Neutral Citation: [2026] UKUT 00062 (TCC)

Case Number: UT/2024/000104

UPPER TRIBUNAL
(Tax and Chancery Chamber)

The Royal Courts of Justice,
Rolls Building, London

NATIONAL INSURANCE CONTRIBUTIONS – agreement with inspector of taxes that certain cars would be "pooled cars" for NICs purposes if various conditions satisfied – HMRC subsequently sought to collect NICs retrospectively – whether HMRC estopped from doing so – whether the FTT had jurisdiction to decide whether Appellants had legitimate expectation that decisions would not be retrospective – appeal dismissed

Heard on: 18 November 2025
Judgment date: 06 February 2026

Before

MR JUSTICE ADAM JOHNSON
JUDGE THOMAS SCOTT

Between

MWL INTERNATIONAL LTD
MAYWAL LTD

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Keith Gordon and Jivaan Bennett, instructed by Berwick Tax Ltd

For the Respondents: Simon Pritchard, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. MWL International Ltd ("MWL") and Maywal Ltd ("Maywal") (together the "Appellants") were trading companies established by David Walpole ("Mr Walpole"). HMRC decided that MWL and Maywal were liable to Class 1A national insurance contributions ("NICs") on the basis that certain cars (the "Cars") leased by the Appellants and used by employees were not exempt from NICs as "pooled cars" as defined in the legislation.

2. The Appellants appealed against the decisions to the First-tier Tribunal (Tax Chamber) (the "FTT"). They argued in the alternative that (1) the Cars were pooled cars, (2) HMRC were estopped from arguing that the Cars were not pooled cars, and (3) the Appellants had a legitimate expectation that the Cars would be treated as pooled cars.

3. The estoppel and legitimate expectation arguments were based on an agreement said to have been reached with an inspector of taxes in 1993 (the "1993 Agreement").

4. The FTT decided that (1) the Cars were not pooled cars, (2) the requirements for estoppel by convention were satisfied, but HMRC were not estopped from retrospectively changing the agreement, because HMRC cannot be estopped from enforcing a statutory provision, and the 1993 Agreement was also void as to the future, and (3) the FTT had no jurisdiction to determine the legitimate expectation issue.

5. With the permission of the FTT, the Appellants appealed against the FTT's decisions on the estoppel and legitimate expectation issues. There is no appeal against the FTT's finding that the cars were not pooled cars under the statutory provisions. By their Respondents' Notice, HMRC sought permission to cross-appeal on the grounds that (1) the conditions of the 1993 Agreement were not satisfied, and (2) the FTT erred in finding that the requirements for estoppel would have been satisfied.

6. This is the decision on the appeal by the Appellants, and the "rolled up" decision on HMRC's application for permission to cross-appeal and (if granted) the outcome of the cross-appeal.

7. We are grateful for the clear written and oral submissions from Mr Gordon, Mr Bennett and Mr Pritchard.

POOLED CARS

8. Normally charges to NICs arise in relation to cars provided by a company to its employees which are available for the private use of those employees. There is an exemption for "pooled cars" which satisfy certain conditions, now provided by section 167 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") as follows:

> **167 Pooled cars**
>
> (1) This section applies to a car in relation to a particular tax year if for that year the car has been included in a car pool for the use of the employees of one or more employers.
>
> (2) For that tax year the car—
>
> (a) is to be treated under section 114(1) (cars to which this Chapter applies) as not having been available for the private use of any of the employees concerned, and
>
> (b) is not to be treated in relation to the employees concerned as an employment-related benefit within the meaning of Chapter 10 of this Part (taxable benefits: residual liability to charge) (see section 201).

(3) In relation to a particular tax year, a car is included in a car pool for the use of the employees of one or more employers if in that year—

(a) the car was made available to, and actually used by, more than one of those employees,

(b) the car was made available, in the case of each of those employees, by reason of the employee's employment,

(c) the car was not ordinarily used by one of those employees to the exclusion of the others,

(d) in the case of each of those employees, any private use of the car made by the employee was merely incidental to the employee's other use of the car in that year, and

(e) the car was not normally kept overnight on or in the vicinity of any residential premises where any of the employees was residing, except while being kept overnight on premises occupied by the person making the car available to them.

9. At the time of the 1993 meeting, the exemption was found in identical terms in section 159 of the Income and Corporation Taxes Act 1988.

THE 1993 AGREEMENT AND OTHER BACKGROUND FACTS

10. The FTT made the following findings of fact which are relevant to this appeal:

The Meeting

38. In 1993, the Inland Revenue carried out a PAYE audit of the Maywal group, following which the Meeting was arranged. This was attended by Mr Walpole and Mr Murch on behalf of the Maywal group; by Mr Perry, and by Mr Ken Nutt (who dealt with PAYE for the Maywal group). The Inland Revenue were represented by an Inspector of Taxes and a compliance officer from the Maidstone tax office. The main purpose of the Meeting was to discuss the use of the Cars by directors/employees.

39. No note of the Meeting is extant, but Mr Walpole's unchallenged evidence was that he told the Officers:

(1) the Cars were purchased because they were required to transport the customers;

(2) the Cars were equipped with communication systems which allowed instant contact with customers, and as a result were used as "travelling offices" by the Trading Directors;

(3) the Cars were kept overnight at Maywal's registered office, which was also Mr Walpole's home;

(4) the Trading Directors each owned another car privately;

(5) no records had been kept of the journeys made in the Cars;

(6) Maywal had treated the Cars as "pool cars" in the past and had thus not reported any benefit in kind in relation to the provision of the vehicles or the related fuel; and

(7) the Maywal group could easily operate from overseas, and would do so if every journey in the Cars had to be logged.

40. It was also Mr Walpole's unchallenged evidence that the Compliance Officer took the position that the Cars could not be pool cars unless records were kept of journeys to support that treatment, but he was overruled. The

Inspector instead agreed with Mr Walpole that the Cars were and would continue to be pool cars as long as:

(1) they were available for the company's business as required;

(2) they were available to, and used by, more than one employee;

(3) they were kept overnight at the registered office of the company (which was also the residential address of one of the directors); and

(4) each employee who had use of the Cars owned another car which was available for private use.

41. The evidence in Mr Perry's letter was briefer and less detailed than that given by Mr Walpole, it confirmed that the Inspector had agreed that the Cars were and would continue to be pool cars, and that no benefit in kind was assessable.

42. We find as facts that Mr Walpole gave the Officers the information at §39 and that the parties then came to the agreement set out at §40.

Subsequently

43. During the period from 1993 to 2018, various of the Cars were sold and new cars purchased. From some date before 2015, all new Cars were purchased by ABM, the leasing company within the Maywal group, and were then leased to Maywal or MWL.

44. At all relevant times, the Appellants relied on the agreement reached at the Meeting, and reported none of the Cars on P11Ds. During that time, they submitted their payroll returns on a regular basis, without any questions from HMRC. It was also Mr Walpole's evidence, again unchallenged, that between the Meeting and the enquiry which led to this appeal, there had been "numerous tax enquiries" during which HMRC did not raise any questions about the Cars.

…

The Cars which were the subject of the assessments

49. The decisions related to twelve Cars, being seven Mercedes; two Teslas; one Land Rover Discovery, one BMW and one Porsche Cayenne. There was no dispute as to the quantum of the decisions, in other words, the Appellants agreed that they had been correctly calculated based on the Cars leased to the Appellants during the relevant period and used by one or more of the directors and/or employees.

50. Mr Walpole gave unchallenged evidence that:

(1) the Porsche was available to and driven only by Mr Mark Walpole, but that all the other Cars:

(a) were available to himself, Mr Mark Walpole and Mrs Walpole;

(b) were driven by himself, Mr Mark Walpole, and the chauffeur (see (6) below), who was also an employee;

(c) were normally kept overnight at Mr Walpole's home, which was also the registered office of both Maywal and MWL;

(2) Mr Walpole and Mr Mark Walpole had personal cars which they owned privately;

…

51. On the basis of that unchallenged evidence, we find the above to be facts.

ISSUES IN THE APPEAL AND CROSS-APPEAL

11. We informed Mr Pritchard during the hearing that we had decided to refuse permission for HMRC to argue by way of cross-appeal that the terms of the 1993 Agreement were not satisfied in practice[1].

12. In deciding to refuse permission for this argument to be raised, we have taken into account the principles helpfully summarised by the Court of Appeal in *Notting Hill Finance Limited v Sheikh* [2019] EWCA Civ 1337. Snowden J (as he then was), who gave the leading judgment, stated as follows:

> 23. Surprisingly, however, [the White Book] notes do not refer to the most authoritative and frequently applied statement of the approach of an appellate court to the question of whether to permit a new point to be taken on appeal. That statement appears in the judgment of Nourse LJ in *Pittalis v Grant* [1989] QB 605 at page 611,
>
> "The stance which an appellate court should take towards a point not raised at the trial is in general well settled: see *Macdougall v. Knight* (1889) 14 App. Cas. 194 and *The Tasmania* (1890) 15 App. Cas. 223. It is perhaps best stated in *Ex parte Firth, In re Cowburn* (1882) 19 Ch.D. 419, 429, per Sir George Jessel M.R.:
>
> > "the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence."
>
> …
>
> The principles were also recently restated by Haddon-Cave LJ in *Singh v Dass* [2019] EWCA Civ 360 at [15]-[18],
>
> > 15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.
> >
> > 16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
> >
> > 17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2 at [30] and [49])
>
> …

13. While it is not made explicit in the Decision, it appears that the FTT did consider that the terms of the 1993 Agreement had been met in practice during the relevant period. In any event, HMRC did not seek to argue this point before the FTT, and if they had done so it is likely that the Appellants would have sought to produce evidence to rebut the argument. For these reasons, we refused permission to cross-appeal on this ground.

14. Therefore, the issues to be determined are as follows:

[1] However, it was common ground that the terms of the 1993 Agreement were not satisfied solely in relation to the Porsche Cayenne.

(1) Could HMRC be estopped from reaching the relevant decisions to apply NICs retrospectively?

(2) Were the requirements for estoppel by convention satisfied in this case (HMRC's cross-appeal)?

(3) Did the FTT have jurisdiction to decide the argument that the Appellants had a legitimate expectation on the basis of the 1993 Agreement that HMRC would not decide to apply NICs to the Cars retrospectively?

ESTOPPEL BY CONVENTION AGAINST HMRC

15. Since the Appellants did not satisfy the statutory conditions for the Cars to be pooled cars, in order to succeed in their appeal they needed to establish that a consequence of the 1993 Agreement was that HMRC were prevented from charging NICs retrospectively ie during the term of that agreement.

16. The first such argument raised before the FTT was that HMRC were estopped from deciding to assess the NICs.

Estoppel by convention

17. There are several categories of estoppel. As explained by Lord Burrows in *Tinkler v HMRC* [2021] UKSC 39 ("*Tinkler*"), at [28]:

> There are several types of estoppel recognised in English law. These include estoppel by representation, promissory estoppel, proprietary estoppel, estoppel by convention and, most recently, so-called contractual estoppel. Whatever their historical roots, most of these doctrines are nowadays usually regarded as equitable doctrines not least because there is a heavy emphasis in the case law on "unconscionability" (although, wherever possible, one should seek to clarify what that vague phrase means in relation to the particular facts in play). Attempts have been made over the years to try to unify the various estoppels but such unification has proved elusive and the different types of estoppel continue to be seen as having their own particular requirements and effects…

18. The FTT decided that it was estoppel by convention which was potentially engaged in this case, and there is no challenge to that decision.

19. In *Tinkler*, Lord Burrows described the decision of the Court of Appeal in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 as the first recognition by an appellate court of the principle of estoppel by convention. He referred to the following passages from that decision as describing the principle:

> 30. Lord Denning MR said this, at pp 121-122:
>
> "To use the phrase of Latham CJ and Dixon J in the Australian High Court in *Grundt v Great Boulder Proprietary Gold Mines Ltd*(1937) 59 CLR 641, 657, 677, the parties by their course of dealing adopted a 'conventional basis' for the governance of the relations between them, and are bound by it. I care not whether this is put as an agreed variation of the contract or as a species of estoppel. They are bound by the 'conventional basis' on which they conducted their affairs. The reason is because it would be altogether unjust to allow either party to insist on the strict interpretation of the original terms of the contract - when it would be inequitable to do so, having regard to dealings which have taken place between the parties. …
>
> When the parties to a contract are both under a common mistake as to the meaning or effect of it - and thereafter embark on a course of dealing on the footing of that mistake - thereby replacing the original terms of the contract

> by a conventional basis on which they both conduct their affairs, then the original contract is replaced by the conventional basis. The parties are bound by the conventional basis. Either party can sue or be sued upon it just as if it had been expressly agreed between them. …
>
> When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."
>
> 31. At pp 126 and 130-131 respectively, Eveleigh LJ and Brandon LJ made clear that they regarded the relevant estoppel as not being estoppel by representation but rather as being estoppel by convention. Brandon LJ cited with approval the whole of, and Eveleigh LJ the last sentence of, the following passage taken from the 3rd edition of *Spencer Bower and Turner, The Law Relating to Estoppel by Representation* (1977), p 157:
>
> "This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed."
>
> It should be noted that, despite that passage referring only to a common assumption as to the facts, the doctrine was being applied in that case to a common assumption as to the law ie as to the legal effect of the guarantee.

20. Lord Burrows approved the following statement of the applicable principles set out in *HMRC v Benchdollar Ltd* [2009] EWHC 1310 (Ch) ("*Benchdollar*") at [52], with the expansion referred to below:

> (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

21. The expansion provided by Lord Burrows was that in relation to the "common assumption" described in the first of these principles, "something must be shown to have 'crossed the line' sufficient to manifest an assent to the assumption.": *Tinkler* at [50].

The FTT's decision

22. The FTT correctly directed itself as to the law, by reference to the principles above. It helpfully summarised its conclusions, at [99] of the Decision, as follows:

> (1) The principles of estoppel by convention set out in *Tinkler* were satisfied.
>
> (2) However, those principles did not operate in the Appellants' case because:
>
> (a) HMRC cannot be estopped from enforcing a statutory provision; and
>
> (b) the Inspector had no authority to enter into a forward agreement relating to Maywal's tax and/or NICs position. The agreement made at the [1993] Meeting was therefore void as regards the future, and an estoppel cannot be founded on a void agreement.

23. HMRC appeal against the first of these conclusions, and the Appellants against the second. We will deal first with the Appellants' appeal.

No estoppel "in the face of a statute"?

24. Before the FTT, HMRC argued that HMRC could not be estopped from applying section 167 ITEPA because there could be no estoppel in the face of a statute. HMRC relied on *Keen v Holland* [1984] 1 WLR 251 and the FTT also referred to *Maritime Electric Company Limited v General Dairies Limited (Canada)* [1937] AC 610 ("*Maritime Electric*"). Mr Gordon (who also appeared for the Appellants before the FTT together with Mr Walpole) accepted that estoppel could not defeat legislation, but argued that the position was different where HMRC had a discretion whether or not to issue a decision. The FTT identified in that context the decision in *Southend-on-Sea Corporation v Hodgson* [1961] 1 QB 415 ("*Southend-on-Sea*"), but decided that it did not support Mr Gordon's proposition, and that in any event HMRC were not exercising discretion in this case. The FTT therefore accepted HMRC's argument.

Discussion

25. Estoppel by convention can in principle operate against HMRC. The leading authorities, such as *Tinkler* and *Benchdollar*, concern whether estoppel by convention operated on the facts against the taxpayer[2]. Nevertheless, Mr Pritchard did not seek to argue that HMRC were exempt from the doctrine of estoppel by convention, and we consider that he was right not to do so.

26. However, the circumstances in which estoppel by convention will operate against HMRC will be limited. As *Chitty on Contracts* puts it, "equitable estoppel may be successfully invoked against the Crown and public authorities, but not to the same extent as it is available against private parties":14-053.

27. We first consider the principles which might prevent estoppel by convention operating against HMRC and then apply those principles to the facts in this case.

28. In identifying the relevant principles, the most important authorities are those identified by the FTT, namely *Maritime Electric*, *Southend-on-Sea*, *Keen v Holland* and *Tinkler*.

29. In *Maritime Electric*, a public utility in Canada mistakenly made statements to one of its customers about amounts due for electricity supplies on which the customer relied and which led to the customer being undercharged. The Privy Council held that the utility company could not be estopped by the mistake from recovering from the customer the full statutory price for the supplies. Lord Maugham, delivering the judgment of the Privy Council, noted that the

[2] An unusual example of the FTT considering estoppel by convention against HMRC is *Queenscourt Ltd v HMRC* [2024] UKFTT 460(TC).

relevant statutory provisions imposed a duty on Maritime Electric to charge for electricity at specific scheduled rates. He then explained why estoppel could not run as follows, at page 620:

> The sections of the Public Utilities Act which are here in question are sections enacted for the benefit of a section of the public, that is, on grounds of public policy in a general sense. In such a case - and their Lordships do not propose to express any opinion as to statutes which are not within this category - where, as here, the statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstance that an estoppel is only a rule of evidence which under certain special circumstances can be invoked by a party to an action; it cannot therefore avail in such a case to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. …The duty of each party is to obey the law… the Court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory position.

30. Although this was a decision of the Privy Council in 1937, it has been followed in several subsequent cases and remains good law. It was, for instance, cited with approval by the Court of Appeal in *Laker Airways Ltd v Department of Trade* [1976] EWCA Civ 10 ("*Laker Airways*") and by the Court of Appeal in *Western Fish Products v Penwith District Council* [1978] EWCA Civ.

31. *Southend-on-Sea* concerned statements made by an officer of a local planning authority to a company, and relied on by that company, that premises had an existing user right as a builder's yard. It transpired that that was misleading, and the authority subsequently sought to serve an enforcement notice on the company requiring them to cease use of the premises as a builder's yard. In legal proceedings, the authority sought to adduce evidence supporting its position, and the issue was whether the authority was estopped from doing so by the initial statements given by the planning officer.

32. Lord Parker CJ, delivering the decision of the Court of Appeal, referred to *Maritime Electric*, and recorded that the parties agreed that this established that "estoppel cannot operate to prevent or hinder the performance of a positive statutory duty". He then set out the argument of the company that that principle "does not extend to an estoppel which might prevent or hinder the exercise of a statutory discretion". He held as follows in relation to the authority's statutory discretion to issue an enforcement notice (at page 423):

> I can see no logical distinction between a case such as that of an estoppel being sought to be raised to prevent the performance of a statutory duty and one where it is sought to be raised to hinder the exercise of a statutory discretion. After all, in a case of discretion there is a duty under the statute to exercise a free and unhindered discretion. There is a long line of cases to which we have not been specifically referred which lay down that a public authority cannot by contract fetter the exercise of its discretion. Similarly, as it seems to me, an estoppel cannot be raised to prevent or hinder the exercise of the discretion.

33. *Keen v Holland* is relied on by HMRC for the proposition that estoppel cannot apply where it would undermine a statute.

34. In that case, it was argued by Mr Keen that Mr Holland was estopped by convention from relying on section 2(1) of the Agricultural Holdings Act 1948 because he had signed a contract excluding the protection of that provision for certain agricultural tenancies. As Briggs J explained in *Benchdollar*, (at [46]) "the primary basis of the decision in that case was that it

was not possible to avoid the protection afforded by the Agricultural Holdings Act 1948 either by contract, or by an alleged convention estoppel contained in a contract".

35. The judgment of the Court of Appeal was given by Oliver LJ, who stated, at page 261D:

> …If an express agreement to this effect would be avoided, as it plainly would, then it seems to us to follow that the statutory inability to contract out cannot be avoided by appealing to an estoppel. The terms of section 2(1) are mandatory once the factual situation therein described exists, as it does here, and it cannot, as we think, be overridden by an estoppel even assuming that otherwise the conditions for an estoppel exist…

36. Oliver LJ did not express his conclusion in terms of estoppel "undermining" a statute. However, in *Tinkler*, *Keen v Holland* was argued to be authority for the proposition that estoppel in that case would undermine the statutory protection of section 9A Taxes Management Act 1970. Lord Burrows referred to *Keen v Holland* as follows (at [33]):

> The decision in *Keen v Holland* [1984] 1 WLR 251 is of primary importance in laying down that estoppel by convention…cannot apply, in certain circumstances, because it would undermine a statute.

37. At [80], referring to the passage from *Keen v Holland* set out above, Lord Burrows explained the rationale for the decision as follows:

> Section 2(1) of the Agricultural Holdings Act 1948 had the purpose of protecting agricultural tenants by granting them security of tenure. The parties could not contract out of that provision because that would defeat the protection given to tenants. As contracting out was not possible, it followed that estoppel by convention could not apply either.

38. Lord Burrows then distinguished *Keen v Holland*, on the basis that section 9A was permissive as to the method of giving notice to a taxpayer, so that estoppel by convention would not "undermine the purpose of the Act": [81].

39. Mr Gordon argued that each of *Maritime Electric*, *Southend-on-Sea* and *Keen v Holland* had either been relied on in error by the FTT or should be distinguished. He submitted that what the authorities establish is that there is no absolute rule that estoppel cannot operate to defeat a statute. Rather, they show that where an estoppel runs into conflict with a statutory provision, the latter takes precedence only where (i) it is mandatory in nature, expressly conferring protections or imposing obligations on a person, and (ii) the objective of the provisions would be undermined if the estoppel operated. Neither of those conditions, he said, applies in this case.

40. We agree with Mr Gordon that there is no absolute rule that estoppel cannot "defeat a statute". However, we do not accept his formulation of the circumstances in which estoppel by convention will operate. We consider that the following principles can be drawn from the authorities:

(1) The starting point is to identify and consider the terms of the legislation against which estoppel by convention is sought. That was emphasised in all of the authorities discussed above.

(2) If the statutory provision imposes a positive duty "enacted for the benefit of a section of the public, that is, on grounds of public policy in a general sense", then estoppel by convention cannot operate to prevent the performance of that duty: *Maritime Electric*. While such a duty might commonly be found in areas such as planning legislation, we consider that this description should not be applied unduly narrowly. As is observed in

Chitty on Contracts[3], "it is difficult to see what kinds of statutory duties would fail to satisfy this test, but their Lordships perhaps had in mind duties imposed under a private Act of Parliament". In relation to tax legislation, any requirement for a policy of public benefit is likely to be satisfied.

(3) To the extent that it would not be possible for the relevant body (in this case HMRC) to avoid or abrogate the relevant statutory provisions by contract, then estoppel cannot be invoked to achieve what contract could not: *Tinkler*, *Southend-on-Sea* and *Keen v Holland*.

(4) It is necessary to determine on the facts and by reference to the statutory provisions against which estoppel is sought whether those provisions would be "overridden" (*Keen v Holland*) or "undermined" (*Tinkler*) by the estoppel: *Keen v Holland* and *Tinkler*. If they would, estoppel will not be available.

(5) These principles apply not only where the statutory provision in question imposes a duty but also where it confers a power or discretion: *Southend-on-Sea*. In *Laker Airways*, Lord Denning described the underlying principle in the following terms:

> …The underlying principle is that the Crown cannot be estopped from exercising its powers, whether given in a statute or by common law, when it is doing so in the proper exercise of its duty to act for the public good, even though this may work some injustice or unfairness to a private individual - see [*Maritime Electric*]…

41. When we turn to apply these principles to the facts in this case, it is clear that the FTT was right to conclude that HMRC cannot be estopped by the 1993 Agreement from reaching the disputed decisions to charge NICs in accordance with section 167 ITEPA.

42. The relevant statutory provisions sought to be estopped are section 167 ITEPA and section 8 of the Social Security Contributions (Transfer of Functions etc) Act 1999 ("ToFA"), which provides that:

> (1) Subject to the provisions of this Part, it shall be for an officer of the Board—
>
> (a)-(b)…
>
> (c) to decide whether a person is or was liable to pay contributions of any particular class and, if so, the amount that he is or was liable to pay…

43. Mr Gordon submitted that these provisions should be read with section 5 of the Commissioners for Revenue and Customs Act 2005, which states as follows:

> **5 Commissioners' initial functions**
>
> (1) The Commissioners shall be responsible for—
>
> (a) the collection and management of revenue for which the Commissioners of Inland Revenue were responsible before the commencement of this section,
>
> (b) the collection and management of revenue for which the Commissioners of Customs and Excise were responsible before the commencement of this section, and
>
> (c) the payment and management of tax credits for which the Commissioners of Inland Revenue were responsible before the commencement of this section.

[3] *Chitty on Contracts*, 36th edition at 14-055.

…

(4) In this Act "revenue" includes taxes, duties and national insurance contributions.

44. The substantive statutory provision with which the NICs decisions are concerned is section 167 ITEPA. In particular, one of the conditions which must be satisfied in order for the pooled cars exemption to apply is that in relation to any employee to whom a pooled car is made available and used "any private use of the car made by the employee was merely incidental to the employee's other use of the car in that year": Section 167(3)(d). Under the terms of the 1993 Agreement, on which the claim for estoppel is based, there was no such provision. The closest analogue was the requirement that "each employee who had use of the Cars owned another car which was available for private use": [40(4)] of the Decision.

45. Mr Gordon argued that the requirement contained in the 1993 Agreement was an attempted reflection of the requirement in section 167(3)(d). The FTT disagreed, finding as follows at [149]-[150]:

> 149. We do not agree with Mr Gordon that the agreement reached at the Meeting was "a fair…attempt to reflect the law". The statutory condition that pool car treatment was only allowed if "any private use was merely incidental" was replaced by the requirement that the employees simply owned another car. We have described this requirement as a "proxy" for Condition (d), but it was a very poor proxy, particularly as records of the use of the Cars were not required.
>
> 150. We also disagree with Mr Gordon's submission that the agreement was "intended to offer a protection to the Inland Revenue to give them confidence that the pool car rules were being complied with". Instead, we find as a fact that the Inspector took what he thought was a pragmatic approach to resolving the dispute both for the past and the future. This can also be seen from the fact that the Compliance Officer took the position that the Cars could not be pool cars unless records were kept to support that treatment, but was overruled by the Inspector, see §40.

46. We consider that the requirement to own another car cannot fairly be described as an adequate means of reflecting the statutory requirement that any private use be merely incidental, or as a methodology for enforcing that requirement. Section 167(3)(d) is requiring in unequivocal terms that any *actual usage* of the car must be no more than incidental. Under the provisions of the 1993 Agreement, it would be perfectly possible for an employee to own another car but not use it at all, and/or to use the "pooled" car exclusively for private purposes. The 1993 Agreement contained no requirement as to actual usage at all[4]. An estoppel on the basis of such an agreement would prevent HMRC from applying the clear terms of the statute.

47. HMRC could not have bound themselves by contract to fail properly to apply the terms of section 167 in this way in exempting the Cars from NICs. It follows that they could not be estopped from applying those plain statutory terms, as they did in the disputed decisions applying NICs.

48. By the same token, the effect of enforcing the estoppel would also be to override and undermine the statutory private use requirement in section 167(3)(d).

49. It does not affect this conclusion that section 8 ToFA (whether or not read with the general collection and management powers conferred on HMRC) refers to a decision by an

[4] Mr Gordon suggested that the condition in the 1993 Agreement that the Cars be kept overnight at the Company's registered office might assist in satisfying the private use requirement in section 167, but we do not accept that submission.

officer of the Board. As we have explained, the policy behind excluding estoppel in this situation would apply whether or not the relevant statutory provisions were characterised as duties or discretionary powers. In any event, we would agree with the FTT (at [131] of the Decision) that section 8 does not require or confer a discretion on an officer. Rather, it envisages a decision that a person is liable to pay NICs. In relation to the Cars such a decision did not involve an exercise of discretion, since liability arose unless the terms of the exemption in section 167 were met. We discuss this area further below in relation to legitimate expectation.

Disposition

50. In conclusion, the FTT made no error of law in reaching the decision that estoppel by convention could not apply, albeit we have expanded on the FTT's concise reasoning, and the appeal on this ground is dismissed.

No estoppel as 1993 Agreement void?

51. Our decision is sufficient to dispose of the Appellants' appeal in relation to estoppel. In view of our conclusion, it is not necessary for us to consider their appeal against the FTT's alternative reason for deciding that estoppel did not operate, namely that the 1993 Agreement was void insofar as it bound HMRC for future tax years, and estoppel could not operate in relation to a void agreement.

52. Although we heard full argument on this point, we consider that the issue is best dealt with in an appeal where it is dispositive, and we express no view on it.

HMRC's cross-appeal

53. Since we have dismissed the Appellant's appeal in relation to estoppel, there is no need for us to determine HMRC's cross-appeal against the FTT's determination that the conditions for estoppel would otherwise have been satisfied. We would in any event have exercised considerable caution in disturbing the FTT's careful findings of facts on this issue.

LEGITIMATE EXPECTATION AND WHETHER THE FTT HAD JURISDICTION

54. The final ground on which the Appellants appealed to the FTT was that they had a legitimate expectation that HMRC would not retrospectively change the 1993 Agreement.

55. Unlike the estoppel issue, the FTT did not determine whether a legitimate expectation existed, in light of its finding that it lacked jurisdiction to decide the issue. It set out the position at [189] as follows:

> Given that finding, we did not consider it necessary further to lengthen this already long judgment by considering whether the Appellants had met the relevant requirements to establish a legitimate expectation. Any such findings would be entirely *obiter.*

Jurisdiction

Relevant statutory provisions and the FTT's decision

56. As described above, the decisions in this case to impose the NICs liabilities were made by an officer under section 8(1) ToFA. The statutory right of appeal against such a decision arises under section 11 ToFA, which provides as follows:

> (1) This section applies to any decision of an officer of the Board under section 8 of this Act…
>
> (2) In the case of a decision to which this section applies
>
> (a) ….

(b) the person in respect of whom the decision is made shall have a right to appeal to the tribunal.

57. Regulation 10 of the Social Security Contributions (Decisions and Appeals) Regulations 1999 (SI 1999/1027) provides as follows:

> **10 Determination of appeals by the tribunal**
>
> If, on an appeal . . . under Part II of the Transfer Act or Part III of the Transfer Order that is notified to the tribunal, it appears to the tribunal that the decision should be varied in a particular manner, the decision shall be varied in that manner, but otherwise shall stand good.

58. Taking into account these statutory provisions, read together with section 167 ITEPA, did the FTT have jurisdiction to consider the Appellants' argument that they had a legitimate expectation that HMRC would not retrospectively change the 1993 Agreement?

59. In this context, the FTT helpfully recorded three propositions on which the parties agreed, at [161]:

> The following points were explicitly stated to be common ground:
>
> (1) The Tribunal's jurisdiction is conferred by statute: it has no inherent or common law jurisdiction. Section 3(1) of the Tribunal, Courts and Enforcement Act 2007 ("TCEA") provides:
>
> > "There is to be a tribunal, known as the First-tier Tribunal, for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act."
>
> (2) Where there is no statutory right of appeal against an HMRC decision, challenges can only be brought by way of an application for judicial review under CPR Part 54. Examples include HMRC's decisions as to who should receive a Notice to File under TMA s 8, and whether an extra-statutory concession applies (as to which, see *Trustees of the BT Pension Scheme v HMRC* [2015] EWCA Civ 315 ("*BT Pensions*") at [143]).
>
> (3) Where there is a statutory right of appeal, whether the Tribunal has a public law jurisdiction depends on the particular provision in question.

60. Beyond this point, the positions of the parties diverged. Mr Gordon's submission was that a taxpayer can always raise a collateral challenge to an assessment on the basis of legitimate expectation unless the right to do so has been circumscribed or displaced by the statute. Mr Marks' submission for HMRC before the FTT was that unless the statute confers a discretion on HMRC as to whether or not to assess a liability, no jurisdiction exists before the FTT, and there was no such discretion in this case.

61. Having discussed certain of the most relevant authorities, the FTT accepted HMRC's reasoning, concluding as follows at [185]-[188]:

> 185. HMRC thus had the power to decide only whether the Appellants were "liable" to pay Class 1A NICs. This is also reflected in the wording of the decisions themselves: they all begin by saying that the Appellant "is liable to pay Class 1A contributions".
>
> 186. The Appellants were "liable" to Class 1A NICs, because the Cars were available for use and actually used by, Mr Walpole, Mr Mark Walpole and Mrs Walpole, and they were not pool cars. The HMRC officer had no discretion: he could not decide the Appellants were not liable.

> 187. The situation is thus similar to that described by Judge McKeever and confirmed by the UT in *Caerdav*. Just as "FTT does not have jurisdiction to consider legitimate expectation where the appeal in question relates to the amount of tax due and HMRC has no discretion", the FTT also does not have a judicial review jurisdiction where the appeal in question relates to a taxpayer's liability, and HMRC has no discretion.
>
> 188. The position is different in other parts of the tax system, where after a liability has been established, HMRC have a discretion as to whether or not to assess that liability: see for instance VATA s 73(1) considered in *Zeman*. But as the case law has consistently said, whether or not this Tribunal has the jurisdiction to consider appeal grounds based on public law arguments (such as legitimate expectation) depends on the statutory provisions under consideration. The Tribunal has no public law jurisdiction in relation to HMRC decisions made under ToFA s 8.

Discussion

62. We would agree with the three propositions recorded by the FTT to be common ground.

63. Moving on from common ground, the thorny issue which then arises, in this appeal as it has in many others, is the starting point in construing the relevant statutory provisions which are said to engage a legitimate expectation jurisdiction on the part of the FTT. In interpreting the particular provisions in question, does one start from the assumption that they permit a legitimate expectation challenge unless the provisions exclude it, or from the assumption that they do not unless one finds within the provisions some need for an exercise of discretion which can form the basis for such a challenge?

64. Mr Gordon pithily expressed the Appellants' position in his oral submissions as being this: there is no need to scrutinise the relevant statutory provisions to see if they include a right to raise a collateral public law argument, because they will unless they exclude it.

65. There are many authorities which discuss this issue or express a view on it. The number continues to grow. The recent decision of the FTT in *WM Morrison Supermarkets Limited v HMRC* [2025] UKFTT 1542 (TC) contains a meticulous discussion (at [288]-[392]) of some of the leading case law on the FTT's jurisdiction under a statutory provision in relation to legitimate expectation. Mr Gordon referred us to even more authorities.

66. Until 2020 the authorities were relatively consistent on the approach to be taken in determining whether a statutory provision encompassed a legitimate expectation jurisdiction on the part of the FTT. To take one example, in *Aspin v Estill* [1987] STC 723, Sir John Donaldson MR, delivering the judgment of the Court of Appeal, referred (at p726) to the "somewhat surprising submission" that the General Commissioners could consider a judicial review argument, a submission which he "greeted…with surprise bordering on horror" given that it could not have been the intention of Parliament to confer that jurisdiction on the Commissioners.

67. Something of an outlier was the decision in *Oxfam v Revenue and Customs Commissioners* [2010] STC 686 ("*Oxfam*"). In that case, Sales J decided that the parties were wrong to agree that the FTT had no legitimate expectation jurisdiction under the relevant provisions, stating, at [68]:

> I do not think that it is a valid objection to this straightforward interpretation of section 83(1)(c) according to its natural meaning that it has the effect that sometimes the Tribunal will have to apply public law concepts in order to determine cases before it. It happens regularly elsewhere in the legal system that courts or tribunals with jurisdiction defined in statute by general words have jurisdiction to decide issues of public law which may be relevant to

> determination of questions falling within their statutorily defined jurisdiction. No special language is required to achieve that effect. Where they are themselves independent and impartial courts or tribunals (as the Tribunal is) there is no presumption that public law issues are reserved to the High Court in the exercise of its judicial review jurisdiction…

68. Two decisions of the Court of Appeal serve to illustrate that the position set out by Sales J was not the commonly held approach:

(1) In *The Trustees of the BT Pensions Scheme v HMRC* [2015] EWCA Civ 713, the Court of Appeal rejected the argument that the FTT had jurisdiction to determine whether or not an extra-statutory concession had been fairly applied by HMRC. Patten LJ, delivering the judgment of the court, considered the statements in *Oxfam* and stated, at [143]:

> We therefore consider that the reasoning of Sales J in *Oxfam v HMRC* has no application to the statutory jurisdiction under s.3 TCEA 2007 in the sense of giving to the FtT and the Upper Tribunal jurisdiction to decide the common law question of whether HMRC has properly operated the extra-statutory concession… This reading of TCEA 2007 is strengthened by s.15 TCEA 2007 which gives the Upper Tribunal jurisdiction to decide applications for judicial review when transferred from the Administrative Court. It indicates that when one of the tax tribunals was intended to be able to determine public law claims Parliament made that expressly clear. There are no similar provisions in the case of the FtT.

(2) In *Metropolitan International Schools Ltd v HMRC* [2019] EWCA Civ 156 ("*Metropolitan*"), the Court of Appeal rejected the taxpayer's argument that the FTT could decide a legitimate expectation argument in relation to particular VAT provisions. Newey LJ, delivering the judgment of the court, said this, at [19]-[21]:

> [19] Secondly, the School's interpretation of s 84(10) of the VATA would appear to imply that public law arguments could routinely be advanced in appeals to the FTT. …
>
> [20] That would be a very surprising result. …
>
> [21] Mr Ramsden [counsel for Metropolitan] did not attempt to persuade us that the UT was wrong in *Noor*. Were, however, his contentions as to the ambit of s 84(10) of the VATA well-founded, it would seem that the FTT had, after all, a wide jurisdiction to rule on public law issues and, in particular, legitimate expectation claims… Further, legitimate expectation (and, seemingly, other public law) arguments could be raised in the FTT without any need to satisfy the requirements as to obtaining permission and time limits that govern applications for judicial review (see CPR 54.4 and 54.5). It is highly improbable that Parliament intended this when it enacted what has now become s 84(10).

69. The Court of Appeal decision in *Beadle v HMRC* [2020] EWCA Civ 562 ("*Beadle*") was released a little over a year after the decision in *Metropolitan*. The case concerned a penalty for non-payment of a partner payment notice, a notice against which no statutory right of appeal to the FTT exists. The taxpayer, represented by Mr Gordon, argued that in this situation he could raise public law arguments by way of collateral challenge to the notice in a statutory appeal to the FTT against the penalty.

70. Delivering the judgment of the court, Simler LJ referred to the "exclusivity principle" derived from *O'Reilly v Mackman* [1983] 2 AC 237 that it is an abuse of process to challenge

a public law decision other than by means of judicial review. However, she held, this principle was not unqualified. She stated as follows:

> 44. Like the UT, I do not doubt that the exclusivity principle derived in *O'Reilly v Mackman* is subject to an important limitation which itself has limits as follows. Where a public body brings enforcement action against a person in a court or tribunal (including a court or tribunal whose only jurisdiction is statutory) the promotion of the rule of law and fairness means, in general, that person may defend themselves by challenging the validity of the enforcement decision or some antecedent decision on public law grounds, save where the scope for challenging alleged unlawful conduct has been circumscribed by the relevant statutory scheme, which excludes such a challenge. The question accordingly is whether the statutory scheme in question excludes the ability to raise a public law defence in civil (or criminal) proceedings that are dependent on the validity of an underlying administrative act.
>
> 45. Mr Gordon submits that only express statutory language is capable of excluding such a challenge. Like the UT, I disagree. In my judgment the express words used by a statutory scheme looked at in isolation may not be sufficient on their own to restrict or exclude public law challenges, but that may be the clear and necessary implication when the relevant statutory scheme is construed as a whole and in light of its context and purpose…
>
> 46. What is necessary in a case where there are competing interests (on the one hand a concern to ensure fairness to those facing enforcement proceedings in having a reasonable opportunity to defend themselves; and on the other, the public interest in the legality of formal acts of a public authority being established without delay to achieve orderly administration) is as the House of Lords made clear in *Boddington* (Lord Irvine LC at 160C):
>
> > "to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or an administrative act under it. There are situations in which Parliament may legislate to preclude such challenges being made, in the interest, for example, of promoting certainty about the legitimacy of administrative acts on which the public may have to rely."
>
> 47. In approaching the question of statutory construction the nature and purpose of the statutory regime and the nature of the rights in issue are the starting point for consideration. There is a strong presumption that Parliament will not legislate to prevent individuals affected by legal measures promulgated by public bodies from having a fair opportunity to challenge such measures and vindicate their rights in court proceedings. Further, whether the impugned administrative act is specifically directed at the respondent to enforcement proceedings, who in consequence has had clear and ample opportunity to challenge the legality of that act before being pursued in enforcement proceedings, or is of a general character directed to the public at large where there has been no obvious or reasonable opportunity to challenge the validity of the underlying administrative act, is an important consideration.

71. The Upper Tribunal decision in *KSM Henryk Zeman SP Zoo v HMRC* [2021] UKUT 182 (TCC) ("*Zeman*") concerned an appeal to the FTT against an assessment to VAT in relation to which the taxpayer sought to raise a legitimate expectation argument. The Tribunal referred to the exclusivity principle and the exception discussed in *Beadle*, holding that the taxpayer's situation was in substance the same as that of a defendant in enforcement proceedings. The relevant statutory provisions in *Zeman* were section 73 Value Added Tax Act 1983 ("VATA"),

which is permissive and enables but does not require HMRC to raise a "best judgment" assessment, and section 83(1)(p) VATA, which allows an appeal "with respect to" an assessment. The Tribunal set out its conclusion on jurisdiction as follows:

> 82. In such circumstances, it seems to us there are good policy reasons for not adopting a construction of section 83(1)(p) which strictly limits the appellate jurisdiction of the FTT… and which therefore excludes consideration of a legitimate expectation argument. We refer again to the comments of Sales J in *Oxfam* quoted at [39] above. Were one to adopt such a restrictive approach, there would be an obvious risk of duplication, delay and potential injustice given the potential for disputes to arise as to which forum any particular challenge should be brought it.
>
> …
>
> 84. Coming back then to where we started our analysis, the critical question in this case (see *Beadle* at [44]) is whether the relevant statutory scheme expressly or by implication excludes the ability to raise a public law defence of legitimate expectation (again, see *Beadle* at [44]). For all the reasons given above, we do not consider that section 83(1)(p) does exclude that ability. On the contrary, on the facts of this case and given the broad subject-matter of section 83(1)(p), we see strong reasons for thinking that it would be artificial and unworkable to exclude a defence based on the public law principle of legitimate expectation from the tribunal's appellate jurisdiction. We therefore consider that the FTT did have jurisdiction to determine that question in this case.

72. Various attempts have been made by the FTT and Upper Tribunal to reconcile some of the statements in *Zeman* with those in earlier authorities. The decision relied on by the FTT in this appeal was *Caerdav v HMRC* [2023] UKUT 00179 (TCC) ("*Caerdav*"). In relation to the jurisdiction issue, the Tribunal in *Caerdav* referred to the passages we have set out above from *Metropolitan*, and stated as follows:

> 152. The starting point is therefore that appeal grounds which concern public law arguments should be pursued in judicial review proceedings rather than before the FTT. However, we, like the FTT, accept that the FTT may have jurisdiction to consider appeal grounds based on public law arguments (such as legitimate expectation) depending on the statutory provisions under consideration.
>
> 153. Thus, the statutory context is key, as the UT in [*Zeman*] explains.
>
> 154. In this appeal, the taxpayer appeals under s.83(1)(b) VATA, which permits appeals to the FTT with respect to "the VAT chargeable… on the importation of goods from a place outside the member States." Like the right of appeal under s.83(1)(c) VATA, the VAT chargeable on the importation of goods is not a matter of discretion but is mandatory and in an appeal the FTT is concerned with whether the conditions prescribed for a charge to arise under the legislation are present and the amount of the charge.
>
> 155. This is in contrast to the manner in which s.83(1)(p) VATA provides a right of appeal against the discretion of HMRC whether to make an assessment under section 73(1). Hence there is a distinction drawn between subsections 83(1)(c) and (p) VATA set in the authority on which the Appellant relies – [*Zeman*]… There is a discretion inherent in s.83(1)(p) VATA read together with section 73, which were the statutory provisions considered in [*Zeman*] which led it to decide public law arguments could be pursued in the FTT appeal. However, there is no discretion conveyed by subsections 83(1)(b) or

> (c) VATA which are the mandatory provisions concerning the appeals applicable in this case and in *Noor* respectively.

73. In this appeal we were presented with submissions on the correct starting point in analysing the statutory provisions which coalesced around *Beadle* and *Zeman* on one side for the taxpayer, pitted against *Metropolitan*, *BT Pensions* and other authorities prior to *Beadle* on the other side for HMRC. The battle lines were drawn in a similar way in *Caerdav* and, more recently, in *Drinks and Food UK Limited v HMRC* [2025] UKUT 00315 (TCC).

74. In our opinion, there is a tension between the authorities, but it should not be overstated. The tension is explicable by a number of factors. First, and most importantly, many of the decisions relate to different statutory provisions, both in terms of the relevant substantive legislation and also in terms of the related appeal rights. As we emphasise below, the question is always one of statutory construction. Second, it is not always clear whether some statements in the authorities are focussed on whether the FTT might be expected to have a judicial review jurisdiction, or should have one, rather than on whether jurisdiction in fact arises under the particular provisions. Third, comments on the issue which are *obiter* carry less weight.

75. Nevertheless, the remaining uncertainty, which is being grappled with by the FTT as taxpayers increasingly seek to raise legitimate expectation arguments in tax appeals, would clearly benefit from clarification, either by legislation or by a decision of a superior court.

76. In our opinion, the approach which best reconciles the authorities is to focus on a conventional purposive construction of the particular statutory provisions in determining the extent of the FTT's jurisdiction in an appeal. In any such exercise, the context and purpose of the provisions will clearly be material. The relevant provisions will include the substantive legislation which is the subject of the appeal, any provisions which relate to the decision-making process in question (does the appeal relate to what Simler LJ in *Beadle* describes as "proceedings that are dependent on the validity of an underlying administrative act"?), and the related appeal rights, including in particular the extent to which they confer a supervisory jurisdiction on the FTT. It will also be relevant to determine whether the FTT proceedings are "enforcement action" [5].

77. We endorse and emphasise what the Upper Tribunal said to this effect in *R & J Birkett v HMRC* [2017] UKUT 89 (TCC) at [30]:

> (4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.
>
> (5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction.

78. Applying that approach in this case, we consider that the FTT reached the right conclusion, namely that the provisions in question did not confer jurisdiction on the FTT to decide the legitimate expectation argument.

79. The substantive provisions under which HMRC decided that liability to NICs arose, including the exemption in section 167 ITEPA, are mandatory provisions and do not incorporate any exercise of discretion. The appeal rights are narrowly framed, and do not signal a supervisory jurisdiction for the FTT.

[5] In this case, the FTT stated that it understood the parties "to agree that a person who appeals a tax assessment is in essentially the same position as a defendant in a civil action": the Decision at [162].

80. The high point of Mr Gordon's case in terms of the statutory provisions is that under section 8 ToFA, "it shall be for an officer of the board…to decide whether a person is or was liable to pay contributions…and, if so, the amount that he is or was liable to pay". We note that section 8 applies in relation to any imposition of a liability to NICs. While this does refer to a decision, not every statutory reference to a decision will necessarily lead to the conclusion that the provisions confer a public law jurisdiction in an appeal against that decision. It is necessary to consider the nature and subject-matter of that decision. As the FTT observed (at [186]), the Appellants were liable to NICs under the substantive statutory provisions and the HMRC officer had no discretion to decide they were not so liable or discretion to estimate (as they would have in a best judgment assessment) the amounts to which they were liable. The FTT correctly observed at [188] that this differed from the statutory provisions in question in *Zeman.*

81. Therefore, we dismiss the appeal under this ground.

LEGITIMATE EXPECTATION AND THE 1993 AGREEMENT

82. As we have explained, in light of its conclusion that it lacked jurisdiction, the FTT expressly made no finding as to whether on the facts the claim for legitimate expectation would have succeeded. We make no criticism of the FTT for taking this approach. However, for the reasons set out below, we would have concluded that even if the FTT and the Upper Tribunal did have jurisdiction to determine the issue, in this case the claim would have failed.

83. The reason it would have failed relates to our conclusion, set out above in relation to estoppel, that in the 1993 Agreement the requirement to own another car cannot fairly be described as an adequate means of reflecting the statutory requirement that any private use be merely incidental, or as a methodology for enforcing that requirement. As we say above, section 167(3)(d) requires in unequivocal terms that any *actual usage* of the car must be no more than incidental. Under the provisions of the 1993 Agreement, it would be perfectly possible for an employee to own another car but not use it at all, and/or to use the "pooled" car exclusively for private purposes.

84. The general principles on which a claim for legitimate expectation can be sustained are well settled. Broadly, a legitimate expectation arises in circumstances where the claimant has an expectation of being treated in a particular way favourable to the claimant by the defendant public authority; the authority has caused the claimant to have that expectation by clear words or conduct; the claimant's expectation is legitimate, and it would be an unjust exercise of power for the authority to frustrate the claimant's expectation.

85. There is a helpful summary of the principles applicable in claiming legitimate expectation in relation to HMRC in *R (Hely Hutchinson) v HMRC* [2017] EWCA Civ 1075. Arden LJ (as she then was), delivering the judgment of the Court of Appeal, relevantly said this:

> *General principles relating to legitimate expectation and their application to HMRC*
>
> 35 … I will set out the general principles applicable to legitimate expectations and explain how they have been applied in relation to HMRC (which term I use to include its predecessors).
>
> …
>
> 37 These general principles do not need further explanation at this stage. They must be applied in this case in the context of the duties which the law imposes on HMRC… HMRC is a public body invested with the power to collect tax, and taxpayers must expect to pay the right amount of tax.
>
> …

> 39 In *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, Bingham LJ, with whom Judge J agreed, held that judicial review could not compel HMRC to act contrary to its statutory duty: pp 1566—1567. HMRC had no general discretion to remit taxes but they had a general managerial discretion as to the best means of collecting tax…
>
> 40 At p 1569, Bingham LJ held: Every ordinarily sophisticated taxpayer knows that the revenue is a tax-collecting agency, not a tax-imposing authority. The taxpayers only legitimate expectation is, prima facie, that he will be taxed according to statute, not concession or a wrong view of the law…
>
> 41 Judge J added at p 1573: Abuse of power may take the form of unfairness. This is not mere unfairness in the general sense. Even if unfair, efficient performance of the statutory obligations imposed on the revenue will not, of itself, amount to an abuse of power.
>
> 42 In the next landmark case, *R v Inland Revenue Comrs, Ex p Unilever plc* [1996] STC 681, the taxpayer complained that HMRC, who had by conduct allowed loss claims to be led late for some 20 years suddenly refused to accept further claims on the basis that they were out of time. This court (Sir Thomas Bingham MR, Simon Brown and Hutchinson LJJ) held that rejection of the claims simply on that basis, without any notice of the change in practice, was so unfair as to amount to an abuse of power. Bingham MR held that the categories of unfairness were not closed and precedent should be taken as a guide and not a cage. Each case had to be decided on its own facts, bearing in mind HMRCs duty to act fairly and to the highest public standards. The threshold of public law irrationality was high…
>
> 43 Simon Brown LJ emphasised that there had to be conspicuous unfairness. He drew a distinction between a decision that amounted to mere unfairness, which he described as conduct which may be characterised as a bit rich but otherwise understandable, and a decision so outrageously unfair that it should not be allowed to stand: p 697. Hutchinson LJ agreed with both judgments.
>
> …

86. So, it is necessary to consider (1) whether the 1993 Agreement merely represented a method of collecting NICs actually due on the Cars, or whether it resulted in a failure to apply clear mandatory terms of section 167, and (2) in light of that, whether it was then conspicuously unfair for HMRC to resile from the Agreement with retrospective effect. It follows from our conclusion above that the expectation claimed by the Appellants in this case would result in HMRC failing to collect tax in accordance with its statutory duties, so a high level of conspicuous unfairness would need to arise.

87. In *R (oao Aozora GMAC Ltd) v HMRC* [2019] EWCA Civ [2019] EWCA Civ 1643 ("*Aozora*"), Rose LJ (as she then was) cited with approval the following statement by Simler J in *R (on the application of Dixons Retail plc) v Revenue and Customs Comrs* [2018] EWHC 2556 (Admin), in a situation where there had been an unequivocal representation, reliance and unfairness:

> [66] On the other hand, and to be weighed on the other side of the balance, is the obvious and strong public interest in the defendant collecting tax that is due in accordance with statute and correcting an incorrect decision if there is a good reason to do so. Fairness in relation to the general body of taxpayers who do pay their VAT so that no individual or group of taxpayers is unfairly advantaged at the expense of other taxpayers weighs strongly on this side of the balance.

88. Rose LJ went on to explain that the importance of HMRC collecting the right amount of tax is an aspect of the unfairness element which is an essential part of a legitimate expectation claim. She continued as follows:

> [49] The need for a high degree of unfairness arises, in my judgment, from the fact that, as Lord Templeman put it in *Preston* the primary duty of the Commissioners is to collect, not to forgive tax… I consider that wherever an express representation is established it is still essential for the court to consider all the factors relevant to whether it would be unfair to allow HMRC to frustrate an expectation arising from that promise, assurance or representation and further that a high level of unfairness is necessary to override the public interest in the collection of taxes to which I have referred.

89. Mr Gordon argued in oral submissions that there was no additional hurdle of conspicuous unfairness, in reliance on *R (on the application of Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25. However, that argument was firmly rejected in *Aozora*, at [48]-[51], with Rose LJ concluding as follows:

> [51] I do not accept Mr Ewart's contention that *Gallaher* removes the need for the claimant who is relying on a representation or promise to show a high degree of unfairness in order to establish a legitimate expectation that HMRC will keep to that representation even if they later decide that their view of the law was wrong. Recent cases in which judicial review proceedings have been brought seeking to establish a substantive right arising from a representation made by HMRC in circumstances similar to the present have emphasised the high degree of unfairness that must be demonstrated in order for such a claim to succeed…

90. In this case, even if we assume that the basic elements of a legitimate expectation claim were made out (as to which the FTT made no findings) we consider that it was not conspicuously unfair to allow HMRC to resile from the 1993 Agreement as they did in reaching the disputed NICs decisions. We accept that there would have been some unfairness in resiling from the Agreement with retrospective effect, but carrying out the balancing exercise set out in the leading authorities, that unfairness would have been significantly counterbalanced by other factors. In particular, the public interest in the proper collection of taxes would have been engaged, given our conclusion that the 1993 Agreement would have permitted the Appellants to have the benefit of the exemption in section 167 over many years without having to satisfy one of its central conditions. It is also relevant in assessing the degree of unfairness that since the liability decisions issued by HMRC related only to the tax years 2015-2020, the Appellants benefitted from the exemption in section 167, with a consequential tax saving, for over 10 years. In all the circumstances, we consider that the NICs decisions did not result in the high level of conspicuous unfairness which would have to be established in order for the legitimate expectation claim to succeed.

91. We also received submissions from Mr Pritchard that the legitimate expectation claim should fail because HMRC did not have power to make an agreement in 1993 which was forward-looking and unlimited in time. In light of our conclusion that the claim would have failed for the reasons set out above, we do not need to consider those submissions.

DISPOSITION

92. The appeal is dismissed.

MR JUSTICE ADAM JOHNSON
JUDGE THOMAS SCOTT