Neutral Citation Number: [2012] EWCA Civ 1744

Case No: C1/2012/0636

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(QUEEN'S BENCH DIVISION) (ADMINISTRATIVE COURT)
BLAIR J
[2012] EWHC 361 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2012

Before :

LORD JUSTICE RIX
LADY JUSTICE ARDEN
and
LORD JUSTICE KITCHIN

- - - - - - - - - - - - - - - - - - - -

Between :

THE QUEEN ON THE APPLICATION OF THE BAMPTON PROPERTY GROUP LIMITED & ORS	**Appellants**
- and -	
ALAN O. KING (an officer appointed by the Commissioners for Her Majesty's Revenue & Customs)	**Respondent**

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(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

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Mr Philip Coppel QC, Mr Keith Gordon & Ms Ximena Montes Manzano (instructed by **Winston & Strawn LLP**) for the **Appellants**
Mr Sam Grodzinski QC & Mr David Yates (instructed by **HMRC Solicitor's Office**) for the **Respondent**

Hearing dates : 8/9 November 2012

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Judgment

Lady Justice Arden:

THIS APPEAL IN A NUTSHELL

1. This is a public law challenge to the decision-making process of the Commissioners for Her Majesty's Revenue & Customs ("HMRC"). The decision in question was to refuse the appellants, all members of a property investment group of companies, headed by a publicly-listed company called Daejan Holdings plc ("Daejan"), an extension of time to make claims to offset losses against profits and thereby reduce their tax bill. Those losses thereby became, as it is sometimes said, "stranded". The respondent, Mr King, is the officer of HMRC who took the decision in question. For simplicity, I have treated HMRC as the respondent.

2. The Daejan group had not itself made these losses. It had acquired the right to use them by purchasing the share capital of defunct corporate members of Lloyd's, which had made losses, under a tax mitigation scheme known as the Lloyd's loss-buying scheme.

3. The proceedings contain two sorts of challenge.

4. Initially, members of the Daejan group (referred to below as "the appellants") brought judicial review proceedings to challenge the reasons given by HMRC for their refusal of an extension of time. The appellants contended that Daejan had made an innocent error and that therefore they should have had an extension of time.

5. In the course of those proceedings, the appellants obtained directions for the disclosure of documents by HMRC. On disclosure, they found what appeared to be a smouldering gun. The documents that they obtained from HMRC showed that HMRC had known about the error from the outset, and not drawn it to the appellants' attention. HMRC did not take that matter into account in making their decision not to extend time. So the appellants enlarged their claim to include a challenge to the decision on the basis that HMRC had failed to notify Daejan of the error and that that matter ought to have been taken into account in the appellants' favour on its application for an extension of time.

6. In a carefully reasoned judgment, Blair J rejected the appellants' challenges and refused to set aside HMRC's decision. There was, he explained, no error in the decision. The appellants appeal from that decision.

7. For the reasons detailed below, I consider that the appellants' challenges to the decision of Blair J also fail. In the particular circumstances of this case, HMRC were not obliged to point out that Daejan's claim to use these losses, made in time, contained an error. As a result, the appellants failed to make a claim for loss relief in time, and HMRC were entitled to refuse to extend time.

8. I need first to explain (in brief) the statutory framework for claims for relief against losses, HMRC's policy on late claims, the factual background up to HMRC's decision and HMRC's Charter for its customers and (so far as relevant) Code of Practice. This case has taken on a new shape since the judicial review challenge was originally

formulated and so I shall not adhere rigidly to the grounds of appeal and will take the arguments in what seems to me to be now the logical and clearest way of presenting them.

DISCLOSURE OF PARTICIPATION IN TAX AVOIDANCE SCHEME

9. Daejan's participation in the Lloyd's loss-buying scheme was notifiable to HMRC pursuant to section 313(1) of the Finance Act 2004. This applied to schemes which the taxpayer expected to result in a tax advantage. "Tax advantage" was defined as including:

> "relief or increased relief from ... corporation tax, or the avoidance or reduction of a charge to tax".

10. Daejan accepted that its participation was notifiable, and duly made disclosure to HMRC.

HMRC

11. HMRC was established as the successor body to the Inland Revenue and HM Customs & Excise in April 2005. Some of the relevant events in this case occurred before that date. However, I will refer throughout to HMRC.

STATUTORY FRAMEWORK: CLAIMS FOR GROUP RELIEF AND CONSORTIUM RELIEF FOR LOSSES

12. This can be dealt with briefly. The key point is that loss relief is restricted to overlapping periods, as explained below.

13. Part X of the Income and Corporation Taxes Act 1988 ("ICTA") sets out the circumstances in which members of groups, and consortia, can claim relief against their taxable profits for losses. In particular, a loss-making subsidiary can surrender certain types of corporation tax loss to another company in its group which has made profits. The claimant company can then claim relief, called group relief, to enable it to set the losses against its taxable profits for tax purposes and so reduce its tax bill.

14. Similarly, consortium relief of this kind ("consortium relief") is available between a member of a consortium (as defined) and a trading company owned by the consortium, subject to a number of restrictions.

15. To obtain relief, the accounting periods of the surrendering company and the claimant company must overlap. If they do not do so, the losses must be time-apportioned (see section 408 of ICTA) to exclude the non-overlapping periods. Accordingly, where there are differences in the dates on which the accounting periods of the claimant company and surrendering company start or end, loss relief must be restricted to the time-apportioned period in which there is an overlap. In addition, where one of the companies joins the group part way through its accounting period, the period prior to acquisition must be excluded on a time-apportionment basis so that relief is limited to the overlapping period. However, in a group situation, the restriction of loss-relief in relation to one company with profits is not fatal to the further use of the excess losses.

Relief against those losses can be taken up by some other company in the group which has taxable profits. In the Daejan group, there were several profit-making subsidiaries available.

16. At all material times, companies subject to UK corporation tax were required to file a self-assessment return showing their tax position. They could at the same time file any claim for group relief. HMRC has power under schedule 18 to the Finance Act 1998 ("FA 1998") to enquire into and amend any such return. HMRC may, after enquiring into a return, issue a closure notice. The taxpayer has 30 days to appeal against the closure notice (paragraph 34 of Schedule 18 to the FA 1998). On any such appeal, Daejan could have amended its claim for loss relief and the appellants could have claimed to use the losses which Daejan was prevented through time apportionment from using itself.

HMRC's POLICY ON EXTENDING TIME FOR MAKING CLAIMS

17. There are strict time limits for claiming group relief or consortium relief: the details are not important as it is common ground that, in this case, they expired and that, if the losses were not to become stranded, HMRC would have to be persuaded to extend time. Paragraph 74(2) of schedule 18 to the FA 1998 confers a discretion on HMRC to give an extension of time. On the face of the statute, the discretion is unfettered: subparagraph (2) provides simply that a claim may be made out of time if an HMRC official allows it.

18. HMRC's policy to applications to extend time is contained in a published statement of practice ("SP"), namely SP 5/01, paragraphs 9 to 13. Those paragraphs are set out in the annex to this judgment.

19. There is no challenge to SP 5/01 as a policy. The appellants only challenge the way in which it was interpreted and applied in their case.

20. The final paragraph of the extract from SP 5/01 set out in the annex to this judgment states that HMRC will take into account, if it be the case, that the late claim forms part of a tax avoidance scheme. That means that I need to say a little more about the Daejan group's use of the Lloyd's loss-buying scheme.

21. The Daejan group invests in property. The Lloyd's loss-buying scheme involved in this case (so far as relevant) the purchase of the share capital of corporate members of Lloyd's, having trading losses, for the sole purpose of using their losses to offset against profits on property investment. It is unnecessary to explain how the scheme works. It has been stopped by legislation.

22. HMRC take the view that entry into the Lloyd's loss-buying scheme was tax avoidance in this case for the simple reason that, while, if a claim was duly made to offset losses against profits, it would achieve a lawful and effective avoidance of tax, it was not part of the intention behind the legislation that underwriting losses should be used to reduce the tax bills of property investment groups. This view on the part of HMRC is relevant to one of the appellants' challenges to the application of SP 5/01.

FACTUAL BACKGROUND

23. The judge set out the facts leading to HMRC's decision to refuse an extension of time in considerable detail in paragraphs 2 to 70 of his judgment. I need in consequence give only a brief summary.

24. The claims in issue relate to Daejan's financial years ended 31 March 2005 and 31 March 2006.

25. The first claim, that for 2005, was made in March 2006 by Cohen Arnold, accountants for the Daejan group. The claims were for consortium relief in respect of losses made by Arch 2004 Limited ("Arch"), Crowe Corporate Capital Limited ("CCCL") and Crowe Dedicated Limited ("CDL"). Those three companies had joined the group part way through the financial year of Daejan, and they all had calendar year ends. Cohen Arnold made an error in the returns because they failed to make the correct time apportionment to eliminate all non-overlapping periods. If they had done so, Daejan's own claim for relief would have been reduced but the appellants, as members of the Daejan group, could have made claims for loss relief.

26. Shortly thereafter the error became known to a number of officers of HMRC. On 8 August 2006, Mr Fletcher, HMRC officer dealing with the matter, advised Mr Bell of HMRC's large business section that the Daejan group had participated in the Lloyd's loss-buying scheme but had got its sums wrong. He suggested that reasonable adjustments could be made even if the scheme worked. On 5 September 2006, Mr Fletcher sent an email to Mr Bell stating that the claim made by Daejan was excessive by around £2 million but that the excess could be used elsewhere in the Daejan group. In late 2006, Mr Fletcher was replaced by Mr Gray, who made it clear in correspondence that he had seen the email of 5 September 2006.

27. On 22 March 2007, HMRC opened an enquiry into Daejan's tax return for the financial year ended 31 March 2005 in pursuance of its powers under schedule 18 to the FA 1998. This had the incidental effect of extending the time for making valid loss claims until thirty days after the enquiry was closed. On 22 March 2007, Mr Gray wrote to Cohen Arnold stating that he intended to open an enquiry into Daejan's return for the year ended 31 March 2005. He raised certain points: the need for copy consents signed by the consortium members and how the estimated losses had been apportioned "so as to arrive at the maximum amount that might be relieved in the overlapping periods". He stated that nothing in his letter should be construed as indicative of HMRC's attitude to a late claim.

28. However, HMRC did not expressly point out Daejan's error and Daejan did not pick it up. On 6 July 2007, Cohen Arnold replied submitting the relevant members' consents. They confirmed that the loss relief claims were made on a time apportionment basis, but did not set out any computations.

29. On 30 March 2007, Daejan made a second claim for loss relief for its financial year ended 31 March 2006. The claim related again to losses made by Arch, CCCL and CDL. Again, Cohen Arnold made a claim without making the correct adjustment for the fact that there were different year ends. If the claims had been duly made, other Daejan group companies could have utilised the losses which Daejan could not use.

30. On 24 September 2007, Mr Gray opened an enquiry into the 2006 returns of Daejan and the appellants, raising again three queries: (i) missing consents from the

surrendering companies; (ii) the apportionment of the surrendering companies' losses and Daejan's profits, and (iii) the underlying arrangements concerning the surrendered losses.

31. On 1 February 2008, Mr Gray wrote to Cohen Arnold about the 2005 claim in response to their letter of 6 July 2007 set out above. Mr Gray stated that HMRC would not pursue any challenge provided that the claims were "in proper form and amount". He queried the number of days involved in the apportionment of Arch's losses in respect of the 2005 claim. HMRC thought that the number of days was 78. Cohen Arnold then pointed out that it was in fact 79 days. Cohen Arnold mistakenly believed that Mr Gray's letter related to both the 2005 and 2006 claims and, subject to the query relating to the number of days in relation to the Arch claim, understood that there was an acceptance of the claim for losses, both in principle and quantum. Acting on this mistake, they wrote to Mr Gray on 28 February 2008, asking him to close the enquiries for various Daejan group companies (including the appellants) for 2005 for the other group companies including Daejan and for 2006 for the other group companies. In a conversation between Cohen Arnold and Mr Gray, it was agreed that the enquiries for the Daejan group companies would be closed save for Daejan for 2006.

32. On 4 March 2008, Cohen Arnold wrote to Mr Gray with a revised computation in respect of the 2006 claim for Daejan, and asked Mr Gray to issue a closure notice for Daejan for 2006.

33. On 4 and 5 March 2008 Mr Gray issued a closure notices for the year ended 31 March 2005 and 2006 in respect of the Daejan group companies (including the appellants) but not for Daejan itself.

34. The time limit for making new claims for group relief accordingly expired on either 3 or 4 April 2008 for the appellants. Daejan's enquiries however remained open with the consequence that insofar as Daejan's claims for group relief were found to be incorrect after 3 or 4 April 2008, it was not possible for the appellants to make in time claims for any losses which could not be used by Daejan"

35. On 28 March 2008, Mr Gray wrote to the accountants querying the amount of loss relief claimed for 2006 in respect of the losses made by CCCL and CDL. On 6 June 2008, he wrote again querying the apportionment of the losses. This led Cohen Arnold to realise that there had been an error in the 2006 claim. At a meeting on 24 June 2008, the accountants raised the possibility of other members of the Daejan group making a late claim to utilise the losses which Daejan could not itself use. On 4 July 2008, Mr Gray stated that the Cohen Arnold would need to explain why HMRC should exercise its discretion to allow a late claim.

36. There was then substantial correspondence between the parties. On 24 July 2008, Cohen Arnold set out the facts at length and relied on paragraphs 10 to 12 of SP 5/01. They attributed the late claim in part to delay by HMRC. Mr Gray sought clarification of the basis of the claim for an extension of time. Cohen Arnold principally relied on the fact that an innocent error had been made.

37. On 16 October 2008 Mr Gray reached the view that the claim for relief for 2005 was also excessive. Cohen Arnold accepted that an error had been made and asked

HMRC to allow a late claim. Mr Gray asked for further particulars of Cohen Arnold's error.

38. On about 3 November 2008, Mr Gray retired and was replaced by Mr King.

HMRC's DECISION ON THE APPELLANTS' CLAIM FOR AN EXTENSION OF TIME TO CLAIM GROUP RELIEF

39. Following further correspondence, Mr King stated on 11 March 2009 that on receipt of the detailed late claims for 2005 and 2006 he would refer them to HMRC's Head Office for advice on the late claims. On 26 March 2009, Mr King made his submission to Mr Jefferies, a policy and technical specialist at HMRC.

40. Mr Jefferies replied by email on 26 April 2010 stating that oversight was not generally a reason to justify acceptance of a late claim and concluding that it would not be unreasonable for HMRC to refuse to exercise their discretion. In material part, his email said:

> "SP 5/01 sets out HMRC's approach to various types of late claims including group relief claims. Paragraph 9 indicates that HMRC will not routinely accept late claims but there may be exceptional reasons for doing so. Paragraph 10 gives HMRC's general approach and the examples describe cases where the profit or loss of the claimant company was under discussion or not apparent and cases affecting internal matters considered outside the claimant company's control. In general, HMRC does not consider cases where error or oversight by the surrendering company or another company within the group gives rise to additional relief for surrender after the time limit for group relief claims to fall within paragraph 10.
>
> Paragraph 12 provides that there may be cases falling outside the general approach in paragraph 10, where, given the overall circumstances, it may be unreasonable for HMRC to refuse a late claim. Oversight, in general, is not considered to be a reason to justify acceptance of a late claim. Schedule 18 of Finance Act 1998 sets out provisions for self-assessment by companies. Within the system of self-assessment, HMRC do not hold responsibility to check or agree claims, or to identify errors or oversights in claims submitted by a company. Cohen Arnold first raised the possibility of a late claim by BPG for APE 31/03/06 at a meeting with HMRC on 24/06/08, over two months after expiry of the time limit. KPMG first indicated the intention to submit late claims for APE 31/03/05 for the six companies listed above on 27/02/09, 10 months after expiry of the time limit. Refusal of the late claim for APE 31/03/06 by BPG would deny that company a repayment of corporation tax of £610K. Refusal of the late claims for APE 31/03/05 by the six companies above would deny those companies a total repayment of corporation tax of £350K. Refusal would mean the relief would remain with the surrendering companies and be

available to set against any future profits of those companies, although it appears unlikely those companies will generate future profits sufficient to utilise the relief.

> Considering all the circumstances as presented, it would not appear to be unreasonable for HMRC to refuse the late group relief claim for APE 31/03/06 by BPG.
>
> Considering all the circumstances as presented, it would not appear to be unreasonable for HMRC to refuse the late group relief claims for APE 31/03/05 by the six companies listed above.
>
> As you may know, there is no right of appeal against HMRC refusal to exercise discretion to accept a late claim. It is open to the company, if they believe there are grounds to challenge the decision, to apply to the High Court for judicial review."

41. Mr Jefferies' advice does not expressly refer to tax avoidance. The judge held that tax avoidance informed HMRC's decision but was not the driving force behind it (judgment, paragraph 127). This leads to a question about the meaning of "the avoidance of tax" in the final paragraph 12 of SP 5/01, with which I deal below (paragraphs 100 to 109).

42. On 28 April 2010, Mr King wrote to Cohen Arnold stating that, having by then received the advice from Head Office, HMRC refused both late claims.

43. Daejan's letter before action of 7 June 2010 asked HMRC for the reasons for its refusal. HMRC obliged by sending a copy of Mr Jefferies' advice.

44. The appellants submit that Mr Jefferies' advice left out of account two important matters relevant to the decision to extend time, and that it would have been open to HMRC to allow the extension of time on the basis of those matters. Those matters were: (1) Daejan had made a claim in time; and (2) HMRC officials were aware of the mistake, and, contrary to expectation, they had failed to let the taxpayer know of mistakes which they had spotted.

45. If HMRC's decision stands, losses of £2.031m for 2005 and £1.644m for 2006 will have become stranded and no longer be available for offset against the Daejan group's profits.

HMRC's CHARTER FOR THEIR CUSTOMERS, CODE OF PRACTICE 14 AND "THE VENERABLE PRINCIPLE"

HMRC's Charter

46. At a late stage in the hearing it emerged that there was a difference between the parties as to whether HMRC had any customer charter in force at the relevant time.

47. HMRC submit that the charter relied on by the appellants (the "Charter") only came into existence in 2009. There was a previous short charter issued by the Inland Revenue in l986 (IR 67), which (it is said) does not contain any matter that would help the appellants. This was withdrawn and replaced by customer service standards. These were withdrawn on the 6 September 2004. However, they continued to be available (we are not told on what basis) on HMRC's website. Between 2004 and 2009, there was no published charter or equivalent document. There was, however, statutory authority for making a charter in the Finance Act 2009.

48. The appellants do not accept that IR 67 was withdrawn. Their position is supported by a consultation document issued by HMRC in June 2008 which states that there were a number of charters in existence which HMRC proposed to replace with a new charter. A charter was indeed issued and is relied on in these proceedings.

49. The appellants have relied on both these documents since it discovered that HMRC spotted the error in its 2005 claim.

50. What seems clear is that the Charter produced in these proceedings was not in force in the period 2005 to 2009. It is impossible to say whether there were equivalent provisions in force.

51. In fairness to the appellants, I propose to proceed on the basis that either the Charter or some equivalent document was in force at the relevant time. HMRC should have produced the relevant evidence well before the hearing if they wished to show that neither the Charter nor any equivalent document was in force at the relevant time.

52. The material provisions of the Charter are as follows:

> "**Our role**
>
> …
>
> We want to give you a service that is even-handed, accurate and based on mutual trust and respect. We also want to make it as easy as we can for you to get things right.
>
> …
>
> **2 Help and support you to get things right**
>
> We want to give you as much certainty as we can that you are paying or claiming the right amount.
>
> We will:
>
> - provide information that helps you understand what you have to do and when you have to do it.
> - provide information that clearly explains the taxes, duties, exemptions, allowances, reliefs and tax credits that we are responsible for

- process the information you give us as quickly and accurately as we can
- put mistakes right as soon as we can.

…”

Code of Practice 14

53. When HMRC open an enquiry into a tax return, they send the taxpayer a pamphlet containing an accessible description of HMRC’s policy with regard to the conduct of enquiries pursuant to schedule 18 to the Finance Act 1998. This is called Code of Practice 14. The appellants rely on this document in support of their submission that HMRC owed a duty to notify Daejan of the errors which HMRC discovered in its 2005 claim.

54. The critical passages are as follows:

> “This Code of Practice tells you how we carry out enquiries into company tax returns and claims made outside a return for accounting periods ending on or after 1 July 1999.
>
> …
>
> **We want companies to pay the right amount of tax, no more, no less.**
>
> …
>
> We want you to feel confident that
>
> - other taxpayers are paying what they should, and
> - we operate the tax system fairly.
>
> In order to do this, we enquire into some tax returns and claims to check that they are correct, or if we need further information to understand the figures on the tax return.
>
> We want to make sure companies do not pay too much or too little tax. Either way, we will tell you if we find something wrong.
> We do not set targets for the amount of additional tax our staff should collect.
>
> …
>
> **If we find something wrong**
>
> **Paying tax during our enquiries**
>
> We will ask the company to make a payment on account towards any additional tax we think may be due, but until the company's self assessment is amended, it does not have to pay anything additional if you do not think it should.
>
> …

We may make an amendment to the company's self assessment before the end of our enquiries if we think

- that additional taxes due, and
- it might not be paid if we did not act promptly.

…

We will only suggest changes we considered to be reasonable in the light of all the information we have.

When our enquiries are completed we will tell you in writing and set out any adjustments we think are necessary. We will try to point out any amendments needed to other tax returns (either for later or earlier periods), but we cannot guarantee this…

[marginal note]**At the end of our enquiries**

If our enquiries have shown something is wrong we will

- explain what it is
- tell you how to get things right for the future

…

Our Service Commitment to you

The Inland Revenue and Customs and Excise are committed to giving you the best service we can by

acting fairly and impartially

We

- treat your affairs in strict confidence, within the law
- want you to pay or receive only the right amount due."

The "venerable principle"

55. The appellants also rely on this appeal on a passage from the judgment of Henderson J in *Tower MCashback LLP1v HMRC* [2008] STC 3366, in which Henderson J referred to a long-standing

> "venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the commissioners in exercise of their statutory functions to have regard to that public interest.
> "

56. This passage was cited with approval by Lord Walker in the same case in the Supreme Court at [2011] 2 AC 457 at [15]. In that case, the issue was whether any closure notice at the end of an enquiry, which stated that a claim for an allowance was excessive, enabled HMRC to contend on appeal before the commissioners that the claim was also impermissible on a different basis. The Court of Appeal (by a majority, myself dissenting on this issue) and the Supreme Court held that, since the commissioners had power to identify the scope of the enquiry before them, they could hear any argument on any issue relevant to the subject matter of the enquiry, subject only to the obligation to ensure a fair hearing. However, HMRC owed their own duty of fairness to the taxpayer, and therefore closure notices had to be reasonably informative: see especially per Lord Walker at [18] and per Lord Hope at [83], with both of whom the other members of the Supreme Court agreed.

ISSUES ON THIS APPEAL

57. The principal issues are as follows:

(1) *Failure to give reasons*: was the decision-maker's reasoning invalidated by the failure to give sufficient reasons in the decision? (Ground 2)

(2) *Exclusion of relevant considerations*:

a. If (as the appellants contend) there was a duty on HMRC officials to notify taxpayers of a mistake in their corporation tax self-assessment returns pursuant to Code of Practice 14, the HMRC Charter, or "the venerable principle" approved in *Tower MCashback*, should the decision maker have taken into account the failure by HMRC to notify Daejan of the error in its 2005 claim? (Ground 4)

b. Did HMRC err in attaching to the taxpayer the mistakes made by the advisers to another group company? (Ground 5)

(3) *Inclusion of irrelevant considerations:*

a. Was HMRC in error under SP 5/01 in taking tax avoidance into account? (Ground 1)

b. Did HMRC wrongly interpret paragraph 12 of SP 5/01 as limited by paragraph 11 of SP 5/01? (Ground 3)

(4) *Inconsistency on the part of the judge?* Was the judge inconsistent in his conclusion that it was irrelevant whether the decision-maker knew about Mr Fletcher's conclusion while holding that it was relevant to take into account the totality of the background to the late claims? (Ground 6)

58. There was a subsidiary ground of appeal challenging the judge's admission of witness statements from HMRC out of time.

59. At the hearing of the appeal, the appellants sought permission for a further ground of appeal. The court refused permission for reasons to be given in our judgments.

60. I will begin with my reasons for this ruling, and then turn to the challenge to the judge's admission of the late witness statements. After that I will proceed to the other grounds as I have reformulated them.

REASONS FOR REJECTING THE NEW GROUND OF APPEAL

61. The new ground of appeal was as follows:

> "If HMRC was entitled to take tax avoidance into account, the judge was wrong to uphold a "unitary" treatment of tax avoidance, that is, an inclusion of tax avoidance without a reasoned assessment by the decision-maker of the aggressiveness of the tax avoidance."

62. Mr Philip Coppel QC, for the appellants, submits that, in making the decision to refuse an extension of time, the decision-maker took tax avoidance into account without assessing its propriety in this case. At the extreme end of the scale, there are artificial schemes for avoiding tax. That was not this case. Mr Coppel submits that taxpayers were simply seeking to use a tax loss in a manner which was clearly allowed by statute. The intention of the provision in question was to introduce liquidity into the Lloyd's insurance market, which the appellants had done by buying the losses. Mr Coppel submits that this court cannot be confident that the outcome of HMRC's decision-making would be the same if tax avoidance, viewed as unitary concept, had not been taken into account and the right assessment of the appellants' actions had been used.

63. Mr Sam Grodzinski QC, for HMRC, opposed the application principally for two reasons. First, it would have required further evidence from the officials as to how they had, in fact, viewed the tax avoidance in this case. Second, the decision-maker (Mr King) had in any event given evidence that the same decision would have been made even if tax avoidance had not been included.

64. The court refused to allow this ground of appeal to be advanced. I reached my decision for the two reasons advanced by Mr Grodzinski and summarised in the preceding paragraph. These matters make it unnecessary to address the appellants' submissions in this judgment.

Subsidiary ground of appeal: Admission of late witness statements

65. When Burnett J gave case management directions in this matter, he laid down the date on which the parties were to serve witness statements. Subsequent to that date HMRC sought to adduce further witness statements of Mr Gray, Mr King and Mr Jefferies. HMRC took the view that the position changed when, after the date for service of witness statements, the appellants filed their skeleton argument in which

they appeared for the first time to challenge the good faith of Mr Gray. Accordingly HMRC sought to adduce the three further witness statements to deal with their state of knowledge. The appellants opposed that application.

66. The judge admitted the three witness statements. While he did not accept that the appellants had ever challenged HMRC's good faith, he held that the appellants had impugned their conduct and this was sufficient to justify the filing of further evidence: see *R v Secretary of State for the Environment, ex parte Powis* [1981] 1 WLR 584.

67. On the basis of these witness statements the judge found that HMRC did not deliberately withhold communication of the apportionment mistake that Mr Fletcher had spotted, but this finding did not make any difference to his overall result. His finding followed from what the witness statements revealed about the state of knowledge of HMRC officials. Mr Gray did not understand the exact problem to which Mr Fletcher referred, and Mr King and Mr Jefferies were not aware that there was any error. The judge observed that a different conclusion might well have led to a different outcome before him. He also observed that he would have reached the same conclusion without the witness statements, as that was the conclusion that he drew from the contemporaneous documents alone.

68. On this appeal, Mr Coppel does not challenge the judge's conclusion on what the witness statements or the contemporaneous documents showed but submits that the judge was wrong to admit these statements. He submits, correctly, that the court should be slow in judicial review proceedings to admit evidence of matters not contained in the decision.

69. Mr Coppel's basic point is that it was unfair to the appellants to give HMRC the chance to adduce more evidence. On disclosure, the appellants realised for the first time that HMRC had been aware of the error in the 2005 claim from the start. By the time it filed the further witness statements in question, HMRC had also had the advantage of seeing the way the appellants put their case following disclosure.

70. Mr Grodzinski submits that this point is academic because the judge held that he would have reached the same decision without these witness statements, and his decision on that point was not appealed. In any event, HMRC did not know that point was going to be taken until 17 January 2012, nine months after disclosure. On that date, the appellants' skeleton argument made the point for the first time. Moreover, it was noteworthy that, once they got the evidence, the appellants made no application to adjourn the hearing or for permission to cross-examine the HMRC witnesses.

71. Furthermore, Mr Grodzinski submits, where there are serious allegations of misconduct on the part of an official, the usual restrictions on the admission in judicial review proceedings of evidence that was not before the decision-maker do not apply: see *Powis*, above, at 595H. If Mr Gray, for instance, had put in no evidence, the appellants would have commented that he must have had information and decided not to file further evidence.

72. I would dismiss the appeal on this point. The further statements were properly admitted because they were directed to answering the new allegations about HMRC's conduct. In any event, the question of the admission of the witness statements is

immaterial because the judge held that he did not need to rely on the witness statements in reaching his final conclusions.

PRINCIPAL GROUND (1): FAILURE TO GIVE ADEQUATE REASONS

73. Under this ground, the appellants complain about the articulation of HMRC's reasons for their decision to reject the appellants' late claim, not about their substance. They point out that Mr King's letter of rejection did not set out Mr Jefferies' advice and expressly adopt it, though Mr King referred to it in his letter and Mr Jefferies' advice was subsequently sent to the appellants.

74. Mr Coppel submits that a decision-maker has to give reasons. Such reasons are needed, he submits, so that the parties know why they have won or lost and if there is any ground for challenging the decision. In this case, inadequate reasons were given in the decision letter. The pre-action protocol reply letter did not make good the deficiency. The reasons given were not those of the decision-maker as the decision maker did not show how he had adopted the advice he had received. By the time the pre-action protocol reply letter was sent, Mr Jefferies' email had ceased to be contemporaneous evidence.

75. Mr Grodzinski submits that, contrary to Mr Coppel's submission, in public law there is no general duty to give reasons for administrative decisions. Moreover, paragraph 74 of Schedule 18 to the Finance Act 1998 imposed no such duty. The sole question is whether fairness required Mr King to say more. That all depends on the context. There had been protracted correspondence between HMRC and the appellants' advisers. It was implicit in the decision letter that none of the things that the appellants' advisers had said warranted exercise of the discretion. The appellants relied on the fact that they had made an honest error but SP 5/01 made it clear that oversight was not a ground for giving an extension of time for a late claim. Fairness also did not require Mr King to traverse each paragraph of the appellants' letters in turn.

76. Because of that correspondence, submits Mr Grodzinski, the appellants were not in the dark as to the reasons for HMRC's refusal, when they received the decision-letter. The case is completely different where there is unfettered discretion and the taxpayers do not know the reasons for a decision and then they simply receive a single line letter refusal. Then they are in the dark. The duty to give reasons is not imposed simply because there is no statutory right of appeal and only a right to bring judicial review proceedings: see *R (o/a Dental Surgery) v Higher Funding Council* [1994] 1 WLR 242 at 259B per Sedley J.

77. In any event, submits Mr Grodzinski, reasons were supplied in this case two months later: see the pre-action protocol reply letter which responded to a request to give reasons. This did not breach any principle of unfairness (as to which, see *Hijazi v Kensington and Chelsea RLBC* [2003] HLR 72).

78. While I accept that the appellants were entitled to know the key reasons for the refusal, the level of reasoning required must necessarily be less where the issues had been well canvassed and both parties knew the issues. Mr Jefferies' advice provided the assurance that HMRC would not be acting unreasonably if they refused to allow a late appeal. The decision-maker visibly and contemporaneously adopted Mr Jefferies'

advice as the substantial part of his reasoning even if the content of Mr Jefferies' advice was not set out. There is therefore no substantial issue as to the use of evidence which post-dated the decision. Any inadequacy in the decision letter because it did not contain an epitome of his advice was remedied by the supply of the email containing Mr Jefferies' reasons.

PRINCIPAL GROUND (2): EXCLUSION OF RELEVANT CONSIDERATIONS

a. Failure by HMRC to notify Daejan of its error not taken into account when refusing extension of time

79. When HMRC refused the appellants' application for an extension of time to make claims to use the stranded losses, they did not take into account that Mr Fletcher had originally spotted Daejan's mistake and that he had not alerted Daejan to it. The appellants complain that this resulted in the exclusion of a relevant consideration and that that exclusion invalidated the decision.

80. Mr Coppel submits that, once the error was discovered, HMRC were duty-bound to inform the taxpayer. The Charter specifically said that HMRC wanted to make it easy for the taxpayer to get his figures right. The emphasis is on getting things right, recognising that the relationship between HMRC and taxpayers is an enduring relationship and that it does not help that HMRC knew of the mistake and kept quiet about it. The Charter is directed at changing the relationship from one of antagonism into a collaborative one. The Charter derives from statute and the expectation in public law is that HMRC will adhere to the Charter unless there is some compelling reason not to do so.

81. Mr Coppel points out that Mr Bell and Mr Fletcher of HMRC were aware of the mistake. They should have pointed this out to the taxpayer within time for him to correct the mistake. It was not enough simply to open enquiries. The error should have been communicated at the latest during the enquiries. That did not mean that HMRC had to tell the taxpayer how to get his loss claim right. Recomputation of the claim might have involved matters not known to HMRC. On Mr Coppel's submission, all HMRC needed to say was:

> "The consortium relief claim by Daejan Holdings is wrong. On a time apportioned basis only £5,500,000 profits are available to be covered by the loss relief. The claim is, therefore, excessive by £2 million or so (this is effectively the relief claimed from Crowe Capital and Crowe Dedicated)."

82. On Mr Coppel's submission, Code of Practice 14 leads to the same result. Because HMRC did not inform Daejan of the point it had spotted, Daejan owed tax on which interest was payable. That is another reason why HMRC should have informed Daejan of the error: see the extracts from Code of Practice 14 set out in paragraph 53 above.

83. Accordingly, on Mr Coppel's submission, the appellants were disadvantaged by HMRC's conduct. They were prevented from arguing this point on their late claim because it was not known then. The appellants do not accuse HMRC of bad faith but of misplaced enthusiasm.

84. In addition, the decision-maker should have taken into account the fact that the errors that led to the late claim had been known to HMRC but not notified to the taxpayer. It is not sufficient that there was oversight on the part of HMRC.

85. Mr Grodzinski submits that Code of Practice 14 cannot assist the appellants for the following reasons; -

i) Code of Practice 14 is simply a summary guide to corporate self-assessment enquiries conducted under schedule 18. To the extent that Code of Practice 14 does anything more than summarise the statutory regime, it may at most be characterised as a statement of best practice. Such statements by public authorities are not apt to give rise to public law obligations: see *R (o/a Enstone etc Trust) v West Oxfordshire DC* [2009] EWCA Civ 1555 at [36] where Sullivan LJ explained that the failure to follow advice in a planning circular does not necessarily result in unlawfulness. If it constitutes a policy of HMRC, it would be open to HMRC to depart from it for good reason: (see for example, *Lumba v Secretary of State for the Home Department* [2012] AC 245 at [26] per Lord Dyson SCJ).

ii) Under the statutory self-assessment scheme, Parliament has placed responsibility on the taxpayer to get his self-assessment right. It is important to note the revolutionary nature of the self-assessment regime.

iii) There is no statutory authority for Code of Practice 14. The starting point should be that the court should be slow to interpret a non-statutory guide as imposing legal obligations not contained in the statute.

iv) Nothing in Code of Practice 14 creates an express requirement on HMRC to inform a claimant that he has made a mistake. The statement on page 1 of Code of Practice 14 that:

> "We want companies to pay the right amount of tax, no more, no less"

cannot be said to create an obligation in law to notify potential errors. Nor does Code of Practice 14 state that HMRC will keep the taxpayer informed throughout the enquiry. On page 14, there is a statement that:

> "if our enquiries have shown that something is wrong we will
> - explain what it is
> - tell you how to get things right for the future…"

This is stated in the context of a completed enquiry: see the marginal note "At the end of our enquiries".

v) Page 10 of Code of Practice 14 states that "if we find anything wrong ... we will ask the company to make a payment on account". This is to avoid interest. It does not impose an obligation on HMRC. The reference to making an amendment applies only if there is a risk of non-payment of tax on discovery of an error during the course of an enquiry.

vi) The appellants were advised by their own sophisticated tax advisers about tax avoidance. To attribute responsibility to HMRC shifts the risk of an error by them to the public. The appellants themselves amended their claims in the course of the enquiries and that reinforces the fact that they had the opportunity to spot the error for themselves.

vii) There was no bad faith on the part of HMRC. The judge found that, in allowing the enquiries into the applicants' tax returns to be closed, HMRC was not motivated by a desire to keep open the enquiry into Daejan's tax return so that HMRC could then point out its error after the appellants' opportunity to amend their returns had been extinguished.

viii) Code of Practice 14 was in any event not applicable to the discovery of the error by Mr Fletcher in 2006 since that was outside any enquiry.

86. Mr Grodzinski submits that the key question in the context of the case is whether it can be said that there was an abuse of power either by Mr Fletcher or other officers of HMRC to fail to bring the error to the attention of Daejan. He submits that, while there was no mention by HMRC of the error spotted by Mr Fletcher, HMRC did give Daejan the chance to check all its sums. It has to be borne in mind that Mr Gray who was then dealing with the matter did not have the error which Mr Fletcher spotted in mind. He had no intention to mislead.

87. I would dismiss this ground of appeal. Mr Grodzinski has convincingly demonstrated that none of the passages in Code of Practice 14 relied on by the appellants imposed an obligation on HMRC to disclose a matter which had been spotted prior to the enquiry but which was not present to the minds of the officials of HMRC handling the affairs of the taxpayer during the enquiry. To hold otherwise would indeed without justification shift the responsibility for those errors from those who had caused the error, namely the taxpayer and its advisers, to HMRC.

88. The Charter refers to putting "mistakes right as soon as we can". Mr Coppel accepts that the duty on HMRC could be no higher than a duty to inform, not to remedy the error. That reinforces my interpretation of this statement as one which refers to errors by HMRC, not those of the taxpayer. On that basis these words have no application. There is in my judgment no other statement in the Charter which could arguably give rise to a duty to notify.

89. I now turn to the "venerable principle" referred to at paragraphs 54 and 55 of this judgment. The appellants' case at the hearing of the appeal proceeded on the basis that it applied to HMRC as a third string to their bow. Mr Grodzinski directed his

submissions to the merits of the argument. At the end of the hearing, we asked for submissions to be filed to provide us with more detail of the origins of this "venerable principle". It emerged that the principle derives from one of the predecessors of section 50 of the Taxes Management Act 1970 ("TMA") (conferring power on the general and special commissioners of income tax, on an appeal, to establish any overcharge or undercharge to tax), and from the decision of this court in *R v Income Tax Special Commissioners, ex parte Elmhirst* [1936] 1 KB 487.

90. In *Elmhirst*, the appellant taxpayer sought to withdraw his appeal to avoid an increase by special commissioners in the amount of tax which he was liable to pay. This court held that the special commissioners had power to make this increase, and that the taxpayer could not obtain a writ of prohibition to prevent them. This court's decision turns on the predecessor of section 50 of the TMA and related provisions. HMRC therefore submit that the principle applied only to the appellate function of the general and special commissioners (now the First-tier tribunal). There was no equivalent provision applying to the Commissioners of Inland Revenue or of Customs & Excise.

91. The appellants sought to counter this by arguing in reply for the first time that HMRC were to be treated as in the same position as special or general commissioners of income tax by implication from new powers given to HMRC to correct self-assessment returns. Those provisions are now to be found in the FA 1998. This submission would open up a potentially extensive line of argument.

92. In all the circumstances, I would not permit this further argument on this appeal. It comes after the conclusion of the hearing and goes beyond our request for details of the principle. The implications of the appellants' argument could also be far-reaching. Section 50 of TMA applies only to appeals whereas the consequence of the appellants' argument is that it would apply to HMRC in the course of its administration of the tax gathering system on an ongoing basis. It might even apply where HMRC had no present knowledge of the error. Furthermore, while the appellants contend that there is a constitutional imperative for the actions of HMRC to be governed by the "venerable principle", there is in my judgment no need to go beyond the duty of fairness for this purpose.

93. I shall instead regard the appellants' case as based on the established duty on HMRC of fairness.

94. As to the established duty of HMRC to act fairly, I conclude that on the facts of this case HMRC did not act unfairly towards Daejan in not informing it immediately the error was spotted or thereafter during the enquiry or in the closure notices, for the following reasons:

   i) The primary responsibility for making a claim that took maximum advantage of the losses available to the group always lay with the group.

   ii) At the time HMRC spotted Daejan's error regarding its 2005 return, there was sufficient time for the loss relief claim to be amended appropriately and for an enquiry to be opened, when the matter could be appropriately investigated. HMRC went on to open enquiries into the returns of both Daejan and the appellants, first into its 2005 returns in March 2007, and then into their 2006 returns in September 2007.

iii) By doing so HMRC in fact extended the time available to the Daejan group to correct the errors.

iv) Unfortunately from the Daejan group's point of view, the HMRC official having conduct of the enquiries was a different person from the official who spotted the mistake. He was aware of his predecessor's discovery but could not work out the precise nature of the error. However, he did what he could by directing Daejan's attention to the computation of its group relief claims.

v) If HMRC could not say what the error was, the existence of the error was really no more than a possibility. This is not altered by the fact that it later turned into an actuality.

vi) The decision to refuse an extension of time was taken when Mr King of HMRC was responsible for dealing with the Daejan group's affairs, and he had no knowledge of the error spotted by Mr Fletcher.

95. It follows that, on the particular facts of this case, the appellants have failed to establish that HMRC's failure to notify Daejan of the errors in its loss relief claims constituted a matter which HMRC ought to have taken into account when considering their claim for an extension of time. There can have been no such duty without non-compliance with the Charter or Code of Practice 14 or the "venerable principle", or non-performance by HMRC of their duty of fairness.

96. In the circumstances I would dismiss the appeal on this point.

b. Attribution to claimant of mistakes made by another group company

97. Mr Coppel submits that SP 5/01 is concerned with a claimant's mistakes or those of his agent, not mistakes that were made by someone else. Here the mistakes had been made by Cohen Arnold and Daejan, and not by any group company applying to make a late claim to use the stranded losses against its own profits. Mr Coppel relies on *Gripple v IRC* [2010] STC 2283 at 23. In that case, Henderson J treated claims by companies in the same group as separate from each other in the context of relief for research and development expenditure.

98. Mr Grodzinski's argument is that in the context of SP 5/01 and group relief a realistic approach must be taken to groups of companies. HMRC can take into account the fact that the error had been made by another member of the taxpayer's group: SP 5/01 did not make a distinction between taxpayers and the rest of their group. The whole concept of group relief recognises the economic importance of the group. It would be absurd in the context of a group relief claim if HMRC were obliged to ignore the group, especially where they had the same advisers, as here. Mr Grodzinski also submits that it would likewise be absurd if a member of the group has a good claim for an extension of time even though the reason for having to make a late claim was that another member of the group had made a mathematical error. Mr Grodzinski points out that, in *Gripple,* Henderson J contrasted that case with group relief where the parties were all part of the same group.

99. The judge held that "on a sensible construction of SP 5/01, HMRC were entitled to treat the group as a whole and to treat the failure to make a claim in time by reason of

the accountants' 'oversight' accordingly" (judgment paragraph 115). I agree. SP 5/01 has to be interpreted realistically. It would run a coach and horses through paragraphs 9 to 12 of SP 5/01 if the consequences of oversight by a company could be side-stepped in this way. It would mean that, if another company under common management or ownership applied to make a late claim to take advantage of a relief which the first company had lost through that oversight, it could completely dissociate itself from the first company's error.

PRINCIPAL GROUND (3): INCLUSION OF IRRELEVANT CONSIDERATIONS

a. Were HMRC in error under SP 5/01 in taking tax avoidance into account?

100. Mr Coppel submits that the use by the appellants of tax losses was not tax avoidance within the meaning of the final paragraph of paragraph 12 of SP 5/01 (see the annex to this judgment). That paragraph is concerned purely with one of the specific anti-avoidance provisions contained in the taxing statutes. The court should not supply any wider meaning because the notion of tax avoidance, outside those specific provisions, was highly uncertain and it would be unfair to give that interpretation to HMRC's policy. Any other interpretation gives too much discretion to HMRC.

101. Furthermore, submits Mr Coppel, the final paragraph of paragraph 12 of SP 5/01 applies only where the making of the late claim is part of the scheme for tax avoidance. Thus this part of the policy is supplementing the tax avoidance provisions elsewhere in statute.

102. Moreover, submits Mr Coppel, Mr King did not say that he would have made the same decision absent the element of tax avoidance.

103. Mr Grodzinski points out that there are examples in statute of the use of the phrase "avoidance of tax" without defining it: for example, section 213 (11) of ICTA. He submits that SP 5/01 uses the phrase "tax avoidance" in that sense. It is not limited to specifically targeted tax avoidance provisions. There would, submits Mr Grodzinski, be no need for the final paragraph of SP 5/01 if there was a specific anti-avoidance provision because that provision would then apply and invalidate the scheme so that the question of a late claim would not arise. The expression "avoidance of tax" was explained by Lord Nolan in *IRC v Willoughby* [1997] 1 WLR 1071 and accordingly can be given effect.

104. Finally, Mr Grodzinski submits that participation by Daejan in the Lloyd's loss-buying scheme is tax avoidance because it could not be said that Parliament had intended to enable property companies to take advantage of losses made by Lloyd's underwriters. The use was permitted but it was nonetheless tax avoidance.

105. Furthermore, Daejan had notified the scheme under the regulations requiring notification of tax avoidance schemes.

106. I accept HMRC's submissions for four reasons. First, SP 5/01 would make no sense if it referred to an express anti-avoidance provision since, if there were tax avoidance in that sense, there would be no claim and therefore no ground for allowing a late claim. In addition, when asked by the Court, Mr Coppel could not put forward any example of such a scheme where the making of a late claim was an integral part.

107. Second, the reference to a scheme for "the avoidance of tax" in the final paragraph of paragraph 12 of SP 5/01 must be given content if some content can reasonably be given to it. The characteristics of tax avoidance have been judicially considered. In *IRC v Willoughby* [1971] 1 WLR 1071, Lord Nolan held:

> "The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hallmark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option."

108. Third, while the appellants attack the phrase "tax avoidance" on the grounds of lack of certainty, there is no challenge to SP 5/01. I see no reason why the phrase should not be taken by HMRC in this context to mean that which qualifies as tax avoidance under the test in *Willoughby,* as the Lloyd's loss-buying scheme plainly did. On that basis, the final paragraph of paragraph 12 of SP 5/01 does not fail for uncertainty.

109. Fourth, my conclusion is consistent with the decision of McNeill J in *R v IRC ex p Fulford-Dobson* [1987] STC 344, where the Inland Revenue refused to apply a discretionary extra-statutory concession because the taxpayer had sought to take advantage of it for tax avoidance purposes. McNeill J dismissed the taxpayer's challenge to the decision. He held that the Inland Revenue were entitled to exclude the application of a concession in cases of tax avoidance. The same applies here.

b. Did HMRC wrongly interpret paragraph 12 of SP 5/01 as limited by paragraph 11 of SP 5/01?

110. Mr Coppel submits that Mr Jefferies' advice was wrong with respect to paragraphs 11 and 12 of SP 5/01. Mr Jefferies in his email had treated oversight as an objection to the grant of an extension under paragraph 12 of SP 5/01, just as much as it was an objection to an extension of time under paragraph 11, where it was specifically mentioned. He should have treated paragraph 12 as specifically applicable to the case where the claim had not been made in time due to oversight. The judge rejected this contention.

111. Mr Grodzinski submits that there is no bright line between paragraphs 10, 11 and 12 of SP 5/01.

112. I would dismiss the appeal on this point. Paragraph 12 provides a safety valve: it admits of a situation where a late claim may be allowed even though paragraph 11 does not enable that result to be reached. Inevitably therefore, the case will also have failed under paragraph 11. The first sentence of paragraph 12 is entirely inconsistent with the notion that paragraph 12 provided some new, independent test. The question under paragraph 12 is whether an extension of time should be granted despite the fact of oversight.

PRINCIPAL GROUND (4): INCONSISTENCY ON THE PART OF THE JUDGE?

113. The judge took the view that the fact that Daejan had made a claim in time was part of the background, and that it had not therefore been left out of account (judgment paragraph 120). Mr Coppel submits that greater weight should have been given to that factor, and that the judge could not at one and the same time hold that this factor was part of the background and hold that it had been taken into account. Mr Jefferies did not refer to Daejan's earlier claim in his email containing his advice. He had not read the whole file and he therefore did not know about Mr Fletcher's discovery of Daejan's error.

114. Mr Grodzinski submits that the judge was right to say that the fact that Daejan had made a claim was part of the background. That was part of what Mr King knew. Mr Jefferies also knew this. As there was no duty to tell the taxpayer about the error that had been spotted, the judge's conclusion was correct. It was irrelevant whether the decision-maker knew about Mr Fletcher's discovery of the error because there was no obligation to inform Daejan of it.

115. I agree. The making of the claim remained part of the background and as such was taken into account. Mr Fletcher's conclusion was relevant only if there was an obligation to inform the taxpayer which HMRC had not fulfilled. I do not therefore consider that there was any inconsistency on the part of the judge and would dismiss the appeal on this point.

OVERALL CONCLUSION

116. For the reasons given above, I would dismiss this appeal.

Lord Justice Kitchin:

117. I agree.

Lord Justice Rix:

118. I also agree.

ANNEX

"*Board's approach to extending time limits for making claims*

9 The time limits allowed for making claims to loss relief, capital allowances and group relief under CTSA and the further provisions described above should generally be adequate and the Board will not make routine use of its powers to accept claims made outside these limits. But the Board recognises that there may be exceptional reasons why a claim is not made within the time specified. Applications to allow further time in accordance with the powers referred to at paragraph 1 above will be considered with the assistance of the following criteria.

10 In general, the Board's approach will be to admit claims which could not have been made within the statutory time limits for reasons beyond the company's control. This would include, for example, cases where—

> – at the date of the expiry of the time limit, the company or its agents were unaware of profits against which the company could claim relief; or
>
> – the amount of a profit or loss depended on discussions with an Inspector which were not complete when the time limit expired, and the delay in agreeing figures is not substantially the fault of the company or its agents.

In such cases the Board's approach will be to admit late claims up to the amount of the profit or loss in question. Where the claim involves the withdrawal of an existing claim and the making of a fresh claim, the Board's approach will be to admit these to the extent of the profit or loss in question. Claims which go beyond this and affect profits which were not in dispute at the time of expiry of the statutory time limits will not be within this approach.

Reasons beyond the company's control would also include a claim where all of the following four features were present—

> – an officer of the company was ill or otherwise absent for a good reason;
>
> – the absence or illness arose at a critical time and prevented the making of a claim within the normal time limit;
>
> – there was good reason why the claim was not made before the time of the absence or illness; and

– there was no other person who could have made the claim on the company's behalf within the normal time limit.

11 The Board would not, however, regard the following as reasons beyond the company's control—

– oversight or negligence on the part of a claimant company or its agent;

– failure, without good reason, to compute the necessary figure;

– the wish to avoid commitment pending clarification of the effects of making a claim; or

– illness or absence of an agent or adviser to the company.

12 There may be cases falling outside the general approach outlined in para 10 where it would nevertheless be unreasonable, given the overall circumstances of the case, for the Board to refuse a late claim. It is likely that such cases will involve a combination of factors, but the following criteria may be relevant—

– the reason why a claim is late, where the reason does not in itself warrant admission of the claim under the approach outlined above, it will still be taken into account by the Board in assessing the circumstances as a whole;

– the extent to which it is late;

– the consequences for the company if the claim is refused; and

– any particularly unusual features.

For the purpose of this paragraph and those above, if the late claim forms part of a scheme or arrangement, the main purpose or one of the main purposes of which is the avoidance of tax (including the payment of tax), then that will be taken into account in the Board's approach."