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CASE NOTE

Unreasonably Limiting Recourse to the Courts? *R (on the application of Haworth)* v *HMRC*

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Follower notices, introduced in Finance Act 2014, can in certain avoidance situations be served on a taxpayer by HMRC (the UK revenue authority) where HMRC is of the opinion that the principles or reasoning of a decided case would deny the tax advantage in dispute. Such a taxpayer, who persists with the dispute, is then exposed to a tax-geared penalty of up to 50 percent and can be required to pay the tax in dispute before the litigation is determined. The follower notice regime was considered by the UK Supreme Court in *R (on the application of Haworth)* v *HMRC*. The Supreme Court judgment addresses fundamental issues concerning access to the courts, the doctrine of precedent and balancing taxpayer rights against the public interest in the collection of taxes.

Keywords: access to the courts - follower notices - Finance Act 2014 - precedent - R (UNISON) v Lord Chancellor (Nos 1 and 2) - taxpayer rights

INTRODUCTION

Follower notices allow Her Majesty's Revenue and Customs (HMRC), the UK revenue authority, to deter taxpayers from pursuing arguments in litigation, in avoidance situations, when, in litigation involving other taxpayers, those arguments have not previously been successful and HMRC are of the opinion that the principles or reasoning of the earlier case would apply to the later one. The deterrent is, broadly speaking,[1] a penalty of up to 50 per cent of the tax in dispute if the taxpayer pursues the litigation after a follower notice has been served. Between 2015 and December 2020 HMRC issued around 22,000 follower notices. In *R (on the application of Haworth)* v *HMRC*[2] the Supreme Court considered whether a restrictive reading should be given to the legislation regarding follower notices, in order to vindicate the constitutional right of access

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1 Technically it is based on the 'denied advantage' not the 'asserted advantage', which may be different. For a discussion of this, see HMRC, 'Guidance Follower notices and accelerated payments' 1.14 Penalty - calculating the denied advantage (the penalty base) at https://www.gov.uk/government/publications/follower-notices-and-accelerated-payments/follower-notices-and-accelerated-payments.

2 *R (on the application of Haworth)* v *HMRC* [2021] UKSC 25; [2021] 1 WLR 3521.

to the courts, which it had previously considered in *R (UNISON)* v *Lord Chancellor (Nos 1 and 2)*[3] (*UNISON*).

The case has much broader relevance than just to tax lawyers, since it builds upon the Supreme Court's caselaw on access to the courts, that it recently considered in *UNISON*. It also has relevance to wider discussions on precedent, in its consideration of what the 'principles laid down' and 'reasoning' of a case are, and the manner in which these apply to factual findings. From a broader tax perspective, it considers balancing the public interest in the collection of taxes against fundamental rights: an issue now regularly engaged by anti-avoidance legislation.

POLICY BACKGROUND AND STATUTORY FRAMEWORK

Follower notices were introduced in Finance Act 2014. HMRC may issue a follower notice to a taxpayer (T) where (broadly speaking): (1) T is in dispute with HMRC (either at the enquiry phase or litigation); (2) it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements; and (3) HMRC is of the opinion that there is a judicial ruling which is 'relevant' to the chosen arrangements.[4] For this purpose:

> (3) A judicial ruling is 'relevant' to the chosen arrangements if–
> (a) it relates to tax arrangements,
> (b) the principles laid down, or reasoning given, in the ruling would, if applied to the chosen arrangements, deny the asserted advantage or a part of that advantage, and
> (c) it is a final ruling.[5]

The effect of a follower notice was that if the taxpayer does not engage in 'corrective action' (essentially[6] meaning settling in HMRC's favour) within a specified period they were liable for a penalty of up to 50 per cent[7] of the tax in dispute.[8] HMRC would cancel the penalty if the taxpayer was subsequently successful in litigation.[9] The taxpayer may appeal the follower notice penalty on grounds including 'that it was reasonable in all the circumstances for

3 *R (UNISON)* v *Lord Chancellor (Equality and Human Rights Commission and another intervening) (Nos 1 and 2)* [2017] UKSC 51; [2020] AC 869.
4 Finance Act 2014 (FA 2014), ss 201, 204.
5 FA 2014, s 205(3).
6 What is precisely required is set out in FA 2014, s 208(4)-(6).
7 Following changes in Finance Act 2021 the maximum penalty has now been reduced from 50 per cent to 30 per cent. However, following those changes, an 'additional penalty' of 20 per cent may be imposed where the First-tier Tribunal finds that the taxpayer or their representative acted unreasonably in bringing or conducting relevant proceedings: FA 2014, s 208A.
8 FA 2014, ss 208-212.
9 HMRC, 'Tax avoidance schemes — follower notices and accelerated payments (except partnerships)', 3 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/444953/CCFS25a_07_15.pdf. There is some uncertainty as to the statutory basis for this, see *HMRC* v *Comtek Network Systems (UK) Ltd* [2021] UKUT 0081 (TCC) at [35]-[36].

[the taxpayer] not to have taken the necessary corrective action … in respect of the denied advantage'.[10] While there is the possibility of a statutory appeal against follower notice penalties,[11] there is no statutory appeal against the notice itself, which can therefore only be challenged by way of judicial review. This is significant as certain additional consequences flow from a follower notice being issued, including[12] that it serves as one of the gateways for an accelerated payment notice (APN) to be issued,[13] which would require the taxpayer to pay the disputed tax upfront, rather than waiting for the outcome of any statutory appeal.

HMRC's policy rationale for introducing follower notices was that:

> When faced with large numbers of very similar cases, it is sometimes most efficient for HMRC to investigate 'representative cases', taking them to litigation if necessary. However, when HMRC wins a representative case in the courts, other taxpayers who have used the same or very similar schemes sometimes see little incentive to settle their cases with HMRC. When HMRC pursues litigation in a number of very similar cases the Tribunal rules allow for the cases to be heard together in certain circumstances, but this only applies to cases which have been notified to the Tribunal. To get to this stage HMRC has to investigate these cases to litigation standard and close the tax enquiry. This uses up the Tribunal's resources, places a strain on HMRC's compliance resources, often delaying the collection of the right tax.[14]

During the Public Bill Committee debate of the Bill that became Finance Act 2014, David Gauke (then Exchequer Secretary to the Treasury) said: 'We think it is not fair to the general taxpayer that those who have entered into tax avoidance arrangements that are very similar to others that have been shown to fail can drag on proceedings over a long period while a matter is being disputed when, ultimately, it is very likely indeed that they will lose.'[15]

He also said: 'I come back to the first principle: is it right that somebody who has arrangements that are designed to reduce their tax bill should be able to continue their dispute with HMRC even when the precedent has been set that they will lose?'[16]

THE FACTS

Mr Haworth was the settlor (and beneficiary) of a trust which attempted to avoid capital gains tax of almost £9 million on the disposal of shares by using an 'around the world' scheme. This scheme involved the Jersey-based trustees resigning in favour of trustees based in Mauritius, who disposed of the shares.

10 FA 2014, s 214.
11 FA 2014, s 214(3)(d).
12 Other consequences include that it a necessary trigger for 'stop notice' under promoters of tax avoidance schemes rules (FA 2014, Sch 34, para 12(3)(a)) and the arrangements fall within the penalty provisions in relation to avoidance arrangements (Finance Act 2007, Sch 24, para 3A).
13 FA 2014, s 219(4)(a).
14 HMRC, *Raising the stakes on tax avoidance: Summary of Responses and Draft Legislation* (2014) 5.2.
15 Finance Bill Deb col 748 17 June 2014.
16 Finance Bill Deb col 749 17 June 2014.

Following the disposal of the shares the Mauritian trustees resigned in favour of UK-based trustees.

The scheme sought to avoid the charge for settlor interested trusts where the trustees of the trust are non-resident *throughout* the year (under section 86 of the Taxation of Chargeable Gains Act 1992 (TCGA 1992)), by the appointment of the UK trustees. It also sought to avoid the charge to tax for settlor interested trusts where trustees are UK resident at *any time* in the year (under section 77 of the TCGA 1992), due to the UK Mauritius double tax treaty. Due to the very limited scope of the taxation of capital gains in Mauritius, it was also anticipated that no tax would be paid there.

A similar scheme had been considered by the Court of Appeal in *Smallwood* v *Revenue and Customs Comrs*[17] (*Smallwood*). In *Smallwood* it was held that, key to the effective operation of the scheme, was for the place of effective management (POEM) of the trust to be in Mauritius, so that the double tax treaty would apply. The location of the POEM was held to be a factual (as opposed to legal) issue. In *Smallwood* the Court of Appeal held that the Special Commissioners (the predecessors of the First-tier Tribunal) were entitled to have found that the POEM was in the UK. From the judgment of Hughes LJ in *Smallwood*, HMRC identified seven '*Smallwood* pointers' which their internal lawyers advised that, if present, 'a Tribunal is likely to find similarly'.[18]

On 24 June 2016 HMRC issued a follower notice to Mr Haworth. The notice stated that he had used a similar scheme to *Smallwood*, set out the seven *Smallwood* pointers and stated that '[c]orresponding reasoning applies to the circumstances and implementation of the tax arrangements used by you or on your behalf.'[19] Mr Haworth was not liable to a penalty because HMRC failed to serve, within the statutory time limit, the separate notice on Mr Haworth to impose the penalty. So, in Mr Haworth's case, the major consequence of the follower notice being served was that tax could become payable upfront, as the follower notice became a 'gateway' for the issue of an APN. Since there is no statutory process to appeal follower notices, Mr Haworth appealed by way of judicial review.

JUDGMENT OF THE HIGH COURT AND THE COURT OF APPEAL

At first instance, Sir Ross Cranston rejected the argument that the requirement, that the principles or reasoning in *Smallwood* 'would … deny the asserted advantage', was to be interpreted as requiring a high degree of confidence by HMRC. He held that: 'If Parliament had intended the higher threshold the claimant suggests, it would have said so. Concepts such as "no reasonable prospect of success" or "hopeless" are well known in the law'.[20]

However, in the Court of Appeal, section 205(3)(b) of the Finance Act 2014 was interpreted by Newey LJ so that: 'to give a follower notice, HMRC must

17 *Smallwood* v *Revenue and Customs Comrs* [2010] EWCA Civ 778; [2010] STC 2045.
18 n 2 above at [36].
19 n 2 above at [40].
20 *R (On the application of Haworth)* v *Revenue and Customs* [2018] EWHC 1271 (Admin); [2018] STC 1326 at [90].

be of the opinion that the principles or reasoning in the ruling in question would deny the advantage, not merely that they would be more likely than not to do so. That implies, I think, a substantial degree of confidence in the outcome.'[21]

It was not sufficient for HMRC to have a 'perception that there is a 51 per cent chance of the advantage being denied.'[22] This was thought justified by Newey LJ because:

i. the use of the word 'would' in section 316D(3)(b) of the Finance Act 2014 'implies that HMRC must be of the opinion that, should the point be tested, principles or reasoning found in the ruling in question *will* deny the advantage';[23]
ii. an alternative construction could allow follower notices to be issued in a wide range of cases, including:
   if HMRC believed there was a 51% chance of a high-level principle found in a decided case (say, the *Ramsay* approach applied recently in *UBS AG v Revenue and Customs Comrs, Deutsche Bank Group Services (UK) Ltd v Revenue and Customs Comrs*) being held to apply in a quite different factual situation. On this basis, it would theoretically be possible for HMRC to use follower notices routinely in relation to disputes pending before the FTT… [but] I can see no indication that follower notices were meant to be available to HMRC otherwise than in relatively exceptional circumstances;[24]
iii. the serious consequences, including a 50 per cent penalty, suggested follower notices should be issued only in a limited range of cases;
iv. '[t]he constitutional right of access to the courts is inherent in the rule of law', 'impediments to the right of access to the courts can constitute a serious hindrance even if they do not make access completely impossible' and the Supreme Court in *UNISON* had held that: '[e]ven where a statutory power authorises an intrusion upon the right of access to the courts, it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question'[25]

accordingly: 'receipt of a follower notice may deter a taxpayer from resort to the FTT, this principle provides a further reason for interpreting s 205(3)(b) as calling for more than just a 51% chance of principles/reasoning from an earlier case being held to apply'.[26]

21 *R (on the application of Haworth)* v *Revenue and Customs Commissioners* [2019] EWCA Civ 747; [2019] 1 WLR 4708 at [37] per Newey LJ.
22 *ibid* at [36] per Newey LJ.
23 *ibid* at [36] per Newey LJ. The emphasis is by Newey LJ.
24 *ibid* at [36] per Newey LJ: *W T Ramsay Ltd* v *IRC* [1981] STC 174 (HL): *UBS AG* v *Revenue and Customs Commissioners* [2016] UKSC 13; [2016] 1 WLR 1005.
25 n 21 above at [36(v)] per Newey LJ: citing *UNISON* n 3 above at [66], [78], [80] per Lord Reed.
26 *ibid* at [36] per Newey LJ.

DECISION OF THE SUPREME COURT

The necessary degree of belief

The sole judgment was given by Lady Rose, with whom all the other panel members agreed. With regard to the content of the opinion formed by HMRC, Lady Rose held: 'that HMRC must form the opinion that there is no scope for a reasonable person to disagree that the earlier ruling denies the taxpayer the advantage. Only then can they be said to have formed the opinion that the relevant ruling "would" deny the advantage. An opinion merely that [it] is likely to do so is not sufficient.'[27]

She came to that view having applied the principle, from *UNISON*, that a statute should be interpreted only to permit such a degree of intrusion to the constitutional right of access to the courts as was reasonably necessary to fulfil the objective of the legislation.[28] Here it was accepted that the purpose of the legislation was to 'deter further litigation on points already decided by a court or tribunal and to reduce the administrative and judicial resources needed to deal with such unmeritorious claims'.[29] Lady Rose suggested that applying this principle and giving 'full weight' to the use of 'would' (as opposed to, for example, 'might') required this high degree of certainty.[30]

Lady Rose suggested that, in any given circumstances, whether HMRC could form an opinion with the necessary degree of certainty would be influenced by:

i. how fact sensitive the application of the relevant ruling is, taken together with the stage of the dispute when the follower notice is issued, more factual clarity perhaps being available at later stages of investigation;[31]
ii. the extent to which the relevance of the earlier ruling depends on an assessment of the credibility of the taxpayer's evidence;[32]
iii. if the taxpayer relies on legal arguments not advanced in the earlier case, or where the earlier ruling was based on a concession by the taxpayer;[33] and
iv. that 'a ruling arrived at after a hearing where, for example, the taxpayer did not appear or was not legally represented or where the reasoning in the decision is brief or unclear is less likely to be capable of forming the basis for the necessary opinion'.[34]

However, Lady Rose emphasised that the relevant opinion was the opinion formed by HMRC, not the opinion of the reviewing court.[35]

27 n 2 above at [61].
28 *ibid* at [61].
29 *ibid* at [58].
30 *ibid* at [62].
31 *ibid* at [64].
32 *ibid* at [65].
33 *ibid* at [67].
34 *ibid* at [68].
35 *ibid* at [62].

Whether 'reasoning given' in the ruling covers factual findings

Mr Haworth had argued that the 'principles laid down, or reasoning given' would not cover factual findings, especially when the case had been appealed. This is because an appeal from the First-tier Tribunal can only be made on a point of law[36] (not of fact) and if an appeal is refused this means that the First-tier Tribunal was *entitled to arrive* at that finding on the basis of the primary facts, not that it was the *only* finding it could have reached. This is because it has been held possible, in cases of fact and degree, that on the same primary facts, decisions both for and against the taxpayer would be upheld on appeal, as both would be correct as a matter of law.[37]

This argument was rejected by Lady Rose. She held that it would create an anomalous position if the decision of the First-tier Tribunal could be a relevant ruling if not appealed, but it might not be so if upheld on appeal.[38] She held it made no difference whether the appeal court stated that the First-tier Tribunal was merely entitled to decide the case as it did, or whether it stated it was the only decision that they were entitled to reach.[39]

By way of example, Lady Rose referred[40] to the case of *Clark (Inspector of Taxes)* v *Perks*[41] which concerned whether a mobile oil-drilling rig was a 'ship' – resulting in workers on it being 'seafarers' and so eligible for an income tax exemption concerning work performed abroad. The General Commissioners held that the mobile rigs were 'ships', which was overturned by Ferris J in the High Court, who held it to be a question of law whether the rigs were ships. The Court of Appeal reversed Ferris J's judgment, holding the matter to be one of fact with which he was not entitled to interfere. Lady Rose suggested that the principles laid down and reasoning given would apply to Mr Perk's colleagues and 'workers on other oil rigs that were not distinguishable (in the legal sense of that word) from the rigs as described in the judgment'.[42] Lady Rose further stated that Mr Perk's 'colleagues could not have sought to relitigate the same matter the next week, dismissing the precedential value of *Clark* v *Perks* as merely deciding that the General Commissioners had been entitled to conclude as a matter of fact that the rig was a ship.'[43]

Other grounds

Lady Rose also upheld the decision of the Court of Appeal on two further grounds, that are only briefly noted as they are of less interest to a generalist reader. First, Lady Rose held that HMRC had overstated the conclusions of

36 Tribunals, Courts and Enforcement Act 2007, s 11(1).
37 See, for example, the discussion of the 'no-man's land of fact and degree' in *Ransom* v *Higgs* [1974] 1 WLR 1594 (HL), 562 and *Marson* v *Morton* [1986] 1 WLR 1343 (ChD).
38 n 2 above at [81].
39 *ibid* at [82].
40 *ibid* at [78]-[80].
41 *Clark (Inspector of Taxes)* v *Perks* [2001] EWCA Civ 1228; [2001] STC 1254.
42 n 2 above at [80].
43 *ibid* at [80].

Hughes LJ in *Smallwood*. Hughes LJ had not decided that the presence of the seven *Smallwood* pointers inevitably led to the conclusion that the POEM of a trust was in the UK.[44] Secondly, HMRC did not provide sufficient detail in the follower notice to satisfy the statutory requirement[45] of explaining why the ruling in *Smallwood* was relevant to the arrangements in *Haworth*.[46]

DISCUSSION

With regard to the plain meaning of the words 'HMRC is of the opinion … [that the] principles laid down, or reasoning given, in the ruling would, if applied to the chosen arrangements, deny the asserted advantage', it is difficult to see how it translates into Lady Rose's gloss that 'HMRC must form the opinion that there is no scope for a reasonable person to disagree that the earlier ruling denies the taxpayer the advantage'. This is especially so when Lady Rose concedes that the relevant opinion is that of HMRC.

Access to the courts

It is surprising that the Supreme Court so freely applied the principles regarding hindering access to the courts from *UNISON* to follower notices, since there are many good reasons to distinguish *UNISON*. In *UNISON* empirical evidence was adduced to show that the fees had the effect of deterring small claims, not of deterring weak claims.[47] No similar evidence was adduced in *Haworth*. More fundamentally in *UNISON* it was said that the right of access to the courts was important not just for the claimant, as there were positive externalities regarding employment litigation, since (i) it established case law precedent and (ii) by potentially vindicating rights made it clear those rights were enforceable and so increased compliance with the law.[48] This was important in the context of employment rights where parliament legislated not merely to 'confer benefits on individual employees, but because it has decided that it is in the public interest that those rights should be given effect.'[49]

This contrasts markedly to the situations where follower notices are issued, which broadly concern tax avoidance.[50] As Arden LJ has observed: 'It is the premise of the [accelerated payment notice] regime that the use of such schemes is in effect anti-social behaviour. However, what is or is not behaviour of this kind is quintessentially a question for Parliament, and the courts should not

44 *ibid* at [74]-[75].
45 FA 2014, s 206(b).
46 n 2 above at [84]-[86].
47 n 3 above at [20], [40], [57] per Lord Reed.
48 *ibid* at [69]-[72] per Lord Reed.
49 *ibid* at [72] per Lord Reed.
50 Specifically, a tax advantage must result from 'tax arrangements': FA 2014, s 204(3). For this purpose 'Arrangements are "tax arrangements" if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements.': FA 2014, s 201(3).

seek to undermine its conclusion on that matter unless there is clearly no basis for it.'[51]

Accordingly, it cannot be said that parliament wishes to give effect to the right of access to the courts, for taxpayers who are subject to follower notices, to the same extent as it wishes to give effect to the employment rights in *UNISON*. Nor can it be said that there is a positive externality by creating precedent, since a condition for issuing a follower notice is that HMRC believes there to be a clear precedent. Also, there is a far weaker argument than in *UNISON* that the relevant litigation would create positive externalities by increasing compliance with the law: quite the reverse. Litigation over tax avoidance risks 'contagion'[52] by publicising the avoidance, especially if the litigation is unsuccessful for HMRC. Such litigation can undermine tax morale and creates a culture of non-compliance. Accordingly, *Haworth* and *UNISON* represent very different factual matrices.

In *UNISON* it was also said that: 'fundamentally, the right of access to justice, both under domestic law and under EU law, is not restricted to the ability to bring claims which are successful. Many people, even if their claims ultimately fail, nevertheless have arguable claims which they have a right to present for adjudication.'[53] This might be thought to suggest a strong belief by HMRC should be required before issuing a follower notice. But that cannot be so, as in the legislation itself parliament has explicitly indicated that the legislation goes beyond hopeless cases. As has already been noted, the relevant judicial ruling can be of the First-tier Tribunal which has no precedent value, and so could be departed from in any subsequent First-tier Tribunal decision and obviously by the Upper Tribunal or any court. There is no reason to suppose that such a decision would fall within the 'brief or unclear' category of decisions, to which Lady Rose suggests less weight can be assigned. Where the relevant decision is made by the First-tier Tribunal and it is questionable whether that decision will withstand appellate scrutiny, it is possible that the taxpayer may be able to appeal a penalty on the basis that it was 'reasonable in all the circumstances not to have taken the necessary corrective action'.[54] Such circumstances may justify appealing such a penalty, but the fact a taxpayer *may* ultimately win does not justify quashing the notice, as parliament clearly intended a notice could be issued in such circumstances.

Further the follower notice legislation only serves to deter taxpayers: it does not *prevent* them from pursuing litigation. As Newey LJ noted in the Court of Appeal, with regard to the common law right of access to the courts, 'impediments to the right of access to the courts can constitute a serious hindrance even if they do not make access completely impossible.'[55] However, any assessment of the seriousness of the hindrance should be seen in the context of other

51 *R (on the application of Rowe and others)* v *Revenue and Customs Commissioners* [2017] EWCA Civ 2105; [2018] 1 WLR 3039 at [53] per Arden LJ.
52 J. Braithwaite, *Markets in Vice, Markets in Virtue* (Oxford: OUP, 2005) 139.
53 n 3 above at [29] per Lord Reed.
54 FA 2014, s 214(3)(d). See discussion in *Revenue and Customs* v *Comtek Network Systems (UK) Limited* [2021] UKUT 81 (TCC) at [35].
55 n 21 above at [36(v)] per Newey LJ: n 3 above at [78] per Lord Reed.

legislation which similarly deters litigation. For example, where a person pleads guilty at the first stage of criminal proceedings, they will generally be entitled to a one-third reduction in sentence.[56] This reduction is partly justified on the basis that 'an acceptance of guilt … is in the public interest in that it saves public time and money on investigations and trials.'[57] Although the sentencing guidelines state that '[n]othing in the guideline should be used to put pressure on a defendant to plead guilty',[58] it has been argued that such reductions can put enormous pressure on a defendant, especially where the effect of the reduction is that a custodial sentence is not (immediately) imposed.[59]

Similarly so with the availability of out of court disposals, such as on the spot penalty notices,[60] where a person has the opportunity to pay a financial penalty (of either £60 or £90)[61] to 'discharge any liability to be convicted of the offence to which the notice relates'.[62] An innocent person may feel coerced into accepting the penalty notice, rather than electing to be tried for the alleged offence, because of fearing harsher sanctions if convicted. On conviction the adverse financial consequences are likely to be considerably higher than accepting the penalty notice: the magistrates would invariably impose a contribution towards prosecution costs[63] and a victim surcharge,[64] all in addition to any fine or other punishment. For someone of good character the greatest incentive not to challenge the penalty notice is that it does not result in a criminal record, whilst electing a trial, they may fear, carries some risk of conviction and an associated criminal record: with possible employment and immigration consequences.[65] HM Government's response to the Covid-19 pandemic has greatly increased the circumstances in which fixed penalty notices may be issued, as well as

56 Sentencing Council, *Reduction in Sentence for a Guilty plea: Effective from 1 June 2017* (Definitive Guideline, Sentencing Council 2017) D1at https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-Plea-definitive-guideline-SC-Web.pdf. The statutory basis for this is Criminal Justice Act 2003 (CJA 2003), s 144.

57 *ibid*, B.

58 *ibid*, B.

59 M. McConville and L. Marsh, *Criminal Judges Legitimacy, Courts and State Induced Guilty Pleas in Britain* (Cheltenham: Edward Elgar, 2014) Chs 3 and 4; A Flynn, 'Fortunately We in Victoria Are Not In That UK Situation': Australian and United Kingdom Legal Perspectives on Plea Bargaining Reform' (2011) 16 Deakin L Rev 361, 377-382. McConville and Marsh give the example of an 18-year old boy of previously good character being coerced into pleading guilty, to the theft of two bags of popcorn, when given an indication that they would be sent to a Detention Centre if he was convicted after a not guilty plea, but if he was 'sensible' and pleaded guilty he would only be fined.

60 Criminal Justice and Police Act 2001 (CJPA 2001), ss 1-11.

61 Penalties for Disorderly Behaviour (Amount of Penalty) Order 2002, SI 2002/1837.

62 CJPA 2001, s 2.

63 On conviction following a summary trial, the prosecution would generally seek costs of between £620 and £930: Crown Prosecution Service, 'Legal Guidance: Costs' 12 February 2018 at https://www.cps.gov.uk/legal-guidance/costs Annex 1: Scales of Cost.

64 CJA 2003, s 161A. Following a summary trial where a fine is imposed this would presently be between £34 https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/fines-and-financial-orders/victim-surcharge/.

65 Although if given for recordable offences, a record of the notice may be placed on the Police National Computer and cited on future occasions: N. Padfield, R. Morgan, and M. Maguire, 'Out of court, out of sight? Criminal sanctions and non-judicial decision-making' in *The Oxford Handbook of Criminology* (Oxford: OUP, 2012) 962-963.

introducing higher monetary penalties.[66] Here we see considerations of 'cost and speed' compromising otherwise normal standards of procedural fairness.[67]

However, follower notice penalties could be better designed to target the particular menace they are designed to address, namely the public cost in investigating and litigating schemes which are similar to those which HMRC has already defeated. If, rather than a tax geared penalty, the taxpayer was required to pay HMRC's costs in the enquiry and litigation, then this would be a more proportionate solution. Such a penalty could either be in respect of HMRC's entire costs, or just costs incurred after the follower notice had been served. Such a costs regime could be asymmetrical, so even if the taxpayer were successful in litigation HMRC would not be required to pay pre-commencement costs of the taxpayer or the taxpayer's litigation costs in the First-tier Tribunal. There would be a precedent for such a regime in respect of licensing appeals,[68] where case law suggests costs should not be awarded against the regulatory authority which acts reasonably but unsuccessfully, since the award of costs might chill the exercise of such a regulatory function.

The doctrine of precedent

In both the High Court[69] and Court of Appeal,[70] the 'principles laid down' and 'reasoning given' were each held to be separate concepts, both distinct from the *ratio* of a case. However, Lady Rose's judgment would appear to identify the 'reasoning given' with the *ratio*. This is apparent from her mention of 'the precedential value of judicial decisions'[71] and from the discussion[72] of *Clark* v *Perks* – which was a case not concerning avoidance arrangements and so broadly outside the scope[73] of instances when a follower notice could be issued.

It 'is disputed whether or not there is a ratio to be found authoritatively within a given opinion, or whether the so-called ratio is simply some proposition of law which a later court or courts find it expedient to ascribe to an earlier decision as the ground for that decision'.[74] On the latter view follower notices might be thought to effectively enable HMRC to perform a quasi-judicial function in identifying the *ratio* of a case, especially in the absence of any earlier decision.

66 The Health Protection (Coronavirus, International Travel) (England) Regulations 2020, SI 2020/568, reg 7; The Health Protection (Coronavirus, Restrictions) (No 2) (England) Regulations 2020, SI 2020/684, reg 9; and The Health Protection (Coronavirus, International Travel and Operator Liability) (England) Regulations 2021 SI 2021/582, reg 20 and Sched 14.

67 A. Ashworth, *Sentencing and Criminal Justice* (Cambridge: CUP, 6th ed, 2018) 11.

68 *City of Bradford Council* v *Booth* [2001] LLR 151 (QBD); *Cambridge City Council* v *Alex Nestling Ltd* [2006] EWHC 1374 (Admin); [2006] LLR 397. A similar approach applies to proceedings before the Competition Appeal Tribunal at first instance, see *Competition and Markets Authority* v *Flynn Pharma Ltd & Ors* [2020] EWCA Civ 617 (permission to appeal to the Supreme Court was granted on 17 December 2020 and the appeal is outstanding at the time of writing).

69 n 20 above at [85].

70 n 21 above at [31]-[34].

71 n 2 above at [78].

72 *ibid* at [78]-[80].

73 Because condition B in FA 2014, s 204(3) is unlikely to be met.

74 N. MacCormick, *Rhetoric and the Rule of Law* (Oxford: OUP, 2009) 145.

Lady Rose's suggestion that precedent covers factual findings is somewhat unorthodox. As Laws LJ noted in *S and others* v *Secretary of State for the Home Department* (*S*):

> the notion of a judicial decision which is binding as to *fact* is foreign to the common law, save for the limited range of circumstances where the principle of *res judicata* (and its variant, issue estoppel) applies. (There is also, of course, provision in Civil Procedure Rules 1998, r 19.10–19.15 for the case management of group litigation, but we need not take time with that.) This principle has been evolved – we put the matter summarily – to avoid the vice of successive trials of the same cause or question between the same parties. By contrast, it is also a principle of our law that a party is free to invite the court to reach a different conclusion on a particular factual issue from that reached on the same issue in earlier litigation to which, however, he was a stranger. The first principle supports the public interest in finality in litigation. The second principle supports the ordinary call of justice, that a party have the opportunity to put his case: he is not to be bound by what others might have made of a like, or even identical, case.[75]

(One might also note, in the present context, that in statutory tax appeals there is provision for lead cases[76] that is analogous to group litigation.) In *S*, however, Laws LJ allowed for country guidance cases to act as factual precedent in instances where the Immigration Appeal Tribunal (IAT) intended it to be determinative.[77] Laws considered that while factual precedent was 'exotic' in the context of 'our general law', in the context of the IAT's responsibilities it was 'benign and practical'.[78]

Laws LJ's general law position on factual precedent has, hitherto, been how tax law[79] was understood to operate. The decisions of appellate courts 'are concerned more to chart a way forward between principles accepted and not to be rejected.'[80] They are not to determine precise factual boundaries of multifactorial legal tests, where the decision maker should ultimately stand back, having considered legally relevant matters, and apply the statutory test.[81] Accordingly, '[i]t is seldom, if ever, useful to look to earlier authorities for supposed analogies on the facts, when what is in issue is the application of legal principles to a new factual situation'.[82]

The full implications of Lady Rose's interpretation of how precedent covers factual findings is unclear. As noted, it appears to apply to tax law generally,

75 *S and others* v *Secretary of State for the Home Department* [2002] EWCA Civ 539; [2002] INLR 416 at [24].
76 First-tier Tribunal (Tax Chamber) Rules (SI 2009/273), r 18.
77 n 75 above at [26].
78 *ibid* at [28].
79 And indeed other areas of law where appeals are limited to points of law. See, for example, the comments of Popplewell LJ in *AA (Nigeria)* v *Secretary of State* [2020] EWCA Civ 1296; [2020] 4 WLR 145 at [9] approving the comments of Coulson LJ in *UT (Sri Lanka)* v *Secretary of State for the Home Department* [2019] EWCA Civ 1095 at [37].
80 *Furniss (Inspector of Taxes)* v *Dawson* [1984] A.C. 474, 513 (HL) per Lord Scarman.
81 *Marson (Inspector of Taxes)* v *Morton* [1986] 1 WLR 1343, 1349 (Ch D) per Sir Nicolas Browne-Wilkinson V-C.
82 *Ingenious Games LLP and others* v *Revenue and Customs Commissioners* [2021] EWCA Civ 1180; [2021] STC 1791 at [105].

not just identifying the principles and reasons given for the purpose of follower notices. Does it extend beyond tax law? Does precedent cover factual findings of the First-tier Tribunal only after that decision is considered by a superior court of record?[83]

The advantage of Lady Rose's approach is that it promotes consistency and certainty. Historically this has sometimes caused judges to adopt an expansive interpretation of (appealable) questions of mixed fact and law, as opposed to (unappealable) pure fact.[84] However, such advantages are likely to be outweighed by drawing tribunals into 'arid' debates concerning 'the precise extent to which the facts of the … case [before them] mirror[s] those of [earlier cases].'[85] This would consume more time for decision makers and lead to even lengthier decisions, as they would need to adjudicate on the basis of the outcomes of prior caselaw, not merely to apply the tests established by the caselaw. Failure to correctly do so would presumably be an error of law, potentially overburdening the Upper Tribunal and appellate courts with appeals.

A restrictive reading of Lady Rose's judgment would seem preferable. Indeed, if her interpretation was orthodox it would seem to run contrary to the exceptional nature of the consequences of follower notices and lead cases (both in the tax context) and country guidance cases (in immigration).

Taxpayer rights vs the public interest

The effect of follower notices limiting access to the courts is an example of the more general question of balancing the public interest in the collection of taxes against the fundamental rights of taxpayers. This often arises where avoidance is in issue. Another recent example is the 'loan charge'.[86] This was highly retroactive legislation that looked back 20-years, introduced to tackle disguised renumeration. The loan charge was the subject of several judicial reviews[87] that considered the right to peaceful enjoyment of possessions guaranteed by A1P1 of the ECHR. Similarly, one might foresee challenges to the regimes

83 Whilst First-tier Tribunal decisions technically carry no precedential value, some case law suggests that First-tier Tribunal judges will have a 'natural inclination' to follow earlier decisions, at least where the earlier decision is by 'an experienced and respected Tribunal judge who ruled in detail on the point': *The Rank Group plc and another* v *HMRC* [2021] UKFTT 241 (TC) at [65].

84 See for example the dissent of Lord Browne-Wilkinson in *Fitzpatrick* v *IRC (No 2)* [1994] 1 WLR 306 (HL), 326G where (disagreeing with the majority's characterisation of the issue as one of mixed fact and law) he stated 'I would hold that both the Court of Session and the Court of Appeal were correct in holding that, on the differing findings of fact made by each body of commissioners, both determinations were correct in law and both appeals should be dismissed. I repeat that I would not regard this result as satisfactory. The conclusion reached by the majority of your Lordships is more practical. I regret that I feel unable to join in it because in my view the limits on the court's jurisdiction in tax appeals precludes me.'

85 n 82 above at [104].

86 Finance (No 2) Act 2017, s 34 and Sch 11.

87 *R (on the application of Cartref Care Home Ltd and others)* v *Revenue and Customs Commissioners* [2019] EWHC 3382 (Admin); [2020] STC 516; *R (on the application of Zeeman and another)* v *Revenue and Customs Commissioners* [2020] EWHC 794 (Admin); [2020] STC 828.

for the promoters[88] and for the enablers[89] of tax avoidance on the basis that those regimes restrict access to legal advice. While determining the balance is primarily a question for parliament, any legislation must be interpreted by the courts and will necessarily be interpreted against a presumption of legality. In so interpreting the legislation concerning follower notices, the Supreme Court seems to have failed to appreciate how in many other areas of law (as discussed above) rights of access to courts are limited on the basis of expediency and so mistook the balance to be in favour of the taxpayer.

88 Finance Act 2015, Part 5.
89 Finance (No 2) Act 2017, s 65 and Sch 16.