenced in September 2009 we have accepted that when an existing enquiry case enters the LDF, all open issues can be settled via the LDF disclosure and our internal guidance and procedures have been predicated on that basis. If we seek to treat EBT cases differently we will be open to challenge."

At the meeting, however, reservations were expressed about Mr Barlow's views, and the decision was taken to refer to the Commissioners the question whether users of EBT avoidance schemes should be allowed to register and settle their outstanding tax liabilities under the LDF.

(4) The question was first considered by a panel of three Commissioners (Mr Troup, Jim Harra and Jennie Granger) at a meeting on 3 February 2014. They had before them various papers, including one on the tax implications of collecting the tax considered to be due from EBT users via the LDF, as opposed to the EBTSO, and a cost analysis of the yield implications of various options available to HMRC. This estimated a loss for 2014/15 of £85 million if EBT users were able to settle via the LDF instead of the EBTSO, and indicated that the impact in terms of tax loss for all years would be between £214 and £256 million. As Mr Troup records in his statement, specific concerns were expressed at the meeting: (i) that the LDF was being used as a means of reducing or minimising tax due from EBT users, but it was not leading to disclosure of any tax liabilities which HMRC did not already know about, contrary to the original purpose of the LDF; and (ii) that there was a potential unfairness to other EBT users whose circumstances were identical except that they had no offshore assets in 2009, which was a precondition to the application of the LDF.

(5) As the judge records, at [41]:

> "Mr Troup and his colleagues decided that the tax liabilities of EBTs should <u>not</u> be settled under the LDF and that no further EBT users should be permitted to register. The Commissioners were aware that this represented a change in practice, and they

identified four categories of EBT users requiring consideration in the face of such changed practice:

(1) EBT users who had registered under the LDF and whose liabilities had been finalised. It was agreed that no change would apply retrospectively, and that therefore any EBT user in this category would be permitted to retain the full benefits of the LDF. (As it turned out, there were no taxpayers in this category.)

(2) EBT users who had already registered to use the LDF but whose affairs were not yet settled. The Commissioners were aware at the time that there were 13 such taxpayers.

(3) EBT users who had applied for registration but whose applications were currently "stockpiled". The Commissioners were aware that there were 11 such taxpayers. This category included all of the Claimants.

(4) EBT users who had not yet made any application to register under the LDF. There were likely to be many taxpayers in this category. The Commissioners decided that taxpayers in Category 4 were not to be permitted to benefit from the full terms of the LDF. Categories (2) and (3) were identified as "transitional categories", requiring careful consideration because the Commissioners' practice on LDF was now set to alter whilst those taxpayers had LDF applications outstanding."

(6) The panel then sought further information and legal advice on the transitional categories, and discussed them at a meeting on 29 April 2014. At this meeting, the Commissioners confirmed their previous view on Categories 1 and 4. In relation to Category 2 taxpayers, it was decided that they too should be permitted to settle on the favourable LDF terms, because their LDF registrations had already been accepted and, as Mr Troup put it in his evidence, "they had been given assurances from which HMRC could not withdraw…". In relation to Category 3 taxpayers, the panel decided that it needed more detailed information and further legal advice on legitimate expectation before coming to a final conclusion.

(7) Further documents were then provided to the panel, including a paper setting out detailed information about the Category 3 cases, and outlining the three options open to HMRC in handling them. The first option was to treat all Category 3 cases in the same way as Category 2; the second was to accord such treatment to taxpayers who could demonstrate detrimental reliance, but otherwise restrict access to the full favourable terms of the LDF; while the third was to reject Category 3 applications for favourable treatment under the LDF, on the basis that their applications had not yet been accepted, they could have no legitimate expectation that they would be, and HMRC were at liberty to change their policy in the meantime. Further legal advice was also provided, in respect of which privilege has not been waived. On 28 May 2014, having reviewed the legal advice and considered the matter further, Mr Troup emailed his two colleagues explaining that he did not consider it consistent with their

agreed policy or even-handed in the treatment of the taxpayer population as a whole to allow settlement on favourable terms to Category 3 taxpayers. Mr Harra and Ms Granger agreed with that view, so the third option was adopted in relation to Category 3. This decision was subsequently implemented by the Fourth Joint Declaration on 14 August 2014, after agreement to the necessary changes had been obtained from the Government of Liechtenstein.

(8) In his written evidence, Mr Troup addressed the issue of unfairness in relation to the transitional categories as follows:

> "22. I understand it to have been suggested, and it now to be the claimants' case, that it was unfair for HMRC to have withdrawn the LDF from EBT scheme users without warning or notice. It was, and is, my view that it was inappropriate for taxpayers in the position of the claimants to be given access to the LDF. Having formed that view, I do not consider that fairness dictated that those taxpayers should be given a further period in which to avail themselves of an unjustified benefit, to the detriment of the general body of taxpayers. On the contrary, HMRC's duty to the general body of taxpayers meant that the availability of the LDF to these taxpayers in these circumstances should be curtailed immediately.
>
> 23. We recognised that, in some circumstances, it could be unfair for HMRC to act in such a way as to defeat a legitimate expectation. It was for that reason, as explained above, that we decided not to reverse the settlements of those users of marketed avoidance schemes who had already settled through LDF or to alter the position of those EBT users who had had their applications for registration in the LDF accepted. However, it was our view and conclusion that the present claimants (who had their applications for registration put on hold pending our consideration of the availability of the LDF for EBT users) were in a materially different position and that it would not be unfair or improper, nor would it defeat any legitimate expectation, to refuse their applications to register for the favourable terms of the LDF. Like all other EBT users they would, of course, still be able to avail themselves of the settlement opportunity under the EBTSO, or to litigate their positions before the Tax Chamber of the First-tier Tribunal in the ordinary way."

I emphasise that in this passage Mr Troup dealt with the wider issue of unfairness, viewed in the context of HMRC's duty to the general body of taxpayers, as well as with the specific issue of legitimate expectation.

The law

29. After setting out the facts, the judge dealt at some length with the law at [52] to [70] of her judgment. Since there is no real disagreement between the parties about the relevant legal principles, I can take them shortly.

Conspicuous unfairness

30. The leading case on this topic is still Unilever, which was decided by the Court of Appeal in 1996. HMRC had refused a claim for loss relief made by Unilever because it was not made within the statutory two-year time limit. The company contended that it had made a claim within the specified period, but if it had not, HMRC could not in fairness treat the claim as time-barred, having regard to the practice consistently adopted by HMRC over the preceding 20 years of allowing such claims to be made outside the time limit. On Unilever's claim for judicial review, Macpherson J found that a claim had not been made within the two-year period, but HMRC could not in fairness treat the claim as time-barred. This decision was upheld by the Court of Appeal, presided over by Sir Thomas Bingham MR sitting with Simon Brown and Hutchison LJJ.

31. Giving the leading judgment, Sir Thomas Bingham MR said at 228B:

> "The courts have not previously had occasion to consider facts analogous to those here. The categories of unfairness are not closed, and precedent should act as a guide not as a cage. Each case must be judged on its own facts, bearing in mind the Revenue's unqualified acceptance of a duty to act fairly and in accordance with the highest public standards."

32. Later in his judgment, he said at 230E:

> "The threshold of public law irrationality is notoriously high. It is to be remembered that what may seem fair treatment of one taxpayer may be unfair if other taxpayers similarly placed have been treated differently. And in all save exceptional circumstances the Revenue is the best judge of what is fair. It has not, however, been suggested that the detailed history described above has any parallel. The circumstances are, literally, exceptional. I cannot conceive that any decision-maker fully and fairly applying his mind to this history…could have concluded that the legitimate interests of the public were advanced, or that the Revenue's acknowledged duty to act fairly and in accordance with the highest public standards was vindicated, by a refusal to exercise discretion in favour of Unilever. I share the Judge's conclusion that this refusal, if fully informed, was so unreasonable as to be in public law terms irrational."

33. Simon Brown LJ expressly rejected HMRC's argument that all challenges based on substantive unfairness had to be confined to cases of legitimate expectation falling within the principles stated in R v IRC, *ex parte* MFK Underwriting Agencies Ltd [1990] 1 WLR 1545, "requiring in every case an unambiguous and unqualified

representation as a starting point" (see 233C). In a well-known passage, Simon Brown LJ went on to say, at 233E:

> " "unfairness amounting to an abuse of power" as envisaged in *Preston* and the other Revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power. As Lord Donaldson M.R., said in *Regina v Independent Television Commission* ex parte *TSW Broadcasting Ltd*: "The test in public law is fairness, not an adaptation of the law of contract or estoppel". In short, I regard the *MFK* category of legitimate expectation as essentially but a head of *Wednesbury* unreasonableness, not necessarily exhaustive of the grounds upon which a successful substantive unfairness challenge may be based. "

34. Near the end of his judgment, Simon Brown LJ referred, at 236D, to:

> "the border between on the one hand mere unfairness - conduct which may be characterised as "a bit rich" but nevertheless understandable - and on the other hand a decision so outrageously unfair that it should not be allowed to stand."

35. As the judge in the present case pointed out at [54], the language of "conspicuous unfairness" has been adopted in subsequent cases as a convenient shorthand to describe unfairness which amounts to an abuse of power.

36. The judge also referred, at [56], to the judgment of Elias LJ (sitting with Sharp J in the Divisional Court) in R (London Borough of Lewisham) v AQA & Others [2013] EWHC 211 (Admin), [2013] ELR 281, where he said at [111]:

> "But I do not believe that *Unilever* has formulated a fresh head of review conferring on the court a wide discretion to substitute its view of the substantive merits for the decision-maker. In order to constitute *conspicuous* unfairness, the decision must be immoral or illogical or attract similar opprobrium, and it necessarily follows that it will be irrational. I would treat this concept of conspicuous unfairness as a particular and distinct form of irrationality, which in essence is how it was viewed by Sir Thomas Bingham in *Unilever*. There are no doubt cases, of which *Unilever* is one, where the concept of fairness, and an allegation of conspicuous unfairness, better captures the particular nuance of the complaint being advanced than the concept of irrationality. Indeed, I think that is typically so in any case where the alleged unreasonable behaviour involves a

> sudden change of policy or inconsistent treatment. It is more natural and appropriate to describe such conduct as unfair rather than unreasonable. But in my view it is only if a reasonable body could not fairly have acted as the defendants have that their conduct trespasses into the area of conspicuous unfairness amounting to abuse of power. The court's role remains supervisory."

Comparative unfairness in tax cases

37. The judge found helpful, and cited extensively from, the judgment of Elias J (as he then was) in R (British Sky Broadcasting Group plc) v Customs and Excise Commissioners [2001] EWHC Admin 127, [2001] STC 437, where the claimant taxpayer complained that HMRC's decision to treat its listings magazine as part of a single supply of broadcast services subject to VAT at the standard rate was unfair because similar treatment had not been imposed on competitors who had continued to treat their listings magazines as separate zero-rated supplies with HMRC's knowledge and approval. The claim was rejected by Elias J. I will not repeat or attempt to summarise Whipple J's analysis of this case, which may be found at [57] to [68] of her judgment, with which I am in general agreement.

38. The most recent and authoritative guidance on this subject is to be found in the judgment of this court in the Hely-Hutchinson case, allowing HMRC's appeal from the judgment which Whipple J had handed down the day before she embarked on the present hearing: see [2017] EWCA Civ 175, [2017] STC 2048. The leading judgment was delivered by Arden LJ, with whom McCombe and Sales LJJ agreed. The facts were rather complex, but the issue at the heart of the case was whether HMRC could fairly resile from guidance which they had given in 2003, and on which the taxpayer had relied when making certain loss claims, in circumstances where the taxpayer's claims were still "open" when the 2003 guidance was withdrawn in May 2009, and HMRC stated that the revised treatment would apply to any enquiry or appeal which was open at that date.

39. Arden LJ dealt with the issue of comparative unfairness at [52] to [65] of her judgment. She began by recording the three main submissions advanced by Mr Nawbatt QC for HMRC, which were (in summary):

    (a) comparative unfairness may only be found to exist where parties are materially identically placed, and taxpayers with open claims are in a materially different position from those with claims made in closed years;

    (b) the judge had wrongly concluded that the question of comparative unfairness was to be determined as at the time of the 2003 guidance, and not when it was withdrawn; and

    (c) the judge failed to direct herself correctly about the exception to the normal requirements for decision-

> makers to act consistently where they had previously acted under a mistake as to the law.

In support of the third submission, Mr Nawbatt had referred to the conclusion of Elias J in the AQA case at [126] that:

> "there is nothing inherently unfair in putting right earlier errors rather than compounding them, even if this involves creating a disparity between similarly placed individuals."

40. Arden LJ concluded, at [62], that Mr Nawbatt's three submissions were correct and amply supported by authority. She said that the judge did not "give due weight to the fact that a public body can change its policy if there is a good reason." In relation to Mr Nawbatt's second submission, she said this, at [64]:

> "I consider that on principle it is not enough to say that the persons to be treated in the same way were in the same cohort originally. It is necessary to look at the time when the decision is made, that is, when the decision-maker is called upon to assess whether they should be treated as being in the same position. In the present case taxpayers with *Mansworth v Jelley* losses were not in the same position if they were in open years as opposed to closed years. For the latter group, HMRC had no power to reopen their affairs and to remove the ability to utilise the *Mansworth v Jelley* loss. The position was entirely different for those whose years were open, including the respondent. Therefore this ground of unfairness was not available to the judge,"

The judge's decision

41. Against this background, the judge began her analysis at [71] by recording her agreement with the claimants' concession that they had no legitimate expectation to any substantive benefit under the LDF. She accepted that the LDF, as a statement published by HMRC to the world at large, was "to that extent…capable of engaging the doctrine of legitimate expectation", but as she then explained:

> "…the LDF is an invitation to taxpayers to apply for registration; it offers no promise that the application will be accepted. It is only if the relevant taxpayer is granted a registration certificate by [*HMRC*] that the taxpayer might have any expectation of entitlement to the benefits described within the LDF. This has two consequences, which are important for the determination of this case: first, a taxpayer who does not have a registration certificate does not have any legitimate - or other - expectation of any benefits at all under the LDF; this is so whether the taxpayer has applied for a registration certificate

> (but not heard back from [*HMRC*]) or has not yet made an application. Secondly, there is a material difference between taxpayers who have been registered under the LDF, who have applied and who have had their applications accepted-they do (at least arguably) have a legitimate expectation that the substantive benefits of the LDF will be extended to them-and those who have not been registered, who have no such expectation at all."

42. The judge then expressed the view, at [72], that HMRC's failure to respond to the claimants' applications for registration within the 60 day period referred to in the MOU did not give rise to any legitimate expectation of certification within that period, or to "any expectation of a substantive benefit under the LDF in default of an answer within that timeframe." She said that:

> "The failure to respond within the promised time is, at its highest, an administrative default by [*HMRC*], which does not have any consequence which is relevant to this claim for [*judicial review*]."

43. The judge then recorded, at [73], that since the grant of permission by Collins J, and the amendment by the claimants of their grounds, the case had been advanced solely on the ground of conspicuous unfairness. She continued:

> "But the abandonment of legitimate expectation gives rise to a problem for the Claimants: the doctrine of legitimate expectation has developed to address complaints of unfairness in the State's refusal to confer promised benefits… Once the Claimants have accepted, as they must, that they had no legitimate expectation arising out of the LDF, they will inevitably struggle to show conspicuous unfairness in the refusal to bestow the LDF benefits, because they had no expectation (of a "legitimate" sort, giving rise to a right protected in law) that they would get those benefits in the first place. "

44. The judge acknowledged, however, that conspicuous unfairness could be found even in the absence of a legitimate expectation, Unilever being just such a case, so she went on to address the four aspects of conspicuous unfairness relied upon by Mr Gordon on the claimants' behalf.

45. Mr Gordon's first complaint was that the claimants had been "led up the garden path" by HMRC, and induced to believe that they could benefit from the LDF, until at the eleventh hour and without warning most of the benefits previously available under the LDF were withdrawn. The judge concluded, at [76], that there was "some truth" in the assertion that the claimants were led up the garden path, and she commented that the tenor of HMRC's own evidence was "one of acceptance that BDO had been

encouraged to believe that their clients could use the LDF to settle their EBT liabilities." It was against that background that the three Commissioners had considered the case very carefully, and acknowledged that their decision would involve a change in HMRC's position.

46. The judge then rejected HMRC's suggestions that the claimants had delayed unreasonably in making their applications for registration, but nevertheless concluded at [78] that the claimants did not "get anywhere near" showing that HMRC had treated them with conspicuous unfairness. She said (ibid):

> "Although BDO were encouraged to think that the LDF would be available to their clients, no guarantee or promise to that effect was given, at any time, to BDO or to any named Claimant. There was not even any guarantee that the terms of the LDF would remain unaltered, or would remain available to the BDO clients. [*HMRC*] were at liberty to withdraw the benefits at any time, because the Claimants had no legitimate expectation of any substantive benefit under the LDF (see above)."

47. The judge then added that the claimants did not even have any legitimate expectations that they would be given a warning if the full benefits of the LDF were to be withdrawn, because a right to be warned was a means of safeguarding a legitimate expectation, and in the absence of such an expectation the judge could "see no basis for demanding that there should be advance warning before the promised treatment is withdrawn or altered." She also accepted that, in the present case, to give such a warning "could have risked frustrating the underlying purpose of the change of policy, which was to deny the LDF to EBT users for wider reasons of fairness": see [79].

48. At [80], the judge said that being "led up the garden path" might be characterised as treatment which was "a bit rich", but, without any guarantee or promise, the refusal to confer the tax treatment available under the LDF was not "so outrageously unfair that it should not be allowed to stand" (adopting the language of Simon Brown LJ in Unilever, cited above). The judge therefore rejected the first alleged ground of unfairness.

49. The judge then dealt rapidly with the second and third complaints, which were that the treatment imposed on the claimants by HMRC was contrary to HMRC's own published policy, and that the Decisions were in some sense backdated by six months "and smacked of retrospection". The judge was satisfied that there was nothing in either point, because the claimants had not been registered under the LDF when the change of policy was announced in August 2014. She then added, at [83]:

> "Perhaps the real complaint which underpins the second and third arguments is not so much that [*HMRC*] refused to confer the full benefits of the LDF on the Claimants (who were unregistered at the time), but rather that [*HMRC*] failed to process the applications for registration more quickly, so as to secure the full LDF benefits for the Claimants before the August 2014 changes. But for reasons set out above, this

> complaint, if this is how the Claimants' case is put, is not a valid basis on which to challenge the Decisions. The 60 day promised turnaround time was a procedural or administrative matter; failure to comply with it does not result in the Claimants being able to claim a substantive benefit (or otherwise to complain of conspicuous unfairness)."

50. The fourth, and final, complaint was that the Decisions were discriminatory because others in a materially identical situation to the claimants were permitted to benefit from the LDF without limitation. The relevant comparison was said to be with the Category 2 taxpayers, whose position was identical save for the immaterial distinction that the timing of their application was different. The judge's answer to this, at [84], was that:

> "…the Category 2 taxpayers were, in fact and law, in a different position, not because of the timing of their applications, but because [*HMRC*] had accepted their applications and issued registration certificates to them. It was not the date of application which divided them, but the fact of registration within the LDF. This was a difference of fact, certainly. But it was more: it meant that Category 2 taxpayers *did* have a legitimate expectation of receiving the full benefits set out in the LDF in its unaltered state, because their applications had been accepted and their eligibility for those benefits had been confirmed. "

51. The judge then found further support for this analysis in the approach adopted by Elias J in the British Sky Broadcasting case, leading to the conclusion that the Category 2 taxpayers were not true comparators at all: see her judgment at [85] to [86].

52. Having thus rejected the claimants' case on conspicuous unfairness, the judge finally dealt with various criticisms which had been made of HMRC's decision-making process, including that HMRC had overlooked relevant factors or given insufficient weight to those factors which favoured the claimants. The judge answered these criticisms as follows:

> "88. …Amongst the many factors considered by Mr Troup and his colleagues, were:
>
> (i) the significant adverse tax yield implications of permitting any of the EBT users to settle by means of the LDF;
>
> (ii) the interests of taxpayers generally, that tax will be collected in accordance with the statute, noting that if tax is not collected, then the burden of making up any deficit in collection will rest on the shoulders of other taxpayers;

> (iii) the purpose of the LDF, which was to enable [*HMRC*] to reach settlements and realise tax from taxpayers whose liabilities had previously been unknown to [*HMRC*], noting that [*HMRC*] were already well aware of the EBT liabilities of the Claimants and other EBT users;
>
> (iv) the possible reputational damage to [*HMRC*], and the possibility of legal action, if [*they*] permitted the LDF to be used for EBT settlements;
>
> (v) [*HMRC's*] litigation and settlement strategy, which set out [*their*] policy on reaching settlements with taxpayers, amongst other things;
>
> (vi) the comparatively less advantageous terms of the EBTSO, through which many EBT users had already settled;
>
> (vii) the non-availability of the LDF to those EBT users who did not have any foreign assets at the relevant date.
>
> These were powerful factors in favour of limiting the LDF benefits to the Claimants and other registered EBT users. [*HMRC*] were well aware of the overtures which had been made by the LDF unit to BDO, and that any refusal to confer the full LDF terms would constitute a change in policy: these were factors taken into account which tended in the opposite direction.
>
> 89. In light of the full analysis undertaken by [*HMRC*] and evidenced in this case, I am unable to conclude that any material consideration was left out or given any inappropriate weight. This was a difficult decision for [*HMRC*]. They undertook a careful review of the many public interest and private interest factors engaged. I cannot identify any fault in their approach or evaluation."

The grounds of appeal

53. The grounds of appeal have the merit of brevity, but contain little in the way of particularity. They are as follows:

(1) The court failed to take into account all relevant considerations.

(2) Other factual conclusions reached were inconsistent with the evidence before the court.

(3) The court misdirected itself as to the law governing challenges on grounds of conspicuous unfairness.

(4) The court's analysis of HMRC's decision-making process is flawed because, contrary to the decision of the judge:

(i) it focused solely on the risk of a legitimate expectation-based challenge;

(ii) it did not consider HMRC's duty to act fairly; and

(iii) material considerations were disregarded.

HMRC's preliminary objection

54. Before considering the grounds of appeal, I need to deal with a preliminary objection taken by HMRC in their respondent's notice and elaborated by Mr Brennan and Mr Nawbatt in their skeleton argument.

55. HMRC's submission is that the appellants should not be allowed to advance on appeal a "discrimination" argument which has never been pleaded (whether originally, by amendment or re-amendment, either before or after the grant of permission to appeal by Patten LJ); upon which permission to apply for judicial review was never sought or granted; and which was not addressed in the evidence on either side. In a little more detail, the argument is that the claimants' original pleaded case was confined to alleged breaches of legitimate expectation, and Collins J only gave permission for the claim to be pursued as one alleging Unilever unfairness in respect of HMRC's failure to give a warning. In the event, however, a much broader case of conspicuous unfairness was advanced before Whipple J, which she comprehensively rejected. In the written reasons which she gave for refusing permission to appeal, Whipple J noted that under the first proposed ground of appeal (failure to take into account relevant considerations) it was now contended that comparison should have been made, not with Category 2 taxpayers, but with non-EBT taxpayers who were permitted to enter the LDF even after 14 August 2014. The judge commented:

> "If that is the argument advanced: (a) it is a new argument – or at least not the way the case was put before me; and, anyway, (b) it surely fails for the same reasons as apply in the context of comparison with category 2 taxpayers…, namely that non-EBT taxpayers are in a materially different position from EBT taxpayers."

56. At the oral renewal hearing of the application for permission to appeal, Patten LJ was satisfied that the wider discrimination argument (which Mr Gordon assured him had been fully articulated and argued before the judge) had sufficient merit to justify the grant of permission, albeit his understanding was that the proposed comparison was with "other taxpayers who would not have qualified under the revised conditions introduced in August 2014 but whose applications were received after those of the claimants and who obtained registration under the LDF before the August 2014 changes took effect": see [2017] EWCA Civ 28 at [19].

57. HMRC's basic point is that, even in their re-amended form, the claimants' statement of facts and grounds made no complaint that they had been discriminated against in comparison with non-EBT LDF applicants. This complaint is in my judgment well-founded. No trace of such an argument can be found in the particulars of alleged conspicuous unfairness set out in paragraph 51 of the re-amended document, nor does the word "discrimination" (or cognate expressions) occur anywhere in the pleaded grounds for review or remedies sought. The nearest that the pleaded case comes to a positive allegation of discrimination is in the opening words of paragraph 51, where it is said that the Decisions deliberately prevented the claimants "from enjoying the benefits (available to others in the same position) of the full favourable terms" of the LDF. In these circumstances, it is scarcely surprising that HMRC's evidence did not focus on the position of non-EBT taxpayers who applied for registration under the LDF, because non-EBT taxpayers were not in any obvious sense "in the same position" as the claimants. Had the claimants wished to run a positive case of unfair discrimination in comparison with such taxpayers, they should in my judgment have pleaded the point with clarity so that HMRC knew precisely what case they had to answer.

58. It was only in the claimants' skeleton argument for the hearing before Whipple J, dated 23 October 2015, that a discrimination argument was formulated for the first time, and even then with little clarity. In the initial outline of the claimants' case, it was said that the Decisions had discriminated arbitrarily against taxpayers who had applied for registration under the LDF on or after 1 August 2013, when compared with those whose applications had been made before that date, and/or those who had applied for registration on or after that date, but who had entered into arrangements not involving EBTs, "and had instead entered into other marketed avoidance schemes or even tax evasion." Later on, it was said in paragraph 6 that HMRC's actions had led to the claimants:

> "being arbitrarily treated more harshly than comparable taxpayers and more harshly than those whose conduct (marketed avoidance schemes and evasion) is more worthy of opprobrium."

It appears to be implicit in this formulation that only EBT taxpayers who had made their applications before 1 August 2013 were regarded as "comparable taxpayers", while there was also a third category of taxpayers whose conduct was worse than that of the claimants (although it should be pointed out that there is a clear distinction between marketed avoidance schemes, which are normally lawful, and tax evasion, which by definition is not). This supposed distinction was then reflected in later paragraphs of the skeleton argument, where it was said that after 1 August 2013 taxpayers with other marketed avoidance schemes and tax evaders continued to be registered with the LDF with a normal turnaround period of about two days from application to registration.

59. Against this confused background, it is unsurprising that there was a discussion soon after the start of the hearing before Whipple J on 12 November 2015 about the parameters of the claimants' case. Mr Gordon said (page 9 of the transcript) that his clients' "fourth area of concern" was that the backdated effect of the Decisions had

"led to different and less favourable treatment from others in materially identical circumstances", and that this fell within the scope of conspicuous unfairness. While the claimants were being denied entry to the LDF, "other arrivals – not even those being actively encouraged by HMRC – were let in without question, even though the new criteria would also have led to their exclusion".

60. There was then some discussion of the claimants' pleaded case, and the judge pointed out that it was pleaded as conspicuous unfairness arising out of circumstances which did not give rise to legitimate expectations. Mr Gordon then said that he was still seeking to rely on a limb of legitimate expectation, where reliance was placed on a published policy, to which Whipple J said (at page 10 of the transcript):

> "I think you are going to have to tread very carefully, Mr Gordon, because that's not….I require things to be properly pleaded before me and at the moment your claim is not pleaded on the basis that there was a legitimate expectation arising out of the published policy. You, on the basis of what Collins J said, stepped back from that and deliberately amended your case into a case of Unilever unfairness and certainly you are perfectly entitled to run that argument, but on the basis that the unfairness was not in the form of legitimate expectation based on the published policy, but on other circumstances and factors, for instance the unfairness by comparison with others. That is how your case is currently pleaded."

61. That was the basis upon which the hearing then proceeded. In due course, Mr Gordon made submissions on the discrimination point, without objection from Mr Brennan, but the transcript shows that he only touched very briefly on the position of non-EBT cases, and he was apparently content for them to be compendiously labelled as tax evaders (page 55 of the transcript). He also relied, within the EBT cohort, on the alleged unfairness between HMRC's Categories 2 and 3. For his part, Mr Brennan at the start of his submissions answered some questions from the judge about "the discriminatory aspect", as she termed it, and the idea that there was "comparative unfairness". Mr Brennan submitted that one has to find the relevant comparator, and alluded to the suggestion in the claimants' skeleton argument that users of marketed avoidance schemes other than EBTs were being allowed access to the LDF during the relevant period. Mr Brennan said, on instructions, that this was not the case, and so far as HMRC were aware, the suggestion had no foundation in fact (page 60 of the transcript). He then made submissions about the Category 2 taxpayers within the EBT cohort.

62. In the light of this rather tangled history, I do not think it would be right to rule that the appellants should be precluded from running any argument before us based on a comparison with the position of non-EBT taxpayers, so far as support for the submission may fairly be obtained from the material in evidence before the court. On the other hand, it needs to be firmly borne in mind that the case has never been expressly pleaded on this basis, and HMRC's evidence was understandably never directed to it. Elementary fairness therefore dictates that we should be extremely cautious before finding a case of this nature to be established. The evidence would in

my view need to be very clear, and to admit of no other reasonable explanation. In particular, I am satisfied that it cannot be enough to cherry-pick a few passages from the documents which happen to be before the court, unless the inferences to be drawn from them are truly compelling, even after full allowance has been made for the fact that the evidence was never directed to this issue.

63. I should also say that I have every sympathy with the judge's reaction when it was put to her, on the application for permission to appeal, that she had failed to deal with the issue of unfair discrimination in comparison with non-EBT taxpayers. On the basis of the passages in the transcript to which we were taken, I do not think that this was a fair criticism.

64. Having dealt with these preliminary matters, I can now turn to the four grounds of appeal.

Ground 3: did the judge misdirect herself as to the law governing challenges on grounds of conspicuous unfairness?

65. It is convenient to begin with the third ground of appeal, because if the judge misdirected herself in law, it is possible that this may have infected her approach to the facts and HMRC's decision-making process. In their written submissions, counsel for the appellants contend that the judge placed inappropriate emphasis on the concept of legitimate expectation, and wrongly approached the issue of conspicuous unfairness from that starting point. They argue that she should instead have treated conspicuous unfairness as a standalone basis for a challenge under the overall heading of irrationality. Symptomatic of this mistaken approach, they submit, is the view expressed by the judge in [73] that, in the absence of any legitimate expectation, the claimants would "inevitably struggle to show conspicuous unfairness in the refusal to bestow the LDF benefits".

66. In my judgment, there is no substance to this complaint. As I have explained, the judge considered the law in some detail and directed herself by reference to the guidance given by this court in Unilever and by the Divisional Court in the AQA case. I cannot detect any error in her approach, which appears to me to be firmly grounded on the authorities. She plainly recognised that the categories of unfairness are not closed, and that conspicuous unfairness should be regarded "as a particular and distinct form of irrationality", to quote from the judgment of Elias LJ in AQA at [111]. Her comment about the difficulty faced by the claimants, in [73], does not in my opinion betray any error of law. Rather, it is a realistic comment on the forensic difficulties facing the claimants in a situation where, as they rightly conceded, they had no legitimate expectation of entitlement to benefit under the LDF. The judge was plainly well aware that this did not rule out the possibility of a case of conspicuous unfairness being made out, because she went on to say in the very next paragraph:

> "74. But Mr Gordon argues that conspicuous unfairness can be found even where there is no legitimate expectation (*Unilever* being just such a case). He is right, at least in principle, so I move on to address his arguments."

67. The other points made by the appellants under this heading, for example in relation to the admittedly high threshold of unfairness amounting to an abuse of power, seem to me on analysis not to be arguments that the judge misdirected herself in law, but rather that she erred in her application of the relevant principles to the facts. I am therefore satisfied that this ground of appeal should be dismissed.

Ground 1: did the judge fail to take relevant circumstances into account?

68. Central to this ground of appeal is the contention in paragraph 30 of the appellants' skeleton argument that the judge "simply failed to recognise that the question of discrimination formed a major plank" of their oral submissions before her. However, this contention faces the obvious difficulty that the judge expressly recognised, at an early stage of the hearing, that Mr Gordon was entitled to run an argument of Unilever unfairness based on circumstances and factors other than legitimate expectation, "for instance the unfairness by comparison with others": see [60] above. Furthermore, the transcript shows, as I have already explained, that Mr Gordon debated this very question with the judge in his oral submissions, albeit giving the impression that the only relevant class of non-EBT taxpayers were tax evaders. Furthermore, it is clear from the judgment that the judge dealt carefully, and at length, with the allegation of discrimination within the EBT cohort between taxpayers in Categories 2 and 3.

69. Quite apart from those difficulties, the submission faces the further obstacle that no case of discrimination in comparison with non-EBT taxpayers was ever pleaded, and no evidence on either side was specifically directed to that issue. In those circumstances, the best that Mr Gordon could do was to point to a few documents which appeared to indicate that non-EBT taxpayers continued to be routinely admitted to the LDF at the same time as the claimants' applications were put on hold. But it remained wholly unclear who these other taxpayers were, whether BDO acted for them, or what their precise circumstances were. We were simply invited to infer, from these slight indications, that HMRC must have deliberately pursued a policy of singling out EBT taxpayers for unfavourable treatment in comparison with all other taxpayers who would have been adversely affected by the change of terms introduced in August 2014, or at any rate in comparison with users of other marketed avoidance schemes. This was in my view a hopeless endeavour, and it would be wrong in principle to draw an inference of such gravity from such slight indications, without HMRC having had a fair opportunity to confront the allegation squarely.

70. As an example of the need for caution, it is perhaps sufficient to refer to a lengthy "Overview paper" on the settlement of EBT cases via the LDF, prepared by Mr Lewis for the panel of three Commissioners on 27 January 2014. Among the many questions for consideration dealt with in the paper, one was:

> "Whatever decision is taken by the Commissioners, do the Commissioners want it applied to all Marketed Avoidance Scheme cases or restricted to EBT cases or would they want to consider each scheme separately?"

Appendix 2 to the paper dealt with the "Non-yield implications of allowing EBT Users to continue to settle their liabilities via the LDF". The discussion in this appendix expressly envisaged the possibility that users of marketed avoidance schemes ("MAS") might wish to access the favourable terms offered via the LDF, but

indicated that no such cases were then known to be in the pipeline. As the writer said, at paragraph 22:

> "Logically whatever decision is taken on this issue by the Commissioners should be applied across all MAS cases. At present the interest in settling MAS liabilities via the LDF is restricted to EBT cases and the central LDF team are not aware of any attempt to settle any other such liabilities via the LDF. Notwithstanding this, the potential remains and should users of other MAS seek to enter the LDF the potential impacts are increased."

This would also appear to tally with the answer given by Mr Brennan on instructions to the judge during his oral submissions: see [61] above.

71. Accordingly, it seems likely that in January 2014 there were in fact no members of the class of non-EBT users of marketed avoidance schemes who were successfully applying for registration under the LDF while the claimants' applications were still on hold. Furthermore, one of the decisions taken by the three Commissioners at their meeting on 3 February 2014 was that marketed avoidance schemes should not be settled on favourable terms under the LDF. On the available evidence, therefore, the most reasonable inference to draw is that, while the claimants' applications were on hold, the only applicants still being admitted into the LDF were tax evaders, who obviously form an entirely separate category and are the group for whom the LDF was originally designed.

72. It is convenient to deal at this point with another complaint made by the appellants under this heading, although it could also come under grounds 2 or 4 (there being a considerable degree of overlap between grounds 1, 2 and 4).

73. The complaint concerns the judge's treatment of the 60 day time limit under the MOU for registration of applications for disclosure under the LDF. Eight of the nine claimants, including all four of the present appellants, had applied for registration under the LDF more than 60 days before any decision was taken to exclude EBT cases from the full terms of the LDF, and between seven and eleven months before the date of the Decisions. I have already referred to the passages in the judgment where the judge dealt with this point. She said that the failure to respond within the promised time was, at its highest, an administrative default by HMRC, which had no consequence of any relevance to the present claim: see the judgment at [72], and also [83] where she described the promised turnaround time as "a procedural or administrative matter", failure to comply with which could not assist the claimants.

74. The appellants criticise this reasoning on a number of grounds. They submit that it was not a mere administrative default, because the obligation to register within 60 days forms part of the LDF itself (it is contained in paragraph 2 of schedule 4 to the MOU), and the contracting parties had agreed that the terms of the MOU could only be amended by agreement in writing. Thus, it is said, the unilateral and unannounced decision by HMRC to suspend their own agreed timetable was at the very least a relevant factor which impinges on the fairness of their later decision. The appellants

also point to clear indications in the evidence that registration was normally a routine matter, typically dealt with in two days.

75. I would accept that this complaint has some force. I think it is regrettable that HMRC took no steps to explain to BDO that the claimants' applications for registration would not be processed in the usual way while the review of the LDF was still in progress. It would also have been better if there had been a formal public announcement of the commencement of the review on 31 July 2013, rather than the relatively informal notification given to BDO and other agents. The fact remains, however, that from 31 July 2013 onwards BDO and their taxpayer clients were on notice that the LDF was under review, and in those circumstances they cannot in my view reasonably have expected that applications made by them while the review was still pending would continue to be processed as before. Significantly, we were not shown any evidence of steps taken by BDO to chase up or accelerate the process of registration during the review period, and still less any evidence from the claimants that they had made their applications in the confident expectation that they would be processed within a matter of days, and that HMRC's failure to do so had caused them any identifiable prejudice. On the contrary, my strong impression is that the making of the applications during the review period was a tactical manoeuvre. But whether or not that impression is correct, I am satisfied that HMRC's conduct in delaying registration while the review was in progress fell far short of conspicuous unfairness. Nor do I see any objectionable element of retrospectivity in HMRC's decision to deny access to the full benefits of the LDF in cases where the application was made after BDO had been notified of the commencement of the review.

76. A further point taken under this heading in the appellants' skeleton argument is the supposed lack of any evidence to support the judge's conclusion that the decision to deny the main benefits of the LDF to EBT users could be justified for wider reasons of fairness. This contention is to my mind completely untenable, because Mr Troup's evidence clearly shows that wider considerations of fairness to the general body of taxpayers lay at the heart of the Commissioners' deliberations: see in particular the passage from his statement quoted at [28(8)] above. In the absence of cross-examination, no possible challenge could be made to the veracity of this evidence. Nor could any challenge sensibly be made to the rationality of taking such wider considerations into account, given the evidence before the Commissioners of the probable loss of tax to the Exchequer of between £214 and £256 million if EBT users continued to be able to settle their cases through the LDF instead of the EBTSO.

Ground 2: did the judge come to factual conclusions which were inconsistent with the evidence before the court?

77. I can deal with this ground of appeal very shortly. The only conclusion by the judge which is specifically challenged under this heading is in [38] of the judgment, where she said that HMRC's decision at the end of July 2013 to initiate the review and put pending negotiations with the advisers of EBT users on hold "was disseminated widely" to accountants and advisers. This conclusion was evidently based on the evidence of Mr Barlow (see paragraphs 18 and 19 of his statement), Ms Pearson's note of her telephone conversation with Mr Cavanagh on 31 July 2013, and internal HMRC emails evidencing the wording that was used to communicate the decision to those acting for EBT users. The judge's conclusion was clearly open to her, and is not invalidated by indications in one of the papers provided for the Commissioners in

May 2014 that agents had been informed of the review "on an ad hoc basis", and the fact that two clients of Ernst & Young had apparently made applications for registration in late January 2014, at a time when Ernst & Young had not been informed of the review. There is nothing to suggest that this was anything more than an isolated exception, nor indeed is it clear that HMRC had been in negotiation with Ernst & Young in relation to the relevant clients (or any other EBT users) at the end of July 2013, some six months before.

78. I am therefore satisfied that there is nothing in this ground of appeal.

Ground 4: was the judge's analysis of HMRC's decision-making process flawed?

79. Ground 4 involves three criticisms of HMRC's decision-making process, the first being that "it focused solely on the risk of a legitimate expectation-based challenge". This criticism is however unsustainable, in the light of the passage from Mr Troup's evidence to which I have already referred. This makes it clear that the Commissioners' ultimate decision was not based solely on considerations of legitimate expectation, but extended more widely to embrace considerations of fairness in the interests of the general body of the taxpayers. Furthermore, it is clear from Mr Troup's evidence that legal advice was sought on at least two occasions before the final decision was taken. Since privilege has not been waived by HMRC, it cannot be assumed, and is in my view inherently improbable, that the advice given was narrowly confined to challenges based on the doctrine of legitimate expectation, and did not examine the issue of fairness more broadly.

80. The second criticism of HMRC's decision-making process, namely that "it did not consider HMRC's duty to act fairly", elicits the same answer. It is clear that considerations of fairness were central to the Commissioners' deliberations, and it would be astonishing if it were otherwise. Questions of legitimate expectation were at the heart of the debate, as was the distinction to be drawn between taxpayers in Categories 2 and 3. The suggestion that the consideration given to these issues, with the benefit of detailed briefing papers and legal advice, somehow overlooked the need for HMRC to act fairly, is in my view little short of absurd. The decision which had to be taken was a difficult one, which involved a review of "the many public interest and private interest factors engaged", to borrow the judge's apt description in [89] at the end of her judgment. In the words of Mr Troup, the ultimate conclusion reached was that "it would not be unfair or improper, nor would it defeat any legitimate expectation, to refuse [*the claimants'*] applications to register for the favourable terms of the LDF."

81. As to the third criticism, namely that "material considerations were disregarded", I have already dealt with the main points relied on by the appellants in my consideration of grounds 1 and 2. I remain wholly unconvinced that there is any substance in this criticism, and do not think it necessary to prolong this judgment by travelling again over what is essentially the same ground.

Conclusion

82. For all these reasons, I would reject each of the grounds of appeal. It follows, if the other members of the court agree, that the appeal will be dismissed.

Holroyde LJ:

83. I agree.

Longmore LJ:

84. I agree also.