INCOME TAX – surcharges for non-payment of tax – taxpayer challenging whether closure notices created a tax debt by way of judicial review – whether reasonable excuse for non-payment – whether taxpayer was expected to pay tax

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

Appeal number: UT/2020/000337

BETWEEN

WILLIAM ARCHER **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: MRS JUSTICE JOANNA SMITH
JUDGE JONATHAN CANNAN

Sitting in public at The Rolls Building, Fetter Lane, London on 24 November 2021

Amanda Brown QC (of KPMG LLP) and Conrad McDonnell (instructed by KPMG LLP) for the Appellant

Michael Ripley instructed by the Solicitor's Office and Legal Services of HM Revenue and Customs for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against a decision of the First-tier Tribunal ("**the FTT**") released on 8 July 2020 ("**the Decision**"). The FTT dismissed Mr Archer's appeal against notices of surcharge pursuant to section 59C Taxes Management Act 1970 ("**TMA 1970**"). The surcharges totalled £1,403,181.78. They were imposed because the respondents ("**HMRC**") contended that Mr Archer had failed to pay tax which was due and payable following enquiries into his self-assessment tax returns for 2001-02 and 2002-03 ("**the Relevant Years**"). Closure notices in relation to those enquiries were issued on 2 February 2016 ("**the Closure Notices**").

2. By way of brief summary at this stage, HMRC contended that the tax due pursuant to the Closure Notices was approximately £14m. Mr Archer did not pay that amount within the time for payment. It was Mr Archer's position that the Closure Notices did not make any amendment to his self-assessments and as a result no tax was due and payable by him. HMRC threatened bankruptcy proceedings and Mr Archer commenced judicial review proceedings ("**the JR Proceedings**") on 29 March 2016, challenging HMRC's decision to commence bankruptcy proceedings. Mr Archer obtained interim relief restraining HMRC from taking steps to bankrupt him pending determination of the JR Proceedings.

3. The application for judicial review was dismissed by Jay J on 21 February 2017 following a hearing ([2017] EWHC 296 (Admin)). Mr Archer obtained permission to appeal from the Court of Appeal, but his appeal was dismissed on 30 November 2017 ([2017] EWCA (Civ) 1962). Mr Archer applied to the Supreme Court for permission to appeal but permission was refused on 13 June 2018. Mr Archer then paid the tax and interest of some £22.5m on 22 June 2018.

4. HMRC can issue a tax-geared surcharge notice under TMA 1970 where tax remains unpaid more than 28 days after the due date, and a further surcharge notice where the tax remains unpaid more than 6 months after the due date. In this case, HMRC issued surcharge notices on 10 May 2016, together with further surcharge notices on various dates thereafter. It is these surcharges which are under appeal. Before the FTT, Mr Archer raised various points as to the validity of the surcharge notices and it was accepted by HMRC that some of the further surcharge notices were invalid because they were not served on Mr Archer. However, the FTT found that the remaining further surcharges were valid. There is no appeal against that decision.

5. It was Mr Archer's case in relation to the valid surcharge notices that he had a reasonable excuse for non-payment of the underlying tax. In summary, his grounds of appeal to the FTT were as follows:

> (1) He had a reasonable belief that no payment was due to HMRC because the Closure Notices did not make any amendment to his self-assessments.
>
> (2) In the alternative, he had an arguable case with a real prospect of success that no payment was due.
>
> (3) Fairness required that no payment of the claimed tax debt should be made until after the conclusion of the JR Proceedings.

6. The FTT dismissed the appeal. It was not satisfied on the evidence that Mr Archer had a reasonable excuse for not paying the tax until 22 June 2018. We will need to address the detail of the FTT's findings in due course.

THE GROUNDS OF APPEAL

7. There are four grounds of appeal to this tribunal. Mr Archer has permission to appeal from the FTT on at least two grounds which we can summarise as follows:

> (1) The Decision is affected by a fundamental error of reasoning. The FTT wrongly considered that, as a matter of law, Mr Archer could and should have appealed the Closure Notices to the FTT rather than seeking to challenge them by way of judicial review. The FTT wrongly proceeded on the basis that if Mr Archer had appealed to the FTT then it could have determined whether or not the disputed tax was due and payable and the disputed tax would not have been postponed. This led the FTT to find that it was not a reasonable excuse for the Appellant to have chosen the judicial review route, which involved delaying the tax payment as a result of the interim relief ordered by the Courts.
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> (2) The FTT failed properly to apply the decision of the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156 (TCC) as to what amounts to a reasonable excuse. It wrongly placed sole or undue focus on Mr Archer's subjective belief and failed to consider his acts, the situation he found himself in and relevant external facts.

8. However, the FTT refused permission to appeal on grounds that alleged the tax was not due and payable. It did so on the basis of what it considered to have been a concession by Mr McDonnell, who appeared before the FTT on behalf of Mr Archer, that the tax was due and payable, a concession to which we will have to return in due course. In circumstances where the scope of the permission from the FTT was unclear, the Upper Tribunal subsequently gave permission to appeal on the two additional grounds identified by Mr Archer, which may be summarised as follows:

> (3) The FTT failed to recognise that collection of the tax by HMRC prior to 14 June 2018 would have been a conspicuous and indefensible abuse of power and/or otherwise unlawful in the circumstances of the case. As a result, the tax was not payable or was not in practice expected to be paid prior to 14 June 2018 and, in either event, there was a reasonable excuse for non-payment.
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> (4) The FTT failed to recognise that Mr Archer was entitled to rely on certain statements made by HMRC at material times that there was no amount of tax due and payable. Mr Archer was entitled to rely on those statements as establishing a reasonable excuse for non-payment and/or HMRC was estopped from submitting to the contrary. Further, the statements should be construed as HMRC exercising its power to extend the time for payment pursuant to s 118(2) TMA 1970.

9. It is Mr Archer's case on this appeal, that in light of these errors, the whole of the FTT's reasoning on "reasonable excuse" must be reconsidered by the Upper Tribunal.

RELEVANT STATUTORY PROVISIONS

10. At this stage it is convenient to set out some of the statutory provisions relevant to the appeal which will also give some context for the various judgments in the JR Proceedings.

11. The Closure Notices were issued pursuant to section 28A TMA 1970 which provides as follows:

> 28A(1) An enquiry under section 9A(1) or 12ZM of this Act is completed when an officer of the Board by notice (a 'closure notice') informs the taxpayer that he has completed his enquiries and states his conclusions.
>
> In this section 'the taxpayer' means the person to whom notice of enquiry was given.
>
> (2) A closure notice must either:

(a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendments of the return required to give effect to his conclusions.

12. Section 31(1)(b) TMA 1970 provides for appeals against Closure Notices as follows:

31(1) An appeal may be brought against—

(a) …

(b) any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return)…

13. The following provisions in relation to the obligation to pay tax are relevant:

59B(5) An amount of tax which is payable or repayable as a result of the amendment or correction of a self-assessment under:

(*a*) section … 28A of this Act (amendment or correction of return under section 8 or 8A of this Act), or

(*b*) …

is payable (or repayable) on or before the day specified by the relevant provision of Schedule 3ZA to this Act.

14. Paragraph 5 Schedule 3ZA TMA 1970 provides:

5(1) This paragraph applies where an amount of tax … is payable or repayable as a result of the amendment of a self-assessment or advance self-assessment under section 28A of this Act (amendment of return by closure notice following enquiry).

(2) The amount is payable (or repayable) on or before the day following the end of the period of 30 days beginning with the day on which the closure notice was given.

15. Surcharges for non-payment of tax following the issue of closure notices are imposed pursuant to s 59C TMA 1970. The relevant sub-sections are as follows:

59C(1) This section applies in relation to any income tax or capital gains tax which has become payable by a person (the taxpayer) in accordance with section 55 or 59B of this Act.

(2) Where any of the tax remains unpaid on the day following the expiry of 28 days from the due date, the taxpayer shall be liable to a surcharge equal to 5 per cent of the unpaid tax.

(3) Where any of the tax remains unpaid on the day following the expiry of 6 months from the due date, the taxpayer shall be liable to a further surcharge equal to 5 per cent of the unpaid tax.

(7) An appeal may be brought against the imposition of a surcharge under subsection (2) or (3) above within the period of 30 days beginning with the date on which the surcharge is imposed.

(9) On an appeal under subsection (7) above section 50(6) to (8) of this Act shall not apply but the Commissioners may:

(*a*) if it appears to them that, throughout the period of default, the taxpayer had a reasonable excuse for not paying the tax, set aside the imposition of the surcharge; or

(*b*) if it does not so appear to them, confirm the imposition of the surcharge.

(10) Inability to pay the tax shall not be regarded as a reasonable excuse for the purposes of subsection (9) above.

(12) In this section:

'the due date', in relation to any tax, means the date on which the tax becomes due and payable;

'the period of default', in relation to any tax which remained unpaid after the due date, means the period beginning with that date and ending with the day before that on which the tax was paid.

16. Section 114 TMA 1970 provides that certain errors in an assessment or other proceeding, including for present purposes a closure notice, shall not invalidate the assessment:

> 114. An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.

17. Section 114 TMA 1970 does not refer to any requirement for a "claim" to obtain the benefit of the section. However, where section 114 applies, it gives HMRC or the taxpayer (as the case may be) a right to claim that the assessment shall not be affected by reason of the defect (see Lewison LJ in the Court of Appeal at [33], with reference to *Baylis v Gregory* [1989] AC 398 at 438). The Court of Appeal described this as a "substantive right" and not a "procedural right". In effect, it is the right to assert the validity of an assessment affected by a relevant mistake or defect.

18. Section 118(2) TMA 1970 provides that:

> 118(2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it in such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.

19. There are essentially three elements to s 118(2). Firstly, there is deemed to be no default if a taxpayer agrees an extended time limit with HMRC, for example a time to pay arrangement. Secondly, there is deemed to be no default where a taxpayer has a reasonable excuse for not doing something. Thirdly, when a reasonable excuse ceases, there is deemed to be no default if the taxpayer does the act without unreasonable delay after the excuse ceases.

20. Section 55 TMA 1970 deals with payment of tax where there is an appeal to the FTT against an amendment in a closure notice. Essentially, the tax remains payable, unless HMRC agrees to postpone payment of the tax or the Tribunal directs postponement:

> 55(1) This section applies to an appeal to the tribunal against -
>
> (*a*) …
>
> (*aa*) a conclusion stated or amendment made by a closure notice under section 28A …
>
> (2) Except as otherwise provided by the following provisions of this section, the tax charged –
>
> (*a*) by the amendment or assessment, or
>
> (*b*) where the appeal is against a conclusion stated by a closure notice, as a result of that conclusion,
>
> shall be due and payable as if there had been no appeal.
>
> (3) If the appellant has grounds for believing that the amendment or assessment overcharges the appellant to tax, or as a result of the conclusion stated in the closure notice the tax charged on the appellant is excessive, the appellant may –
>
> (*a*) first apply by notice in writing to HMRC within 30 days of the specified date for a determination by them of the amount of tax the payment of which should be postponed pending the determination of the appeal;

(*b*) where such a determination is not agreed, refer the application for postponement to the tribunal within 30 days from the date of the document notifying HMRC's decision on the amount to be postponed.

An application under paragraph (*a*) must state the amount believed to be overcharged to tax and the grounds for that belief.

21. It is clear from section 55(8B)-(8D) TMA 1970, to which we will refer in due course, that the position is different in the case of a sum specified as payable in an accelerated payment notice ("**APN**") issued by HMRC pursuant to the Finance Act 2014 ("**FA 2014**"). In broad terms, where HMRC considers that a taxpayer is seeking to obtain a tax advantage from tax avoidance arrangements it may serve an APN which requires payment of an amount equal to the understated tax. That payment is treated as being made on account of the understated tax. The result is that the tax may become payable sooner than would otherwise have been the case. The taxpayer is given an opportunity to make representations objecting to the APN or the payment specified in the APN. HMRC must then either confirm the amount specified in the APN or amend the notice to specify a different amount.

22. The APN regime is relevant to Ground 1 of this appeal and we consider the provisions in more detail below.

THE FTT'S FINDINGS OF FACT

23. The FTT heard no oral evidence and neither party served witness statements in relation to the appeal (although there was some evidence in the form of witness statements prepared for the JR Proceedings). The FTT's findings of fact were therefore based on the documentary material before it. That documentary material included the judgments and orders made in the course of the JR Proceedings. The FTT set out its findings of fact at [11] – [51] and we summarise those findings (which are not controversial) so far as they are relevant to the issues before us.

24. HMRC opened enquiries into Mr Archer's tax returns for the Relevant Years on 18 July 2003 and 30 June 2004 respectively. The enquiries concerned the use of two marketed tax avoidance schemes. In 2009 the Court of Appeal decided that neither of the schemes was effective.

25. HMRC issued Follower Notices ("**FNs**") and APNs to Mr Archer in respect of the Relevant Years in October 2015 and January 2016. The FTT acknowledged that the APNs did not give rise to any debt due and payable by Mr Archer. This was because KPMG made statutory representations on Mr Archer's behalf on 27 January 2016 in relation to the APNs and HMRC did not respond.

26. KPMG made applications to the FTT in December 2015 and January 2016 pursuant to section 28A(4) TMA 1970 for directions that HMRC be required to issue closure notices in respect of the enquiries. In the event, prior to the hearing of those applications, HMRC issued the Closure Notices on 3 February 2016.

27. Mr Archer had until 3 March 2016 to lodge any appeal against the Closure Notices with HMRC. However, on 2 March 2016, KPMG notified HMRC that the Closure Notices did not make any amendments to Mr Archer's self-assessments for the Relevant Years. This was on the basis that the Closure Notices did not expressly state any amount of tax due. KPMG said that in their view the Closure Notices did not create any payment obligation under section 59B TMA 1970 and there was no date for payment under para 5 Sch3ZA, TMA 1970. As a result,

the original self-assessment stood and KPMG asserted that as the Closure Notices did not over-charge Mr Archer there was nothing to appeal.

28. In a letter dated 10 March 2016, HMRC set out the basis on which they maintained that the Closures Notices were valid. It was noted that Mr Archer had not appealed the Closure Notices and HMRC stated that in their view the tax was due and payable and they would commence any appropriate enforcement proceedings in due course.

29. HMRC's debt management team wrote to Mr Archer on 11 March 2016 warning of bankruptcy proceedings if a debt of £22,541,746.48 was not paid within seven working days. Discussions via email and telephone ensued between KPMG and HMRC. On 22 March 2016, HMRC confirmed in a telephone call that it would commence bankruptcy proceedings in respect of the Closure Notices in the week commencing 28 March 2016.

30. KPMG sent a judicial review pre-action protocol letter to HMRC on 24 March 2016. They warned that Mr Archer intended to commence judicial review of HMRC's decision to initiate bankruptcy proceedings on the basis that no debt was due and payable to HMRC. They asserted that HMRC had failed to assess Mr Archer to tax in the claimed amount, or any amount, in relation to the Relevant Years. KPMG maintained that the FTT had no jurisdiction to determine the question of whether there was a debt due and payable to HMRC for the purposes of bankruptcy proceedings.

31. Mr Archer filed a claim commencing the JR Proceedings in the High Court on 29 March 2016, applying for an order quashing HMRC's decision to bankrupt him. At the same time, he made an application for urgent interim relief restraining HMRC from issuing a statutory demand or commencing any bankruptcy proceedings until further order.

32. Mr Archer's claim for interim relief was heard by Kerr J on 29 March 2016. The application was granted and HMRC was restrained from issuing or serving a statutory demand or taking steps towards Mr Archer's bankruptcy in respect of the Relevant Years until further order.

33. By reference to a note of the hearing before Kerr J produced by KPMG, the FTT found that Kerr J had expressed some doubt as to whether what he described as a "procedural irregularity" with the Closure Notices would prevent HMRC from pursuing the substantial amount of money involved and that he had noted that the letter from HMRC dated 11 March 2016 told Mr Archer what money was owed. However, Kerr J considered that Mr Archer had raised a strong prima facie case that the tax debt of £22 million odd had not yet crystallised, even if in the end it may not turn out to be a good point.

34. Permission for Mr Archer's judicial review application to proceed was granted by Whipple J on 21 September 2016 on the basis that the claim was arguable. At the same time the order for interim relief was renewed.

35. The application for judicial review came before Jay J on 1 February 2017. In a judgment handed down on 21 February 2017 he dismissed the application. The FTT records at [25] of the Decision that Jay J decided as follows:

> (1) Section 28A TMA 1970 requires that a closure notice itself amend the taxpayer's return by stating the amount of tax due. The Closure Notices were therefore defective.
>
> (2) Section 114 TMA 1970 did not "save the errors" in the Closure Notices to make them effective to give rise to a debt due and payable. Although that section could cover purported assessments, there was no purported assessment in Mr Archer's case.
>
> (3) However, there was nothing to preclude Mr Archer from issuing notices of appeal against the Closure Notices under section 3l(l)(b) TMA 1970 challenging HMRC's

conclusions. The FTT, on an appeal under section 31(1)(b), would and should have deployed section 114(1) to cure the defects in the Closure Notices.

(4) The FTT quoted the following facts found by Jay J at [97]:

> "(a)…The taxpayer is a sophisticated businessman who has the benefit of high-powered advice. The APNs and the FNs explained HMRC's position very clearly, and the taxpayer did not place any of the amounts (*qua* figures) in dispute. Even setting to one side the point that I have found that the figures and sufficient of the methodology would have been visible in the "view accounts" section of the website, KPMG could have done the arithmetic for themselves. Instead, they waited until almost the last possible moment before raising their objections on the notices…[but] this was not a simple case: it had taken many years to resolve (unconscionably long, in my view), and KPMG were continuing to raise other technical arguments in their replies to the APNs.
>
> (b) HMRC made amendments to Mr Archer's computer returns which were visible on-line."

(5) As a result, Mr Archer had an effective right of appeal against the Closure Notices and the judicial review was an abuse of process.

36. The FTT also referred at [26] to the following findings of fact made by Jay J but not challenged in the Court of Appeal:

(1) Mr Archer had been notified of HMRC's position, including the precise sums said to be due, by the APNs and the FNs before the date of issue of the Closure Notices.

(2) The Closure Notices made it clear that HMRC were rejecting the whole of Mr Archer' s claims for loss relief.

(3) Neither Mr Archer nor KPMG challenged HMRC's arithmetic and KPMG could have done the arithmetic themselves.

(4) HMRC did in fact amend Mr Archer's on-line returns and they were visible on HMRC's website.

(5) Although the conclusions in the Closure Notices were brief, they were sufficient to enable Mr Archer to understand where he stood with HMRC.

37. The FTT also observed that Jay J had commented that if his analysis about the application of section 114 TMA 1970 by the FTT was incorrect, the application for judicial review would have succeeded, but HMRC would have been able to issue fresh closure notices.

38. The FTT records that Mr Archer was granted permission to appeal by Jay J. In fact, the judge refused permission and an application to extend the interim relief was also refused. However, in making his order, Jay J nevertheless observed:

> "I am persuaded by the Claimant that he has a real prospect of success in the Court of Appeal on my approach to s.114 of the TMA in relation to the hypothetical appeal the Claimant did not bring but in my view should have brought… However, the Claimant must lose one way or the other…. the Claimant will need to persuade the CoA that, even if he is right about s.114 and any hypothetical appeal, he should not be paying the entirety of the tax in dispute. The ·Claimant's argument that HMRC would be precluded from serving further closure notices is without merit… It follows that it would be inappropriate to order interim relief in this case… If the Claimant wishes to take this case further, he should nonetheless pay the tax due. In the event that (a) he wins on the s.114 point in the Court of Appeal, and (b) manages to secure a modest reduction of his tax liability on any appeal he might bring against further closure notices, HMRC would repay the balance."

39. KPMG immediately asked HMRC for an undertaking that they would not do anything that would have been a breach of the interim relief order granted by Kerr J if that had continued. On the same day KPMG applied to the Court of Appeal for permission to appeal and applied to that court to renew the order for interim relief on an expedited basis.

40. HMRC wrote to KPMG on 27 February 2017 saying that in view of the decision of Jay J, HMRC would proceed to bankrupt Mr Archer unless he paid the debt by 1 March 2017. KPMG referred this correspondence to the Court of Appeal.

41. Lord Justice Henderson granted permission to appeal on 7 March 2017 and reinstated the interim relief. He stated:

> "Permission to appeal: the substantive grounds of appeal raise important questions of principle about the content of closure notices, the scope of s.114 of the Taxes Management Act 1970 ("TMA 1970"), and the application of the Autologic principle to the facts of this case. I am satisfied that the grounds have a real prospect of success.
>
> Interim relief: the interim relief granted by the Order of Kerr J dated 29 March 2016 should be reinstated and continue until determination of the appeal. I consider that it would be wrong in principle for HMRC to initiate or pursue bankruptcy proceedings against Mr Archer at a time when, according to the judge, the closure notices were ineffective for failure to specify the amount of tax due, that failure was incapable of remedy under s. 114, and there was accordingly no statutory debt due under section 59B of TMA 1970".

42. The appeal was heard by the Court of Appeal on 22 November 2017. Judgment was given on 30 November 2017 dismissing Mr Archer's appeal.

43. The FTT records at [33] that the Court of Appeal decided:

> "(1) The self-assessment that Mr Archer was required to file as part of his return was required to state the amount of tax for which he was liable. One would naturally expect that an amendment to that assessment must likewise state the amended amount of tax for which he is liable. The formal requirements for the validity of a closure notice must be the same irrespective of how sophisticated the particular taxpayer is or how skilled his professional advisers might be if he has any. Section 28A(2)(b) TMA 1970 requires the amendment of the return to be made by the closure notice itself; not merely by an officer of HMRC. Unless incorporated by reference, HMRC's amendment of the on-line return cannot itself satisfy the words of the sub-section.
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> (2) The two conclusions reached by Jay J regarding the application of section 114 TMA were irreconcilable in that he said on the one hand there was nothing on which section 114 could bite in the proceedings for judicial review, but on the other hand that section 114 could validate a closure notice, at least in the context of an appeal to the FTT.
>
> (3) The approach to the application of section 114 TMA 1970 set out in *HMRC v Donaldson* [2016] EWCA Civ 761 was applied. In applying an objective test the reader of the Closure Notices must be taken to be equipped with the knowledge that Mr Archer and KPMG had, including knowledge of what had led to the enquiry and what HMRC' s conclusions were. Mr Archer's liability could have been easily worked out, and he could have been in no doubt what he owed HMRC. He had in addition been informed by the APNs as to what HMRC asserted was his liability.
>
> (4) HMRC's omission to amend his return to accord with their conclusions was a matter of form rather than substance on the particular facts of this case. Therefore, the Closure Notices were validated by section 114. Section 114 applied irrespective of the forum in which it was relied upon. Therefore, Mr Archer owed HMRC a debt which exceeded the bankruptcy limit."

44. The Court of Appeal refused permission to appeal to the Supreme Court. The interim relief order of Henderson LJ was discharged and Mr Archer's application to extend the interim relief was refused.

45. HMRC wrote to KPMG on 1 December 2017 saying that enforcement action would be taken if Mr Archer did not pay the outstanding debt within 14 days.

46. KPMG responded on 5 December 2017 saying that they intended to make an urgent application to the Supreme Court for permission to appeal and for interim relief. They stated that an application for expedition would not be necessary if HMRC would undertake not to take any further steps towards Mr Archer's bankruptcy pending the outcome of the application.

47. HMRC agreed not to proceed to bankrupt Mr Archer for the debt due whilst the applications were being considered by the Supreme Court, provided that Mr Archer agreed in return not to ask the Supreme Court to consider the applications on an urgent basis. It was accepted by the parties that HMRC were anxious to avoid the Supreme Court being required to consider an expedited application for interim relief. The offer was accepted by KPMG on 7 December 2017. The terms of the agreement do not appear in the Decision, but it was stated in HMRC's letter dated 6 December 2017 as follows:

> "HMRC will, however, agree not to proceed to bankrupt the Appellant for the debt of tax due for 2001/02 and 2002/03 whilst the applications are being considered by the Supreme Court provided that the Appellant agrees in return not to ask the Supreme Court to consider the applications on an urgent basis."

48. Mr Archer made his application to the Supreme Court for permission to appeal and for interim relief on 7 December 2017. HMRC objected to both applications and served notice of objection on 12 December 2017. They submitted that the application for interim relief was an abuse of process because it side-stepped the statutory scheme of the tax legislation which required Mr Archer to pay the disputed tax in circumstances where an APN had been issued before appealing the Closure Notices. HMRC maintained that the tax debt remained payable.

49. The Supreme Court refused Mr Archer's application for permission to appeal on 13 June 2018 on the grounds that it did not raise an arguable point of law.

50. Mr Archer paid the sum of £22,541,746.78 to HMRC on 22 June 2018.

51. We turn now to the surcharges issued by HMRC. The FTT described the surcharges issued to Mr Archer at [41] – [48] of the Decision. The First Surcharges were issued on 10 May 2016 in the sums of £360,588 and £339,256 for each Relevant Year. Mr Archer notified an appeal against those surcharges. The appeal was stood over pending the outcome of the JR Proceedings. Further surcharges were issued on 8 February 2019 in the sums of £362,334 and £339,256 for each Relevant Year. On the same date an additional surcharge was issued in the sum of £1,746 relating to tax year 2001-02. Mr Archer notified appeals against those surcharges. The FTT dismissed what might be described as technical challenges to the validity of the further and additional surcharges and, as we have said, there is no appeal against that decision.

52. The FTT made findings of fact at [49]-[51] of the Decision in relation to Mr Archer's online self-assessment account. The online account operates as a statement showing amounts due from a taxpayer, any adjustments to those amounts and any payments and claims made by the taxpayer. Mr Archer's account could be viewed online by Mr Archer and KPMG.

53. Mr Archer's online account statement for the period from 18 June 2017 to 17 June 2018 showed credit entries in relation to the Relevant Years with the narrative "Collection Suspended". As a result of those credit entries, the account showed a net balance of zero.

54. HMRC emailed KPMG on 19 June 2018 to say that the charges that had previously been held over had now been released. At that point, the amounts previously shown as credits against "Collection Suspended" were shown as £0. This meant that the balance shown as due from Mr Archer included the tax and interest claimed of some £22.5m.

THE FTT'S DECISION

55. In order to fully understand the Decision it is necessary for us to quote from it at length. The principal issue for the FTT was whether Mr Archer had a reasonable excuse for not paying the tax due for the Relevant Years. The FTT summarised the basis on which Mr Archer contended that he had a reasonable excuse at [107] as follows:

> "107. Mr Archer maintains that he had a reasonable excuse for the later payment of tax for the Relevant Years because of the judicial review litigation concerning the existence of an obligation to pay HMRC. In the grounds of appeal it is said that the reasonable excuse consisted of:
>
> (1) the reasonable belief that no payment was due to HMRC in consequence of the Closure Notices on the basis that it was Mr Archer's reasonable view that, as a matter of law, the Closure Notices did not make any amendments to his self-assessments for the Relevant Years and, accordingly, that the Closure Notices did not function to create any payment obligation under s.59B TMA 1970. That is to say, there was no tax debt due to HMRC as a result of the Closure Notices;
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> (2) the fact that the Appellant had an arguable case that no payment was due, with (in the words of Lord Justice Henderson) a real prospect of success, and Mr Archer continued to have an arguable case with a real prospect of success until the decision of the Supreme Court on 13 June 2018;
>
> (3) the general principle - reflected in the injunctions granted by the Administrative Court and the Court of Appeal by way of interim relief and in the undertaking given by HMRC's solicitor on 7 December 2017 which had equivalent effect - that whilst the question of whether a payment is due or not is being considered by the courts in current legal proceedings with a real prospect of success, fairness requires the preservation of the status quo ante; that is to say, fairness requires that no payment of the claimed debt should be made until after the conclusion of the legal proceedings."

56. A question arose as to whether HMRC had conceded that Mr Archer had a reasonable excuse until 30 November 2017 when the Court of Appeal dismissed his appeal. The FTT concluded at [111] that there was no such concession.

57. The FTT dealt with the law on reasonable excuse in paragraphs [76]-[79] of the Decision. In particular, the FTT referred to the guidance given by the Upper Tribunal in *Perrin v HM Revenue & Customs* [2018] UKUT 0156 (TCC) at [81], which both parties accepted should be applied:

> "81. When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the

matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

58. Later in the Decision, the FTT referred to various other decisions as follows:

(1) The FTT agreed with the approach of Judge Berner in *Barrett v HM Revenue & Customs* [2015] UKFTT 329 (TC):

"161. The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual's conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different."

(2) The FTT referred to two FTT decisions on reasonable excuse for non-payment of tax in the context of APNs – *Chapman v HM Revenue & Customs* [2017] UKFTT 0800 (TC) and *Sheiling Properties v HM Revenue & Customs* [2018] UKFTT 0247. The latter case has subsequently been appealed and we refer to the Upper Tribunal's decision in detail below.

59. It is convenient to refer to *Chapman* at this stage. One of the grounds advanced by the taxpayer in that case as a reasonable excuse for non-payment of the sum specified in the APN was that he considered, on the strength of reputable advice, that the APN was invalid. He had been advised to pursue judicial review proceedings challenging the legality of the APN on the grounds that eventually the APN demand would be found to be unlawful. Judge Hellier at [65] observed that a person should not lightly assume that HMRC are acting unlawfully and then went on at [71] to [74] to consider whether this could be a reasonable excuse:

"71. …There must I think be circumstances in which it is reasonable to consider an APN unlawful and on that basis reasonably decline to pay it.

72. But those circumstances will I believe be exceptional. If one starts from the presumption that HMRC should not lightly be taken to act unlawfully, it will generally be only where there is an obvious or gross error in the notice (even though it may comply with the formal requirements of section 220) that belief in its unlawfulness could be a reasonable excuse for non payment. An example might be where the decimal point had slipped in the statement of the amount to be paid.

…

74. However, for such a belief reasonably to lead to non payment, it must be robustly based, and the decision to act on it must be reasonable. An opinion, even from an eminent practitioner, that "you should win" may not be enough. In this appeal neither Mr Chapman nor Mr Noorani pointed to any patent error in the APN, and I was not shown the advice received. I was therefore not able to conclude that it was so robust that it would have been reasonable not to pay."

60. The FTT in the present case agreed with Judge Hellier's observation that if a taxpayer believes that an amendment to a self-assessment is wrong and fails to pay the tax when due, it is possible for the taxpayer to establish a reasonable excuse if, in all the circumstances, the behaviour was reasonable (paragraph [112]). Although the FTT accepted the submission that *Chapman* should be read in its own context, i.e. as being concerned with whether there is a reasonable excuse for late payment under the specific regime applicable to APNs, nevertheless, the FTT also expressed the view that in one sense this was no more than "an extrapolation of the *Perrin* principle requiring consideration of all the circumstances" (paragraph [114]). It then went on to acknowledge that in this case, it is similarly relevant to bear in mind the "background legislative structure" which Mr Archer faced:

"115. …Although the APNs issued to [Mr Archer] had not given rise to a debt, because a response from HMRC was outstanding, the effect of section 55(8B) [TMA 1970] is that the mere issuance of the APNs meant that the amounts to which they related could not be postponed on an appeal of the Closure Notices. The APN amounts accounted for nearly all of the amounts at issue under the Closure Notices. A small amount, less than £7000, relating to a benefit in kind, was not the subject of the APNs. Therefore very nearly all of the £22.5 million would have been payable on an appeal of the Closure Notices and, in just the same way as in an appeal of an APN, that amount would have been repayable by HMRC if Mr Archer had won his appeal.

116. … Notably Mr Archer did not seek judicial review of the Closure Notices, albeit that in considering the lawfulness of HMRC's actions to initiate bankruptcy proceedings the courts were bound to address the validity of the Closure Notices in determining whether there was in fact a debt due and payable. This meant that payment of the tax claimed by HMRC would have rendered the judicial review nugatory and the taxpayer would not have been able to proceed. Once he had gone down the judicial review track Mr Archer therefore could not pay the tax for the Relevant Years and continue on that litigation track. In contrast, in the reported cases involving judicial review of APNs, payment of those APNs could be made without rendering the judicial review of the APNs themselves nugatory.

117. Mr Archer could not have pursued his challenge of the bankruptcy threat in the FTT, but it is clear, as a result of the Court of Appeal decision if not before, that Mr Archer could have appealed the imposition of tax resulting from the Closure Notices despite their apparent defects. However, the benefit of hindsight knowing the position as a result of the Court of Appeal decision cannot inform me about Mr Archer's knowledge and actions at the relevant times prior to that decision."

61. We note in passing the FTT's reference to an appeal of an APN. In fact, there is no appeal procedure in relation to APNs, simply the opportunity to make representations to HMRC. However, it is clear from these paragraphs that the FTT considered that Mr Archer could have appealed the Closure Notices to the FTT and that, if he had done so, he would have been required to pay the tax said by HMRC to be due and payable.

62. At [119], the FTT acknowledged, however, that the mere fact that Mr Archer could have appealed the Closure Notices "does not in itself mean that his conduct should be regarded as unreasonable" and it identified what it described as a "significant evidential problem" in this case:

"119. …*Perrin* identifies a non-exclusive list of factors which can be relevant to determining whether reasonable excuse exists, including a person's belief at the relevant time as well as all other relevant circumstances. Indeed, the grounds of appeal refer to Mr Archer's "reasonable belief". However, there is a significant evidential problem in this case. There is no evidence from Mr Archer himself about his belief at any stage. No witness statement has been provided from him save that which was prepared in 2016 for the judicial review and he did not attend the hearing."

63. Although it is not entirely clear, there are grounds for reading the FTT's Decision as reflecting the view that Mr Archer not only could have appealed the Closure Notices, but that he should have appealed them. We return to this later. For present purposes, we set out what the FTT said at [122] – [124] of the Decision, with particular reference to [123]:

"122. Mr Archer did not respond to HMRC's letter [dated 11 March 2016] by lodging an appeal. As Mr Shea submitted, this tribunal hears numerous cases where the issue in dispute is the validity of the notice. I recognise that events moved quickly after 10 March with that letter being followed up the next day with the letter from HMRC threatening bankruptcy proceedings, but again there is no evidence why KPMG did not contact HMRC to appeal the Closure Notices.

123. The witness statement of the senior KPMG manager advising Mr Archer which was prepared for the judicial review application makes reference to the fact that HMRC would only

be pursuing the bankruptcy proceedings if closure notices issued to Mr Archer were not appealed. Therefore the simple act of making the appeals would have stopped the bankruptcy proceedings. If the FTT considered no valid appeal could be made because there was nothing to appeal it is hard to understand how HMRC could then have proceeded with bankruptcy and at that stage if they had done so Mr Archer could have pursued the judicial review.

124. Ms Bews' Witness Statement for the judicial review application makes detailed reference to the perceived inadequacies of the Closure Notices, but does not engage with the assertion made by HMRC that the Closure Notices could be appealed. Ms Bews states in the same witness statement that she and Mr Archer were unaware of how much HMRC thought was due from Mr Archer for the Relevant Years as there was no amendment of the self-assessment in the Closure Notices and no accompanying calculations, yet this was found to be incorrect by Mr Justice Jay. He concluded, and this was confirmed by the Court of Appeal, that KPMG did know where Mr Archer stood with HMRC."

64. In addition, the FTT was plainly concerned at the lack of evidence from Mr Archer addressing his beliefs at any time:

"125. Was Mr Archer influenced, as HMRC have stated in the judicial review documents, in taking the decision that he would not or could not appeal the Closure Notices by the fact that on appeal he would have been required to pay the £22.5 million for the reasons explained earlier? I cannot make any findings about this because Mr Archer has provided no evidence about the assessment carried out by him and his advisers.

126. Mr McDonnell submitted that in this case it is not a matter of Mr Archer's beliefs. Instead, the evidence of the High Court and Court of Appeal decisions shows that Mr Archer pursued a reasonable course of action in making his application for judicial review and in the circumstances of the threatened bankruptcy it provided a reasonable excuse for non-payment of the underlying tax because payment of the tax would bring the judicial review to an end."

65. The FTT did not accept that submission. It summarised its views as follows:

"129. The High Court and Court of Appeal documents show that Mr Archer had a reasonable basis to challenge the threatened bankruptcy as what the Court of Appeal described as "an entirely technical" matter as to whether a debt had been created for the purposes of the Insolvency Act 1986 and that was not a question for the FTT. The Court of Appeal made clear that the fact that a tax issue arises in proceedings to collect an amount claimed to be due by HMRC does not mean that the FTT is the only place in which the dispute can be determined. It is clear that Mr Archer was entitled to seek judicial review of the bankruptcy actions of HMRC, but in much the same way as in the context of the APN cases, that does not without more mean that his action in taking that course was a reasonable excuse for not taking the alternative route of appealing the Closure Notices and paying the dispute (*sic*) tax to do so. If, as Mr McDonnell urges, I simply look to the decisions, there remains an evidential hole in the evidence provided by Mr Archer about the basis on which the decision was made by him not to appeal the Closure Notices as invited by HMRC and pay the tax at that time. As Lord Justice Lewison stated "Mr Archer could have appealed against the conclusions stated in the closure notices but has chosen not to do so".

130. The reliance on the court documents alone as showing the reasonable excuse raises a further problem for Mr Archer's case. Mr Justice Jay said in his decision that it would be inappropriate to make a further order for interim relief and if Mr Archer wished to take the case further he should pay the tax due. Therefore on 21 February 2017 any reasonable excuse shown by the court documents ceased until the grant of interim relief by Lord Justice Henderson on 7 March 2017. There is no other evidence to fill the evidential gap as to why payment was not made at that time and on what basis it was considered by Mr Archer that he had a sufficiently strong case to justify not carrying out Mr Justice Jay's direction. .

131. Mr Archer has not provided any evidence of his belief or understanding about the strength of his case at any point. I consider that to show that he had a reasonable excuse for not paying

the tax he should show "robust advice" or what Judge Richards in *Sheiling Properties* described as a "high degree of confidence" that he could not appeal the Closure Notices.

132. It is undoubtedly the case that Mr Justice Kerr decided that there was a strong prima facie case in the judicial review and Lord Justice Henderson decided that the case raised important points of principle and had a real prospect of success. However, even if, despite my reservations described above, I were to find the High Court and Court of Appeal decisions to be sufficient to show that Mr Archer had a reasonable excuse for not paying the tax, I would also find that the evidence of that reasonable excuse comes to an end on 30 November 2017 when the Court of Appeal made its decision and refused permission to appeal to the Supreme Court. That is because there is then a further gap in the evidence provided to me by Mr Archer. The fact that Mr Archer had the right to continue litigation is insufficient in itself to show that from that point he had a reasonable excuse without any further evidence about the prospects of success."

66. A key issue in the present appeal is whether the principal basis on which the FTT dismissed Mr Archer's appeal was the absence of any evidence as to what he believed in relation to the obligation to pay the tax. We return to that issue when we come to consider Ground 1. What can be seen from these passages is that even if the FTT had accepted Mr McDonnell's submission that it could just "look to the decisions" of the courts to establish a reasonable excuse, it considered that there were still "evidential gaps" when Mr Archer had not provided evidence as to why payment was not made in the following periods:

(1) 21 February 2017 to 7 March 2017: On 21 February 2017, Jay J had dismissed the application for judicial review and refused interim relief restraining any bankruptcy proceedings. Interim relief was not granted until the order of Henderson LJ on 7 March 2017.

(2) 30 November 2017 onwards: On 30 November 2017 the Court of Appeal dismissed Mr Archer's appeal and refused permission to appeal to the Supreme Court.

In relation to these two periods the FTT considered that there was no evidence as to the prospects of success of the JR Proceedings (see paragraph [130] of the Decision set out above together with paragraph [133]:

"133. Mr Archer had lost his case in both the High Court and the Court of Appeal, albeit on differing bases and at that point, if not before, I would expect robust evidence of the likelihood of the Supreme Court overturning the Court of Appeal, in line with the approach taken in *Chapman* and *Sheiling Properties* to counteract the "evidence" from the decisions."

67. Even on the assumption that there was a reasonable excuse up to 30 November 2017 (and the FTT does not appear to have made any clear finding as to this point one way or the other), the FTT found that Mr Archer did not have a reasonable excuse after that date, or at least had not made payment without unreasonable delay after the excuse ceased. The FTT did not consider that HMRC's agreement not to pursue bankruptcy proceedings after that date, or the information available to Mr Archer on his self-assessment account indicating "collection suspended", justified the delay:

"134. That leads to the question of whether HMRC's agreement not to pursue the bankruptcy proceedings and/or the "Collection Suspended" notes on Mr Archer's account extended any such reasonable excuse from 30 November 2017.

135. I find that the agreement not to pursue the bankruptcy proceedings was no more than that. There was no suggestion in the agreement that it meant that the underlying tax was not payable. There is no evidence from Mr Archer or his advisors at KPMG to show that they understood anything else beyond the words in the letter of 6 December 2017. Indeed, if I apply

the approach of looking to the judicial review court documents for "evidence", HMRC's grounds of objection to Mr Archer's application for interim relief served on KPMG on 12 December 2017 make it abundantly clear that in HMRC's view the tax remained payable.

136. Similarly, I find little basis to give the words "Collection Suspended" more than their natural meaning. Suspended is defined in the Oxford English dictionary to mean "to cease for a time from the execution or performance of". Therefore the action of collection was ceased for a time, but it was only the collection, or enforcement, of the debt which was paused. Liability to pay was not suspended.

137. … the reader of the entries marked "Collection Suspended" must be taken to be equipped with the knowledge Mr Archer and KPMG had. This case involves a taxpayer benefitting from what Mr Justice Jay described as "high-powered advice". No evidence has been provided from anyone at KPMG or from Mr Archer himself to describe what was understood by the statement entries. I consequently find that there is insufficient basis to conclude in the circumstances overall that they realistically understood the entries in the self-assessment statement to mean that the underlying tax was no longer payable.

138. Mr McDonnell submits that if HMRC had considered the sums were payable at an earlier time, for example following the Court of Appeal's judgement, then HMRC would have shown the sums due in the self-assessment account, cancelling the credits against the "Collection Suspended" entries as was later done on 19 June 2018. I do not agree with the submission. Given the fact that HMRC had agreed not to pursue the money via bankruptcy proceedings, collection was in fact still suspended and the existence of the credit entries is consistent with that agreement. Again the entries must be read in the context of the information and knowledge of KPMG and Mr Archer.

139. I therefore find that neither the HMRC agreement nor the "Collection Suspended" entries (nor a combination of the two) gave rise to a reasonable excuse for Mr Archer not to pay the tax for which he was liable in the Relevant Years."

68. In the light of these findings, the FTT dismissed Mr Archer's appeal against the surcharges.

DISCUSSION

69. We have set out above the four grounds on which Mr Archer has been given permission to pursue his appeal against the decision of the FTT.

Ground 1

70. Mr Archer says that the FTT was wrong to consider that he could and should have appealed the Closure Notices to the FTT rather than commence JR Proceedings. It was also wrong to consider that if he had done so, the FTT could have determined whether or not the disputed tax was due and payable and that the disputed tax would not have been postponed. These errors of law infected the FTT's approach to the question of whether he had a reasonable excuse such that it wrongly considered that, owing to his choice of jurisdiction, Mr Archer should not be entitled (and had no reasonable excuse) to avoid the consequences of non-payment.

71. Ms Amanda Brown QC, now appearing on behalf of Mr Archer, submitted that he had no reason to appeal the conclusions in the Closure Notices, because the conclusions that the schemes did not work were correct. Also, the Closure Notices did not make any amendment to his return which he could have appealed. Hence, there was nothing to appeal under s 31(1)(b) TMA 1970.

72. Ms Brown described the issue as to whether there was any sum of tax which was due and payable as "the Debt Question". She submitted that the FTT would have had no jurisdiction to

determine the Debt Question and that accordingly the FTT had been wrong to take the view in its Decision that the Debt Question could and should have been determined on an appeal against the Closure Notices.

73. Mr Ripley, now appearing on behalf of HMRC, submitted that, on the contrary, the FTT did have jurisdiction to determine the Debt Question. The only point which could not be determined by the FTT was the technical question of whether a debt had been created for the purposes of the Insolvency Act 1986. The FTT could, however, have decided whether the Closure Notices had amended Mr Archer's self-assessment, thereby creating an amount of tax which was due and payable.

74. In support of her submissions, Ms Brown relied upon the decision of the Court of Appeal, and in particular a passage from the judgment of Lewison LJ at [42]-[44], which she submitted held that the FTT did not have jurisdiction to determine the Debt Question:

> **"Was Mr Archer entitled to proceed by way of judicial review?**
>
> 42. In view of my conclusion on the application of section 114 this question does not arise, so I can deal with it shortly. However, if Mr Goldberg [counsel for Mr Archer] had been correct in submitting that there had been no effective amendment of Mr Archer's self-assessments, and therefore no debt presently owing to HMRC, I find it difficult to discern the principle upon which a taxpayer could have been compelled to appeal to the FTT entirely against his own interest.
>
> 43. Mr Archer could have appealed against the conclusions stated in the closure notices but has chosen not to do so. Had he wished to dispute those conclusions then recourse to the FTT would have been his only option. His point is an entirely technical one: no debt has been created for the purposes of the Insolvency Act 1986. That, as it seems to me, is not a question for the FTT. It does not depend on whether HMRC are right or wrong in their conclusions. Nor does it depend on whether the purported closure notices are or are not valid. It is not a question of what the closure notices should have contained: it is a question of what they did contain. The answer depends simply on whether as a matter of fact (taking into account section 114) there was an amendment of Mr Archer's self-assessment. Proceedings to recover an amount of tax said to be due are collection proceedings. The mere fact that some tax issue arises in collection proceedings does not without more mean that the FTT is the only place that the dispute can be determined. If the dispute does not concern the correctness of HMRC's view about how the tax code applies to the taxpayer's case I do not consider that the civil courts are barred from dealing with that dispute: see *HMRC v Cotter* [2013] UKSC 69, [2013] 1 WLR 3514 at [32].
>
> 44. Accordingly, I consider that if HMRC had served Mr Archer with a statutory demand, Mr Archer would have been entitled to apply to set it aside on the ground that there was no debt owing to HMRC (if his legal arguments on the effect of the closure notice had been correct). HMRC did not argue (either before the judge or before us) that the availability of a potential challenge to a statutory demand either in the county court or in the Chancery Division was in itself a reason to refuse judicial review. On the assumption that such an argument would not have prevailed, I cannot see that it makes any difference if, instead, he seeks to challenge the decision to initiate proceedings towards his bankruptcy."

75. In these paragraphs, which were not referred to by the FTT, the Court of Appeal was dealing, *obiter*, with the position if section 114 TMA 1970 did not cure the defects in the Closure Notices. It was HMRC's argument, which had been accepted by Jay J, that in any event Mr Archer had not exhausted his available remedies by appealing to the FTT and therefore he could not proceed by way of judicial review.

76. We do not read these paragraphs as saying that Mr Archer could not have challenged the validity of the Closure Notices in the FTT. Rather, they point out that Mr Archer was entitled to challenge the existence of a debt in the JR Proceedings. The FTT would have no jurisdiction to determine the specific issue of whether the Closure Notices established a debt for the purposes of the Insolvency Act 1986. However, in our judgment, as the Court of Appeal

recognised, the FTT would have jurisdiction to determine whether the conclusions stated in the Closure Notices were correct and whether the Closure Notices properly amended Mr Archer's return so as to give effect to the conclusions stated in the Closure Notices. In this regard, it was not Mr Archer's case in the JR Proceedings that the Closure Notices were invalid. It was his case that they were valid, but did not make any amendment. HMRC's case was that they did make an amendment. We see no reason why that issue would not fall within the jurisdiction of the FTT pursuant to section 31(1)(b) TMA 1970.

77. This is consistent with the references by Lewison LJ in [42] to Mr Archer not being "compelled" to appeal to the FTT, and in [43] to (i) the fact that Mr Archer "could have appealed against the conclusions stated in the closure notices"; (ii) the FTT not being the only place where the dispute could be resolved and (iii) to the civil courts not being barred from dealing with the dispute.

78. We note the reference in [42] of Lewison LJ's judgment to an appeal to the FTT being "entirely against [Mr Archer's] own interests". It is not clear from the Court of Appeal's judgment what was meant by that reference, although Lewison LJ referred at [6] to the FTT's jurisdiction under section 50 TMA 1970 to increase a self-assessment. In her skeleton argument, Ms Brown submitted that this was a reference to an appeal that Mr Archer could properly have brought under section 31(1)(b) TMA 1970, such as an appeal against the conclusions stated in the Closure Notices, as opposed to an appeal against the amendment. Such an appeal would be against Mr Archer's interests because it would have facilitated a remediation of the defect in the Closure Notices which would otherwise have been unavailable. The FTT would have power pursuant to section 50(7) TMA 1970 to amend an assessment, unshackled by any arguments as to whether there was a defect and whether that defect could be cured by section 114:

> 50(7) If, on an appeal notified to the tribunal, the tribunal decides
>
> (*a*) that the appellant is undercharged to tax by a self-assessment
>
> (*b*) that any amounts contained in a partnership statement are insufficient; or
>
> (*c*) that the appellant is undercharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be increased accordingly.

79. If Mr Archer had appealed the conclusions in the Closure Notices, the FTT could therefore have amended Mr Archer's self-assessment so as to increase it in line with those conclusions. However, Mr Archer was not seeking to challenge the conclusions in the Closure Notices which were based on previous Court of Appeal decisions that the tax avoidance schemes were ineffective. Further, it was Mr Archer's case that there was no amendment to challenge.

80. We note that at [123] of the Decision, the FTT records evidence from KPMG to the effect that if Mr Archer had appealed the Closure Notices, HMRC would not have sought to bankrupt Mr Archer. That may explain why the FTT did not consider an appeal to the FTT would have been against Mr Archer's interests.

81. If, as appears may have been the case, the FTT took the view that, as a matter of law, Mr Archer should have appealed the Closure Notices to the FTT in order to determine the Debt Question, that was plainly an error. He was entitled to raise the Debt Question in the JR Proceedings. Further, we are satisfied that, whilst Mr Archer could have appealed the Closure Notices to the FTT, on the face of it that would have been against his own interests, as the Court of Appeal recognised, in that it would have engaged the FTT's jurisdiction to increase his self-assessment. The FTT failed to recognise that fact in its analysis at [117] of the Decision.

82. In her skeleton argument, Ms Brown points to paragraph [115] of the Decision, submitting that there the FTT compounds its error as to the potential role of the FTT in determining the Debt Question by considering that had Mr Archer appealed, he would have had to pay the tax immediately and would not have been entitled to a postponement owing to the effect of section 55(8B) TMA 1970. In other words, the FTT treated Mr Archer as somehow seeking to evade the consequences of section 55(8C) TMA 1970 by virtue of what the FTT (incorrectly) saw as his jurisdictional choice for determination of the Debt Question.

83. Ms Brown criticised that conclusion, first by reference to the jurisdiction issue identified above, and second on the grounds that it was a fundamentally flawed interpretation of the relevant provisions of section 55 TMA 1970. In particular, she argued that:

(1) Section 55(2) TMA 1970 provides that (except as otherwise provided in section 55) where there is an appeal against a closure notice, tax shall be due and payable as if there were no appeal, subject to the postponement provisions in section 55(3).

(2) The postponement provisions only apply to postpone the payment of tax which is already due and payable. If no postponement is allowed by HMRC or the tribunal the tax shall be "due and payable as if there had been no appeal".

(3) Section 55(2) TMA 1970 does not create a debt, it simply provides that section 59B TMA 1970 and other provisions shall continue to apply as if there had been no appeal.

(4) If the Closure Notices did not create a debt under section 59B TMA at the outset because they did not amend Mr Archer's self-assessment, then that position would simply continue, because an appeal cannot, through section 55(2), create a debt which does not already exist. They could only create a debt once the FTT had cured the defect under s 114 TMA 1970 or had increased Mr Archer's self-assessment under section 50(7) TMA 1970.

(5) Further, or additionally, section 55(8B)-(8D) TMA 1970 only effectively preclude postponement beyond the due and payable date for the payment specified in the APN.

84. It is clear from [115] that the FTT considered that the £22.5m would have been payable by Mr Archer in the event he had appealed the Closure Notices. In order to test that finding, Ms Brown referred us in detail to the APN provisions and the postponement provisions.

85. Section 219 FA 2014 provides that an APN may be given to a taxpayer where conditions A – C are met. Condition A distinguishes APNs given whilst an enquiry is in progress and APNs given after an enquiry has concluded and an appeal been notified to HMRC:

> 219(2) Condition A is that –
>
> (a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax, or
>
> (b) P has made a tax appeal (by notifying HMRC or otherwise) in relation to a relevant tax but that appeal has not yet been –
>
> (i) determined by the tribunal or court to which it is addressed, or
> (ii) abandoned or otherwise disposed of.

86. Section 220 makes provision for the contents of an APN given pursuant to section 219(2)(a) whilst an enquiry is in progress, which was the position in relation to the APN given to Mr Archer:

> 220(2) The notice must –

(a) …

(b) specify the payment (if any) required to be made under section 223 and the requirements of that section.

87. Section 221 makes provision for the contents of an APN given when the taxpayer has already made an appeal against an assessment. It is not directly relevant to the present situation.

88. Section 222 makes provision for taxpayers to make representations in relation to an APN, either objecting to the APN on the grounds that Conditions A-C are not met, or objecting to the amount specified in the APN. HMRC must consider any representations and must determine whether to confirm or withdraw the APN, or confirm or amend the amount specified in the APN. We note that in the present case HMRC did not determine Mr Archer's representations, despite section 222 requiring them to do so. It is not clear why that was the case.

89. Section 223 FA 2014 makes provisions dealing with the effect of an APN issued whilst an enquiry is in progress, including the situation where representations are made under section 222:

223(1) This section applies where –

(*a*) an accelerated payment notice is given by virtue of section 219(2)(*a*) (notice given while a tax enquiry is in progress) (and not withdrawn), and

(*b*) an amount is stated in the notice in accordance with section 220(2)(*b*).

(2) P must make a payment ("the accelerated payment") to HMRC of that amount.

(3) The accelerated payment is to be treated as a payment on account of the understated tax (see section 220).

(4) The accelerated payment must be made before the end of the payment period.

(5) "The payment period" means –

(a) if P made no representations under section 222, the period of 90 days beginning with the day on which the accelerated payment notice is given, and

(b) if P made such representations, whichever of the following periods ends later –

(i) the 90 day period mentioned in paragraph (a);

(ii) the period of 30 days beginning with the day on which P is notified under section 222 of HMRC's determination.

90. Where an APN has been issued, the postponement provisions in section 55 are amended as follows:

(8B) Subsections (8C) and (8D) apply where a person has been given an accelerated payment notice or partner payment notice under Chapter 3 of Part 4 of the Finance Act 2014 and that notice has not been withdrawn.

(8C) Nothing in this section enables the postponement of the payment of (as the case may be) –

(a) the understated tax to which the payment specified in the notice under section 220(2)(b) of that Act relates,

(b) the disputed tax specified in the notice under section 221(2)(b) of that Act …

(8D) Accordingly, if the payment of an amount of tax within subsection (8C)(b) is postponed by virtue of this section immediately before the accelerated payment notice is given, it ceases to be so postponed with effect from the time that notice is given, and the tax is due and payable -

(a) if no representations were made under section 222 of that Act in respect of the notice, on or before the last day of the period of 90 days beginning with the day the notice or partner payment notice is given, and

(b) if representations were so made, on or before whichever is later of -

(i) the last day of the 90 day period mentioned in paragraph (a), and

(ii) the last day of the period of 30 days beginning with the day on which HMRC's determination in respect of those representations is notified under section 222 of that Act.

91. Thus section 55(8C)(a) applies to APNs given during an enquiry and section 55(8C)(b) applies to APNs given after an appeal has been lodged.

92. In the case of an APN issued after an appeal has been lodged and where the disputed tax had already been postponed, the tax ceases to be postponed pursuant to section 55(8D) and becomes due and payable by reference to whether the taxpayer had made representations and if so the date on which HMRC issued a determination in response to those representations.

93. In the case of an APN issued during an enquiry, where representations are made but for whatever reason there is no determination by HMRC, there is no payment period pursuant to section 223(4) by reference to which the accelerated payment must be made. Hence no payment is due pursuant to the APN.

94. Ms Brown submitted that the effect of this is that "the amount [specified in] the APN is not only not due but the ability to postpone also remains unaffected". Ms Brown's submission was that the FTT was wrong to assume that there would have been an automatic and immediate liability to pay the tax on an appeal against the Closure Notices.

95. Mr Ripley submitted that the FTT was right to conclude that on an appeal against the Closure Notices the tax would have been due and payable without postponement. However, he did not engage with Ms Brown's submissions in relation to the effect of the APNs on the ability of Mr Archer to postpone any sum payable. This appears to be because his submission was that the Decision did not depend on the FTT's finding as to the ability of Mr Archer to postpone the tax payable on an appeal against the Closure Notices. He submitted that the Decision was principally founded on the absence of evidence as to Mr Archer's beliefs as to his liability to pay tax, which is the issue addressed in Ground 2.

96. In our judgment no question of postponement even arises on the facts of this case.

97. It is necessary to distinguish between two different statutory regimes; first the tax payable pursuant to a closure notice and second the payment required by an APN which is treated as a payment on account of what HMRC considered to be and specified as the understated tax.

98. In the ordinary course, there will be no doubt that a closure notice has amended the taxpayer's self-assessment. If an APN has been issued during the enquiry and the taxpayer makes representations which are not determined by HMRC, then no amount would be payable pursuant to the APN. However, there would still be tax payable as a result of the amendment in the closure notice. Section 55(8C) provides that the understated tax to which the payment specified in the APN relates cannot be postponed. Hence, in so far as the tax payable pursuant to the closure notices is the understated tax to which the APN payment relates it cannot be postponed. In the present case, the FTT found at [115] that the payment specified by the APN was indeed the tax in issue under the Closure Notices. If that tax was due and payable, it could not be postponed.

99. The circumstances of Mr Archer were unusual because the sum specified in the APN was not due, and his case was that the Closure Notices did not give rise to any tax debt because they did not amend his self-assessment. In other words, as Ms Brown identifies in her primary argument set out in paragraph 83 above, his case on an appeal against the Closure Notices would have been that section 55(2) was of no effect because section 59B(5) was not engaged

and there was no tax charged by the Closure Notices. It is because the Closure Notices did not specify any sum due by way of amendment that no tax was due (subject to a claim under s 114 TMA 1970), rather than the effect of the postponement provisions.

100. In our judgment, on an appeal against the Closure Notices, there would inevitably have been an argument as to whether the Closure Notices were effective to amend Mr Archer's returns and if so what tax was payable. There was certainly no prospect of postponement. The real issue would have been whether the Closure Notices were effective and if not, whether the identified defect could be cured by section 114 TMA 1970. That was essentially the issue which was determined in the JR Proceedings.

101. In the JR Proceedings, there is some ambiguity in the judgment of Jay J as to whether or not he found that a debt was owing. The FTT did not quote directly from his decision, save as described above. However, for present purposes, we note his finding at [74] and his disposal of the claim at [107] and [108], which clearly support the proposition that he had concluded there was no debt:

> "74. … I have reached the point that the Closure Notices were defective in that they did not contain amendments to the returns, and (perforce) consequential amendments to the self-assessments. Section 59B(5) of the TMA fixes HMRC's claim to an existing debt only on the basis that there has been an amendment of a self-assessment under section 28A. I have found that there has not been one. It follows that there could be no relevant debt for the purposes of section 59B(5) *unless* section 114(1) may be recruited to save the error (using shorthand parlance).
>
> …
>
> *Disposal*
>
> 107. I am dismissing this application for judicial review on the basis that the taxpayer had an effective right of appeal which he should have exercised. In reaching that conclusion, I have upheld Mr Goldberg's submissions on section 28A(2) of the TMA but – in this particular context - have rejected them on section 114(1).
>
> 108. If the last of these conclusions were incorrect, I would have granted the judicial review application on the basis that no statutory debt had arisen under section 59B(5) of the TMA as at the date of the decision under challenge. But, I would also have held that there was nothing to prevent HMRC issuing further closure notices under section 28A of the TMA."

102. By contrast, at [106] of the judgment, Jay J says in terms that Mr Archer "must pay up" thereby apparently acknowledging (contrary to the passages referred to above) the existence of a debt:

> "106. … If I had reached a different conclusion on the principal issues, this application for judicial review would have succeeded but HMRC would have been able to issue fresh closure notices. These could have been appealed in due course, and KPMG's technical points on the APNs considered by the F-tT. But, my decision on the principal issues means that there is now no possibility of an appeal, **and the taxpayer must pay up**. Albeit tempting, it would be supererogatory for me to express any view on these technical points which, were I to be overturned by the Court of Appeal, might live to fight another day" (**our emphasis**).

103. Mr Ripley submitted that it was plain from paragraph [106] and from the terms of the order of Jay J refusing interim relief (quoted above), that he considered the tax was due. Mr Ripley also relied on the fact that Mr Archer had appealed the decision of Jay J, which he contended would have been unnecessary if the judge had determined that there was no debt.

104. The Court of Appeal clearly found that the Closure Notices were defective and did not create a debt for the purposes of s 59B(5), subject to the defect being cured by section 114. Lord Justice Lewison said this at [31]:

> "31. In my judgment in principle *Hallamshire* still holds good where it is HMRC who calculate the tax due, despite the change to self-assessment. I consider, therefore, that the closure notices did not comply with section 28A (2). Unless section 114 can be successfully invoked to supply the omission to amend the self-assessment, no debt payable under section 59B (5) has been created. The application of section 114 was not addressed in *Hallamshire*, so it is to that question that I now turn."

105. That had also been the view of Henderson LJ when he extended the interim relief and gave permission to appeal to the Court of Appeal.

106. We do not know what arguments were put to the FTT in relation to these issues, beyond what is recorded in the Decision. However, the FTT did not appear to appreciate that on an appeal to the FTT against the Closure Notices, it would have been at least arguable that no tax was due because of the alleged defect in the Closure Notices. The FTT would have to make a finding as to the existence of that defect and consider whether it could be remedied through the application of section 114 TMA 1970. To that extent, therefore, we consider that the FTT was wrong to find at [115] that the tax and interest of £22.5m would have remained payable despite an appeal against the Closure Notices. Issues of postponement did not arise.

107. We are satisfied therefore that the FTT made the following errors in its analysis:

(1) It failed to recognise that an appeal against the Closure Notices to the FTT would have been against Mr Archer's interests. It also appears that the FTT may have considered that Mr Archer not only could have appealed the Closure Notices to the FTT but that he should have appealed the Closure Notices rather than pursuing the JR Proceedings.

(2) It wrongly considered that the tax and interest would have remained payable despite an appeal against the Closure Notices. Issues of postponement did not arise.

108. We must now consider what effect, if any, these errors had on the conclusion of the FTT that there was no reasonable excuse.

109. Ms Brown submitted that it is impossible to know how these errors of law influenced the FTT in reaching its decision that there was no reasonable excuse. The FTT was proceeding on the mistaken assumption that Mr Archer was "being too clever" in taking the judicial review route to avoid payment of the tax and its view of his choice of jurisdiction must have played a significant role in influencing its reasoning on whether there was a reasonable excuse.

110. Mr Ripley submitted that even if errors of law are established under Ground 1, the FTT was still entitled to find that Mr Archer had not established any reasonable belief that the tax was not due and payable. In other words, it is not sufficient for Mr Archer to succeed only on Ground 1.

111. Mr Ripley submitted that the FTT had four independent reasons for dismissing the appeal. Those reasons appear to have been in the alternative and, with reference to the relevant paragraphs in the Decision, may be summarised as follows:

(1) The absence of evidence as to Mr Archer's reasonable belief that he did not need to pay the tax - [119] to [121].

(2) The FTT was not satisfied that pursuing the judicial review claim instead of paying the tax and appealing the Closure Notices was a reasonable course of action - [129] and [131].

(3) There was an evidential gap between 21 February 2017 and 7 March 2017 [130].

(4) There was an evidential gap after 30 November 2017. If there was a reasonable excuse prior to that date, it came to an end on 30 November 2017 when the Court of Appeal gave judgment in HMRC's favour [132] and [140].

112. If the FTT found that evidence as to Mr Archer's beliefs as to his obligation to pay the tax was essential to establishing a reasonable excuse (and was missing), then Mr Ripley submits that the errors of law we have identified are irrelevant.

113. It is difficult to identify these independent reasons from the Decision. The FTT first identifies the absence of evidence as to Mr Archer's belief at [119] to [122]. It describes this as a "*significant evidential problem*". The FTT then moves on to observe at [123] that "*the simple act of making the appeals would have stopped the bankruptcy proceedings*". It appears from these passages that the FTT considered that Mr Archer should have appealed the Closure Notices rather than commencing the JR Proceedings. At [125] it poses the question whether Mr Archer was influenced in deciding not to appeal the Closure Notices by the fact that he would have been required to pay the £22.5m and concludes that it cannot make any finding in that regard because Mr Archer has provided no evidence about the assessment carried out by Mr Archer and his advisers. The FTT then leaves the topic, and at [126] to [130] it addresses Mr McDonnell's submission that the case is not about Mr Archer's beliefs but about whether it was objectively reasonable for Mr Archer to pursue the JR Proceedings. At [131] the FTT observes that there is no evidence about Mr Archer's belief about the strength of his case and that he should have adduced evidence of "robust advice" that he could not appeal the Closure Notices. The FTT then concludes at [132] that even if it accepted Mr McDonnell's submission and there was a reasonable excuse until 30 November 2017, there was no reasonable excuse after that date. It also must have found, although it does not expressly say as much, that the tax was not paid without unreasonable delay after that date.

114. There is no clear finding by the FTT that evidence of Mr Archer's beliefs as to his obligation to pay the tax was, in itself, essential to establish a reasonable excuse for non-payment of the tax. In our judgement, we cannot safely conclude that this was the finding of the FTT. It appears that the FTT took an overall view that there was no reasonable excuse because of a combination of factors. Those factors included (i) the absence of evidence as to Mr Archer's beliefs, (ii) that he could and should have appealed the Closure Notices which would have resulted in the tax being payable, and (iii) that there was no evidence as to why payment was not made in the periods after 21 February 2017 and 30 November 2017. On that basis the errors of law we have identified above did form part of the FTT's reasons for dismissing the appeal.

115. It is arguable that the evidential gaps identified by the FTT in the periods after 21 February 2017 and 30 November 2017 amounted to a free-standing reason for the FTT's conclusion that there was no reasonable excuse throughout the period of non-payment. However, we do not consider it safe to draw that conclusion. We are satisfied that the errors of law we have identified above did affect the decision of the FTT and that we should, accordingly, set aside the Decision. In those circumstances Ms Brown invited us to re-make the decision rather than remit it to the FTT, and we consider that is the appropriate course.

Ground 2

116. Ground 2 is in the alternative to Ground 1. The issues will be relevant when we come to re-make the decision of the FTT.

117. Mr Archer says that the FTT failed properly to apply the decision of the FTT in *Perrin v HMRC* [2018] UKUT 156 (TCC) as to what amounts to a reasonable excuse. It wrongly placed

sole or undue focus on Mr Archer's subjective belief and failed to consider his acts, the situation he found himself in and the relevant external facts.

118. The FTT properly set out the guidance given by the Upper Tribunal in *Perrin* at [81], quoted above. However, it is helpful at this stage to record what the Upper Tribunal in *Perrin* also said at [70] – [73] in relation to appeals concerning reasonable excuse:

> "[70] … the task facing the FTT when considering a reasonable excuse defence is to determine whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and accordingly give rise to a valid defence. The burden of establishing the existence of those facts, on a balance of probabilities, lies on the taxpayer. In making its determination, the tribunal is making a value judgment which, assuming it has (a) found facts capable of being supported by the evidence, (b) applied the correct legal test and (c) come to a conclusion which is within the range of reasonable conclusions, no appellate tribunal or court can interfere with.
>
> [71] In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times (in accordance with the decisions in *The Clean Car Co* and *Coales*).
>
> [72] Where the facts upon which the taxpayer relies include assertions as to some individual's state of mind (eg 'I thought I had filed the required return', or 'I did not believe it was necessary to file a return in these circumstances'), the question of whether that state of mind actually existed must be decided by the FTT just as much as any other facts relied on…
>
> [73] Once it has made its findings of all the relevant facts, then the FTT must assess whether those facts (including, where relevant, the state of mind of any relevant witness) are sufficient to amount to a reasonable excuse, judged objectively."

119. The issue of reasonable excuse in the context of non-payment of a sum shown in an APN has recently been considered by the Court of Appeal in *Beadle v HM Revenue & Customs* [2020] EWCA Civ 562 and by the Upper Tribunal in *Sheiling Properties Limited v HM Revenue & Customs* [2020] UKUT 175 (TCC). Both of these authorities post-date the decision of the FTT in this case.

120. The Court of Appeal in *Beadle* was concerned with non-payment of a partner payment notice which is similar to an APN. The reason for non-payment was that the taxpayer considered that the sum specified in the notice was not due as a matter of law. He did not commence judicial review proceedings, but when he was issued with a penalty he appealed the penalty to the FTT on the ground that the notice was invalid or the payment required should have been zero. He relied on his genuine belief that the notice was invalid as a reasonable excuse for non-payment. The FTT considered that such a belief could not amount to a reasonable excuse owing to the fact that a reasonable taxpayer in the appellant's position would make payment of the sum under the partner payment notice within the payment period and make whatever challenges to the underlying liability he or she chose to make in the meantime; that would be the case whatever his or her reasonable belief as to the merits of the substantive challenge. The Court of Appeal agreed that in the context of the scheme for partner payment notices and APNs, the taxpayer's belief that the notice was invalid could not amount to a reasonable excuse.

121. In *Sheiling Properties*, the taxpayer appealed against penalties imposed in respect of non-payment of APNs and asserted a reasonable excuse based on professional advice that there was a good prospect of establishing in judicial review proceedings that the APNs were invalid. The FTT made findings as to why the taxpayer had not paid the sums specified in the APNs. Those findings included findings that the financial consequences to the taxpayer of paying the sums

specified in the APNs would have been extremely serious; it was not satisfied that the taxpayer's case on the judicial review "*had a sufficiently high degree of certainty, that was objectively justified, to give it a reasonable excuse for not paying the sums that HMRC demanded*"; and that "*the predominant reason*" why the company did not pay the APNs was because of its concern as to the severe financial consequences of doing so.

122. The Upper Tribunal endorsed the guidance in relation to reasonable excuse in *Perrin* and at [68] identified the particular issue before it as follows:

> "68. … the situation in the current appeal raises a particular question. Leaving aside for the moment the separate challenge to the FTT's finding in relation to insufficiency of funds, how should objective reasonableness be assessed in relation to a belief by the taxpayer that an APN he has received has not been validly issued? More particularly, to what extent does the legislative policy underpinning the APN regime affect that assessment?"

123. The Upper Tribunal drew a distinction between cases in which the taxpayer is challenging the "substantive validity" of the APN by way of judicial review and those in which the taxpayer is challenging the "procedural validity" of the APN. It described the distinction at [69]:

> "69. It must be noted at the outset that (real or perceived) "invalidity" can arise in two situations. The first is where the taxpayer believes that the tax payment accelerated by the notice is not owed by him, either because he does not owe it at all or because it has been wrongly calculated. We call that "substantive invalidity". The second is where the taxpayer believes that, regardless of whether he owes the tax, the APN has not been issued in compliance with one or more of the statutory conditions imposed by FA 2014. We call that "procedural invalidity"."

124. As to the significance of this distinction, the Upper Tribunal said as follows:

> "74. HMRC submitted that *Beadle* was authority that reasonable excuse could never be a defence in respect of any alleged invalidity of a PPN, whether procedural or substantive. We disagree. It is clear on the facts that the Court was dealing only with an excuse founded on substantive invalidity. In the absence of binding authority, we begin by considering whether, in principle, a belief as to procedural invalidity is capable of forming a reasonable excuse. In doing so, we are looking at the objective element of the test, and not the subjective element of the taxpayer's actual belief. We then consider whether the FTT erred in this case in finding on the facts that a reasonable excuse on such a basis was not made out."

125. The Upper Tribunal considered that *Beadle* was a case involving belief in a substantive invalidity, namely whether the sum charged by the APN was owed by the taxpayer. Such a belief could never amount to a reasonable excuse. Whereas a challenge to the procedural validity of the APN, namely whether the APN complied with the statutory conditions, could found a reasonable excuse. It considered arguments as to whether a belief that an APN was procedurally invalid could give rise to a reasonable excuse for non-payment. These focussed on the policy behind the APN regime, which the Court of Appeal in *Beadle* described as "*pay now, argue later*". The Upper Tribunal said as follows:

> "78. These arguments have given us pause for thought. However, we have concluded on balance that it would be unduly restrictive to determine that a belief as to procedural invalidity could never be a reasonable excuse in respect of a penalty for non-payment of the APN. In our opinion, there is a difference between substantive invalidity and procedural invalidity, because in relation to procedural invalidity the policy considerations considered in *Beadle* and in other cases cannot simply be assumed to apply in undiluted form. Where the taxpayer's belief is essentially that what purports to be on its face an APN is not an APN at all, because it does not

satisfy the statutory conditions, the policy considerations driving the APN code are necessarily less persuasive in determining the objective reasonableness of that belief."

126. In *Sheiling Properties*, the taxpayer had commenced judicial review proceedings asserting the invalidity of the APN. Those proceedings had been stayed behind the claims of other taxpayers. The Upper Tribunal addressed the relationship between the two types of proceedings as follows:

> "80. However, the objection that a penalty appeal before the FTT is the wrong forum in which to debate the procedural validity of an APN remains a substantial concern. Where the taxpayer who alleges that the APN is invalid (for whatever reason) has not begun judicial review proceedings, he should do so. Where judicial review proceedings have begun, in our view it cannot be desirable for the hearing of those proceedings to have been preceded, and to a degree prejudged, by a "mini-trial" before a specialist tax tribunal of the objective strength, and effective merits, of the taxpayer's case."

127. The Upper Tribunal gave the following guidance in relation to assessing whether such challenges gave rise to a reasonable excuse for non-payment of the sum specified in the APN:

> "81. We consider, therefore, that in assessing the objective reasonableness of a belief which a taxpayer had been found to hold that the APN issued to him is procedurally invalid, the FTT's assessment should take into account the following points:
>
> (1) In line with *Perrin*, it should consider all the surrounding facts and circumstances, including the foundation for the taxpayer's belief, any advice on which he has relied, and whether that advice is specific to his APN.
>
> (2) It should identify precisely what the taxpayer does believe; is it that the APN is obviously procedurally invalid, or merely that it is arguable (however strongly) that it is?
>
> (3) It should take into account the reason for the alleged procedural invalidity. We observe that in *Francis Chapman*, to which the FTT referred in this case in forming its view, the FTT referred at [72] to "an obvious or gross error" in the notice, such as where the decimal point had slipped in the statement of the amount to be paid. One can postulate other similar errors. One would hope that in practice such errors would be corrected through the process of representations. In any event, the assessment of objective reasonableness in such a situation will be much more straightforward than one where the determination of validity turns on detailed legal arguments and the outcome of a judicial review.
>
> (4) In view of the concerns we have set out above, it would not be desirable or appropriate for the FTT to conduct a "mini-trial" of the arguments which a taxpayer asserts mean that his judicial review into procedural invalidity will or is likely to be successful.
>
> (5) It must be borne in mind that substantive invalidity cannot form the basis for a reasonable excuse. While the dividing line between substantive and procedural invalidity is clear in principle, there may be instances where the taxpayer's excuse is really the former dressed up as the latter."

128. The first ground of appeal in *Sheiling Properties* was that the FTT erred in holding that Sheiling could only establish a reasonable excuse if, viewed objectively, there was a high degree of confidence that the APNs were invalid. The Upper Tribunal accepted that the FTT had erred in this way:

> "83. For the reasons we have given, we consider that the FTT was correct to conclude, at [52], that it was not impossible for a belief in the likely success of the judicial review proceedings to amount to a reasonable excuse. We also consider that it was correct, at [53], to take into account in assessing objective reasonableness the clear parliamentary intent of the APN regime. However, we consider that the FTT's approach of requiring the taxpayer "to demonstrate that, viewed objectively, there is a high degree of confidence that the APNs are invalid" is not the best way to

make that assessment. We do not favour some separate test of objective reasonableness in relation to a belief in the procedural invalidity of an APN; in our view the better approach is to apply *Perrin*, but taking into account the considerations we identify above. Further, a focus on the objective degree of confidence in the belief, where the basis of that belief turns on legal arguments which will be heard in full in the judicial review proceedings, is likely to lead to the disadvantages and problems we have described in relation to forum."

129. The second ground of appeal was that in the alternative, the FTT wrongly concluded that objectively, the taxpayer did not have a strong case in the judicial review proceedings. The Upper Tribunal dealt with this as follows:

> "84. As we have explained, this is a debate which the FTT should resist the temptation to be drawn into. Indeed, if the alleged ground of procedural invalidity requires detailed submissions by the parties on competing legal arguments, it is by definition not a gross or obvious error, and, as such, is considerably less likely to be objectively reasonable in this context. We do not accept that the FTT's assessment in this respect was one which no reasonable tribunal could have reached, but, more importantly, there was no need in any event for a "mini-trial" of Sheiling's judicial review case in order to assess its objective reasonableness as an excuse for not paying the APNs."

130. Whilst the Upper Tribunal held that the FTT should not have made its own assessment of the merits of the taxpayer's judicial review claim, it endorsed the FTT's conclusion that there was no reasonable excuse because the taxpayer did not have a belief that the APNs were without doubt invalid, only that there was a good prospect they were invalid. The Upper Tribunal held at [85] that the FTT's evaluative conclusion as to the merits of the judicial review claim should not be disturbed. It continued:

> "85. …Importantly, [the taxpayer's] belief at the relevant time was not that the APNs were without doubt invalid, as he would likely have believed in the case of an obvious or gross error of the type contemplated by Judge Hellier in *Francis Chapman*. Rather, it was that there was a "good prospect" that the judicial review proceedings would show the APNs to have been issued unlawfully, although he was not certain that they were unlawful: [27] and [28]. In relation to such a belief, in principle it is reasonable to conclude that a reasonable and responsible taxpayer would be likely to pay the APNs and argue his case in the judicial review."

131. Ms Brown submitted by reference to *Chapman* that where a taxpayer has a belief of a procedural invalidity, it is necessary to look at the belief. But where there is a gross and manifest procedural invalidity, there is objective evidence of the invalidity. It is not necessary to establish a belief that it was invalid because it is obvious to everyone. Hence, Mr Archer did not need to establish a reasonable belief.

132. Ms Brown further submitted that the references to reasonable belief in *Perrin* and other cases were apt in cases where a taxpayer is not relying on documentation to establish why they conducted themselves as they did, but that this is not such a case. She acknowledged that the original grounds of appeal referred to Mr Archer's (subjective) reasonable belief and there is evidence to which we were referred by Mr Ripley that this case was prosecuted before the FTT on the basis of Mr Archer's reasonable belief. Indeed, Mr McDonnell's skeleton argument for the FTT submitted that "*Mr Archer reasonably considered that no amendment to his self assessment had been made by the closure notice, so that, accordingly, no sum was due and payable by him*", although it appears that, at least by the end of the hearing in the FTT, Mr Archer's case had shifted to focus on objective reasonableness of conduct rather than belief. However, the present appeal was argued on the basis that Ms Brown disavowed the approach taken below and wished only to argue that Mr Archer's course of conduct was objectively reasonable.

133. Ms Brown made various criticisms of the FTT's approach to the question of whether Mr Archer had a reasonable excuse for not paying the tax. Overall, her submission was that the FTT ought to have found, on the basis of the objective evidence, that it was reasonable for Mr Archer to pursue the JR Proceedings without paying the disputed tax.

134. The material on which Ms Brown relied in support of her contention that the strength of Mr Archer's judicial review challenge can be objectively determined may be summarised as follows:

(1) An obvious error in the Closure Notices which was drawn to the attention of HMRC on 2 March 2016. HMRC denied there was any defect and did not reference section 114 TMA 1970. It was Ms Brown's case that the Closure Notices appeared on their face to be ineffective, containing no amendment to the self-assessment.

(2) The statement of Kerr J that Mr Archer had a strong prima facie case in the JR Proceedings.

(3) The fact permission was granted to Mr Archer to challenge HMRC's decision to bankrupt him on the basis of the Closure Notices – there could have been no such grant of permission unless Mr Archer had at minimum a reasonably arguable case.

(4) The fact that Mr Archer was granted interim relief in the JR Proceedings both in the Administrative Court and the Court of Appeal. This could only have been on the basis of a strong prima facie case.

(5) The finding of Jay J that the Closure Notices were defective and could not be cured by section 114 TMA 1970, at least in the JR Proceedings. There was a "gaping hole" in the Closure Notices which was described as "existential". The effect of that finding was that there was no debt under s 59B TMA 1970.

(6) The judgment of the Court of Appeal that the FTT would not have been an appropriate forum to determine the Debt Question. It was against Mr Archer's interests to appeal the Closure Notices to the FTT.

(7) The Court of Appeal held that the Closure Notices were defective, albeit they could be cured by section 114 TMA 1970.

(8) It was clear that the purpose of the JR Proceedings was to determine whether the Closure Notices were effective so as to give rise to a debt under section 59B TMA 1970. The Court of Appeal indicated at [44] that there was no other clear mechanism available to decide that question apart from the bankruptcy procedure.

(9) Having embarked on his judicial review claim, Mr Archer was entitled in the periods following the decision of Jay J and following the decision of the Court of Appeal to rely on his rights of appeal against those decisions.

(10) HMRC agreed to interim relief pending determination of Mr Archer's application to the Supreme Court for that relief and for permission to appeal. Objectively, HMRC would not have agreed to that unless they considered it was at least a realistic outcome that the Supreme Court would make a similar order.

135. It was submitted that any taxpayer possessing Mr Archer's experience and attributes would objectively and reasonably have been entitled to conclude that he had a strong case in the judicial review that there was no debt due under section 59B TMA 1970. That was the position until the Court of Appeal judgment on 30 November 2017. Thereafter, Mr Archer was seeking permission to appeal the Court of Appeal judgment and HMRC agreed to the

continuation of the interim relief. It was objectively reasonable for Mr Archer to continue his challenge in the JR Proceedings.

136. Ms Brown submitted that any reasonable taxpayer in the position of Mr Archer would have acted exactly as he did, although she did not go so far as to suggest that the FTT should have inferred that he in fact reasonably believe that the disputed tax was not due and payable.

137. Mr Ripley submitted that Ms Brown is wrong to say that in a case of objectively reasonable conduct it is not necessary for the taxpayer to establish a reasonable belief that the tax was not payable. He contends that reliance solely upon the question of whether the taxpayer has a strong arguable case would short circuit the approach and guidance of the Upper Tribunal at [81] of *Sheiling Properties.*

138. Accordingly, Mr Ripley argues that the FTT correctly rejected the submission that the reasonable excuse relied upon did not require evidence of Mr Archer's subjective belief and that it was sufficient that Mr Archer had pursued a reasonable course of action. He submitted that the defect relied upon by Mr Archer in this case is similar to the procedural irregularity in *Sheiling Properties*. As such the focus should first be on evidence as to the taxpayer's beliefs. None of the matters relied upon by Mr Archer to establish that his conduct was reasonable provide evidence as to his own beliefs and Ms Brown was not inviting any inferences.

139. The issue we have to determine under Ground 2 is whether Mr Archer was required to establish that he had a reasonable belief that the Closure Notices were invalid and that the appropriate course was to challenge the Closure Notices by way of judicial review without paying the disputed tax. Put another way, is it sufficient to establish a course of conduct which is objectively reasonable? Ms Brown submitted that in theory, even if Mr Archer had subjectively thought that the tax was due and payable, he would still have a reasonable excuse because his conduct was objectively reasonable. We consider that would be a surprising result, at least on the facts of this case.

140. Mr Ripley relied on a number of propositions which in our view provide an answer to Ms Brown's case that no evidence of Mr Archer's subjective belief was necessary in this case:

(1) Whatever reasons for non-payment are relied upon, those reasons must have caused the non-payment of tax if they are to amount to a reasonable excuse.

(2) It is not enough that the taxpayer has an argument that tax is not due or payable. The taxpayer must have reasonably believed that it was not payable.

(3) The reasonableness of the taxpayer's belief is to be judged objectively.

(4) What is reasonable is a matter of fact and degree and involves a value judgment by the FTT.

141. In relation to the question of causation, Mr Ripley relied on the well-known case of *Commissioners for Customs & Excise v Steptoe* [1992] STC 757 where the Court of Appeal was concerned with a provision in the Finance Act 1985 to the effect that an insufficiency of funds can in no circumstances amount to a reasonable excuse for non-payment of VAT. Notwithstanding that provision, it was held that the underlying cause of the insufficiency of funds could amount to a reasonable excuse. Lord Donaldson MR described the issue in these terms at p770:

> "… the legislative intention is that insufficiency of funds can never *of itself* constitute a reasonable excuse, but that the cause of that insufficiency, ie the underlying cause of the default, might do so.

> The difficulty which then arises is that Parliament has not specified what underlying causes of an insufficiency of funds which lead to a default are to be regarded as reasonable or as not being reasonable…"

142. Mr Ripley submitted that it was clear from this passage that, when looking for a reasonable excuse, one is looking for the underlying cause of the default. He also relied on what the Upper Tribunal said in *Sheiling Properties* at [86] in relation to the third ground of appeal in that case:

> "86. The third ground is that the FTT erred in finding that insufficiency of funds was the predominant reason for non-payment of the APNs, and that in the circumstances this was not a reasonable excuse. At [58], this was expressed to be "another reason" for the FTT's decision. We consider that this was an inference drawn from findings of primary fact which the tribunal was entitled to make. We accept Mr Elliott's submission that the reason for non-payment is not necessarily the same as the taxpayer's excuse for non-payment. However, it is for the FTT to find as a fact, at the first stage of the *Perrin* approach, what the taxpayer believed was its excuse for non-payment. The conclusion at [58] must be read against the FTT's findings of fact at [32] in relation to "the precise reasons" why Sheiling did not pay the APNs. As we read that conclusion, it is a finding of fact that Sheiling's excuse for non-payment was not only what it had offered as its excuse (belief in the invalidity of the APN) but was also its concern as to the financial consequences of payment. Further, the FTT found that of those two reasons or excuses for non-payment the latter was predominant. Those were findings which it was for the FTT to make on the basis of the evidence before it, and they were not irrational or perverse so as to give rise to an error of law."

143. That approach has been adopted by the FTT in several cases, including *Chapman* and we accept the proposition that the reason or excuse for non-payment put forward by the taxpayer must have caused the non-payment. In our view, in circumstances such as this, the FTT is entitled to, and indeed must, consider the reasons for non-payment. That will inevitably involve the taxpayer advancing by way of evidence what the reasons were, with HMRC being entitled to test that evidence in cross-examination. That is what happened in *Sheiling Properties,* where the evidence was that the reason the APNs were not paid was because of advice the taxpayer had received that there was a good prospect that the APNs were invalid. It was only when pressed in cross-examination that it became apparent that the predominant reason for non-payment was the financial position of the taxpayer.

144. The fact that it is necessary to establish that the reason put forward as an excuse caused the taxpayer not to pay the tax inevitably means that, in the first instance, the taxpayer must give evidence of his or her subjective beliefs. As Mr Ripley said in his oral submissions, without examining the subjective belief of the taxpayer, it cannot be established that the strength of the argument in the JR Proceedings alone was causative; no matter how strong the argument on invalidity, the real reason for non-payment may be inability to pay the tax, which section 59C(10) TMA 1970 provides cannot amount to a reasonable excuse. Accordingly, Ms Brown's submission that Mr Archer's beliefs are irrelevant is, in our view, inconsistent with *Sheiling Properties*.

145. Ms Brown submitted that the point in *Sheiling Properties* was that there were various potential reasonable excuses. Where one is impermissible it is necessary to decide which one led to the non-payment; here, however, there is no question of an impermissible excuse. It has never been suggested that Mr Archer did not have the funds. Instead, there was an objective reason offered for non-payment. We do not accept that submission, which permits the taxpayer to take the view that he will not disclose any details of his own personal circumstances. It is the actual reason or reasons for non-payment that is relevant. Only the taxpayer can say what

those reasons were, based on his beliefs. The FTT in this case did not know and was not provided with any evidence as to what Mr Archer's reasons for non-payment were or what his beliefs were as to the merits of the JR Proceedings and whether or not he should pay the tax. Ms Brown was not seeking to draw any inference as to what Mr Archer believed as to the need for him to pay the tax.

146. Ms Brown also relied on a decision of the FTT in *Sokoya v HM Revenue & Customs* [2009] UKFTT 163 (TC) in relation to information notices issued pursuant to section 19A TMA 1970. In that case Judge Berner held, without any reference to the taxpayer's belief, that it was reasonable not to comply with a notice when the notice was being challenged:

> "23. It must be reasonable for a recipient of a s 19A notice not to comply with such a notice whilst that notice is being challenged in the tribunal or in the courts. Otherwise any such appeals would be rendered nugatory. For this reason, even if the penalty notice were to have been valid, I find that at the date of issue of the penalty notice Mr Sokoya would have had a reasonable excuse for failure to comply with the s 19A notice, and that accordingly he is deemed by s 118(2) TMA not to have failed to comply with it at that time.
>
> 24. I have considered whether this conclusion could be affected by the uncertainty over whether s 19A(11) precludes any onward appeal from the decision of the Special Commissioners, and the fact that a stay of execution of the s 19A Notice was not granted. In this case, however, the issue does not in my view arise. Mr Sokoya's appeal to the High Court was permitted to proceed, and his application to the Court of appeal was entertained, and so, notwithstanding that a stay of execution had been denied prior to the appeal in the High court, I find that Mr Sokoya would have a reasonable excuse for failure to comply up to the time his possibilities of appeal were legally exhausted."

147. Mr Ripley submitted that a right to litigate cannot in itself provide the taxpayer with a reasonable excuse. Such a principle would be inconsistent with *Sheiling Properties* and *Beadle*. We accept that submission in the context of the present case. The FTT in *Sokoya* (a case involving a litigant in person) referred to a challenge to the validity of a notice being rendered nugatory if the recipient had to comply with the notice before that challenge was determined. The decision itself is not authoritative. We note also that the FTT had already found that the penalty notice in that case was invalid. Its consideration of the question of reasonable excuse was therefore *obiter*. Nor does it appear that the FTT heard full argument on the issue of reasonable excuse. We do not consider that the FTT's views in the context of information notices necessarily translate to the circumstances of the present case.

148. Having said that, the FTT in the present case did find at [116] that if Mr Archer had paid the tax, then the JR Proceedings would have been rendered nugatory. Mr Ripley sought to argue that this finding of the FTT was wrong because the outcome of the JR Proceedings would not have been academic in the sense described by Peter Jackson JL in *L, M and P v Devon County Council* [2021] EWCA Civ 358 at [61] and [62]. He suggested that Mr Archer could have sought declaratory relief in the JR Proceedings to the effect that the Closure Notices had not created any debt and he submitted that this "throws light and focus onto why Mr Archer believed that no payment should be made, not only at the outset of JR Proceedings, but also after losing at each stage". Further, Mr Archer could have paid the underlying tax of some £14 million leaving the interest outstanding which would have meant the JR Proceedings would not have been academic. Mr Ripley contended that the instruction of Jay J to Mr Archer to "pay up" if he wanted to take the proceedings further was supportive of his general proposition.

149. HMRC did not serve any respondents' notice challenging the FTT's finding that the JR Proceedings would have been rendered nugatory if Mr Archer had paid the tax. However, Mr Ripley contended that he did not need a respondent's notice where he was seeking to rely on a pure question of law that "feeds into the reasons which the FTT itself gave about the need to

understand why Mr Archer believed that he did not need to pay the tax". We do not need to decide this issue. In our judgment, whether or not the JR Proceedings would have been rendered nugatory by a payment of tax does not much matter for present purposes. For the reasons given above, what is relevant is why Mr Archer did not pay the tax. It may be that he was advised not to and that if he paid the tax then the judicial review claim would have been rendered nugatory. We simply do not know and HMRC have had no opportunity to test the reasons being put forward on his behalf.

150. For the sake of completeness we should also note that Ms Brown argued that it was not necessary to have evidence of Mr Archer's belief because there was a gross and manifest procedural irregularity in the Closure Notices. We are not satisfied that the defect in the Closure Notices was at any stage properly described as gross and obvious, to use the language in previous cases. We note in that context that HMRC argued before Jay J and the Court of Appeal that the Closure Notices did validly amend Mr Archer's return. Whilst those arguments were ultimately rejected, there was no indication that they were without merit.

151. For the reasons given above, we would not have allowed the appeal on Ground 2.

Grounds 3 and 4

152. The parties took Grounds 3 and 4 together and we shall do the same. We can deal with them quite briefly.

153. Mr Archer says that the FTT failed to recognise that collection of the tax by HMRC prior to 14 June 2018 would have been a conspicuous and indefensible abuse of power and/or otherwise unlawful in the circumstances of the case. Those circumstances included the interim relief orders of the High Court and the Court of Appeal and the agreement of HMRC in December 2017 not to bankrupt Mr Archer whilst the applications were being considered by the Supreme Court. As a result, the tax was not payable or was not in practice expected to be paid prior to 14 June 2018.

154. Further, Mr Archer says that the FTT failed to recognise that he was entitled to rely on certain statements made by HMRC at material times that there was no amount of tax due and payable. Mr Archer was entitled to rely on those statements as establishing a reasonable excuse for non-payment. Yet further, the statements should be construed as HMRC exercising its power to extend the time for payment pursuant to s 118(2) TMA 1970.

155. In the skeleton argument served on behalf of Mr Archer, it was also said that HMRC were estopped from denying that he was entitled to rely on those statements. Further, good tax administration and/or public law principles including requirements of equal treatment and fairness meant that he should be entitled to rely on those statements. In the event, Ms Brown did not pursue detailed submissions in support of those arguments. We do not consider that they add anything to the existing grounds of appeal.

156. Ms Brown's submissions in her skeleton argument and orally may be summarised as follows:

> (1) The sums calculated as due by the reference to the Closure Notices, as validated by section 114 TMA 1970, were prima facie due and payable on 4 March 2016. However, in practice the sums were not payable at any point prior to 19 June 2018. In the circumstances, there was either no default or there was a reasonable excuse for non-payment.

(2) The reason for this is the interim relief orders starting on 29 March 2016, the "collection suspended" entry on Mr Archer's statement of account and the December agreement with HMRC not to proceed to bankrupt Mr Archer.

(3) HMRC could not require or compel payment, nor could they take any action by way of bankruptcy. The practical effect or consequence was that the tax would not be paid.

(4) Mr Archer and HMRC did not expect the tax to be paid until June 2018.

157. One issue that arose in connection with these grounds was the extent to which Mr Archer had conceded before the FTT that the tax was due and payable, and that his case was limited to establishing a reasonable excuse for non-payment. Ms Brown submitted that the FTT had wrongly recorded at [7] of the Decision what was said to be a concession by Mr Archer that the tax was "due and payable" at all material times:

> "7. At the hearing Mr McDonnell confirmed that it was no longer being argued that Section 118(2) had been applied to mean that the tax liability for the Relevant Years was not due and payable until after the Supreme Court refusal of permission to appeal. The amount of tax had remained due and payable, but the undertaking given by HMRC not to pursue the debt was part of the reasonable excuse for the late payment of the tax."

158. Ms Brown says that what was conceded by Mr Archer before the FTT was an argument that HMRC's correspondence in December 2017 amounted to a "time to pay" arrangement within section 118(2) TMA 1970. The concession did not extend more widely than that. In particular it did not extend to reliance on the statements of account.

159. We were provided with the Judge's hearing note in relation to the concession and it does not take matters any further than what is recorded in the Decision. In the circumstances, it seems to us that, absent a transcript of the hearing, we have little choice other than to accept that the concession was made in the terms recorded in paragraph [7] of the Decision, i.e. that it was being conceded that the tax was due and payable as a matter of law. It was also conceded that there was no time to pay agreement within section 118(2) TMA 1970. There was no application to withdraw the concession.

160. The concession does not extend to Ms Brown's submission that the tax was not "in practice" payable prior to June 2018. However, the matters relied on to support that submission are matters which the FTT considered in the context of whether there was a reasonable excuse.

161. The FTT considered at [134] – [139] of the Decision, quoted above, whether the existence of the agreement in December 2017 or the statements of account "extended" any pre-existing reasonable excuse. The FTT found that neither the December agreement, the statements of account nor a combination of the two amounted to a reasonable excuse. It is implicit that the FTT also found that the delay between 30 November 2017 and 22 June 2018 was unreasonable.

162. We are satisfied that the FTT was entitled to reach that conclusion on the facts and that there is no proper basis on which we could overturn that conclusion. There was no error of law in the FTT's approach.

163. The interim relief orders went no further than HMRC's agreement in December 2017. They restrained HMRC from issuing a statutory demand and from taking steps towards Mr Archer's bankruptcy. They did not restrain HMRC from issuing the surcharges on the basis that they considered the sums to be due and payable. We do not consider that anything in the interim orders made in the JR Proceedings, the December agreement or the statements of account rendered the issuing of surcharges in this case a conspicuous or indefensible abuse of power. Indeed, there was no evidence that Mr Archer relied on these matters as justifying non-payment of the sums claimed by HMRC. It would have been clear from the fact that HMRC

issued the First Surcharges on 10 May 2016, after interim relief was first granted by Kerr J, that HMRC considered the sums to be due and payable and were expecting the sums to be paid.

164. These matters did not give rise to any reasonable excuse for non-payment of the tax. We cannot see that they could in the alternative support an argument that the tax was not in practice payable, or that Mr Archer and HMRC did not expect the tax to be paid prior to 22 June 2018.

165. In the circumstances, we do not consider that Grounds 3 and 4 establish any error of law by the FTT.

RE-MAKING THE DECISION

166. We have decided on the basis of the errors of law established under Ground 1 that we should set aside the decision of the FTT and re-make the decision.

167. In the light of our findings on Ground 2 it is clear that Mr Archer's appeal against the surcharges must be dismissed. Notwithstanding the relevant external facts to which Ms Brown drew our attention, there is no evidence as to why Mr Archer did not pay the tax. Without that evidence we cannot be satisfied as to Mr Archer's reason for non-payment. We cannot be satisfied that the reason for non-payment was that he was acting on the strength of "robust" professional advice or that he reasonably believed there was no obligation to make payment. We cannot be satisfied that any reason Mr Archer may have had in fact caused the non-payment of tax. Accordingly, and having regard to the guidance in *Perrin* and *Sheiling*, we cannot go on to arrive at the conclusion that he has an objectively reasonable excuse. The available facts are insufficient to enable us to reach such a conclusion.

168. We also consider that even if (contrary to the conclusion we set out above) Mr Archer did have an objectively reasonable excuse merely by reference to the fact that he was pursuing the JR Proceedings and that he had been provided with some encouragement from the court that he had a reasonably arguable case, there were important evidential gaps in the period immediately after the judgment of Jay J and in the period after the Court of Appeal had refused permission to appeal in respect of which there is no evidence whatever on which to form a view as to whether Mr Archer had an objectively reasonable excuse for failing to pay the outstanding tax. There is no evidence as to the advice he was receiving, or his own beliefs as to the merits of the JR Proceedings between 21 February 2017 and 7 March 2017 or in the period after 30 November 2017.

169. In relation to the former period, Jay J had said that Mr Archer must pay the tax. He had refused permission to appeal and he had refused to continue the interim relief. Ms Brown contends that Jay J's judgment was inconsistent insofar as it was not clear whether he considered the tax to be payable or not and accordingly she submits that such inconsistency "reasonably permitted somebody in Mr Archer's position to not pay", thereby establishing a reasonable excuse. The difficulty with this submission is that it begs the question as to what Mr Archer's belief as to the merits of his position based on any advice he was receiving would have been at this point. On the face of things, and looked at objectively having regard to the facts on which Ms Brown relies, Mr Archer's position was both tenuous and uncertain. We think it extremely unlikely that the reasonable taxpayer operating with the advantage of the knowledge and advice available to Mr Archer would have continued to withhold the tax in such circumstances and we disagree that the existence of inconsistencies in Jay J's judgment is sufficient to give rise to an objectively reasonable excuse. The fact that Mr Archer was seeking to exercise his right to appeal during this period does not assist him absent evidence as to his subjective belief in doing so.

170. In relation to the period after 30 November 2017, the Court of Appeal had found that whilst there was a defect in the Closure Notices, the defect had been cured by the application

of section 114 TMA 1970. It had refused permission to appeal and had discharged the interim relief order. Ms Brown accepted during her submissions that at this point in time "things changed" because the "Court of Appeal had validated the closure notices"; indeed from this point in time she appeared to place greater emphasis simply on a litigant's right to explore whether the higher court will entertain his appeal.

171. Again, looked at objectively having regard to the facts on which Ms Brown relies, it is difficult to see that any reasonable taxpayer in the position of Mr Archer and with access to legal advice would at this stage have continued to withhold payment of tax. Insofar as it is Mr Archer's case that it was reasonable for him to await the Supreme Court's decision on his application for permission to appeal, there is insufficient evidence (as the FTT pointed out at [141]) on which to conclude that was a reasonable approach for him to take and we do not consider that HMRC's agreement not to proceed to bankrupt Mr Archer for the debt of tax due in the Relevant Period, made in its letter of 6 December 2017, affects the position. There is no available evidence as to the view Mr Archer took of this agreement at the time. In any event, we consider that there is no basis for a finding of objectively reasonable excuse and we note that the Supreme Court ultimately refused permission to appeal on the ground that there was no arguable point of law.

172. We consider that Mr Archer must show what his belief was during these periods together with the foundation for that belief. In the absence of any such evidence, we cannot simply infer that Mr Archer had a reasonable excuse and nor do we consider that the available facts, judged objectively, are sufficient to establish a reasonable excuse. Even if a reasonable excuse existed until 30 November 2017, we also reject any suggestion (for similar reasons) that Mr Archer has shown that he made payment without unreasonable delay after that excuse ceased.

DISPOSAL

173. For the reasons given above, we set aside the decision of the FTT and re-make the decision as indicated. The overall result is that Mr Archer's appeal is dismissed.

Signed on Original

MRS JUSTICE JOANNA SMITH
JUDGE JONATHAN CANNAN

Release date: 04 March 2022