



Neutral Citation: [2026] UKUT 00394 (TCC)

Case Number: UT/2024/000153

**UPPER TRIBUNAL
(Tax and Chancery Chamber)**

The Royal Courts of Justice,
Rolls Building, London

INCOME TAX – assessments relating to payments claimed under the Coronavirus Job Retention Scheme – appeal dismissed by FTT – whether the FTT erred in deciding that it had no jurisdiction in the appeal to determine a claim of legitimate expectation – whether the claim of legitimate expectation based on a telephone call with HMRC was a new point raised on appeal and, if so, whether it could be relied on – determination and importance of whether a point is “new” – appeal dismissed

Heard on: 3 July 2026

Judgment date: 14th October 2026

Before

**MR JUSTICE MICHAEL GREEN
JUDGE THOMAS SCOTT**

Between

JOSOEMAG SERVICES LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Becket Bedford, instructed by direct access

For the Respondents: Harry Winter, instructed by the General Counsel and Solicitor to His Majesty’s Revenue and Customs

DECISION**INTRODUCTION**

1. Josoemag Services Limited (“JSL” or the “Appellant”) made claims to the Respondents (“HMRC”) for support payments in relation to employees under the Coronavirus Job Retention Scheme (“CJRS”). HMRC challenged the amounts claimed on a number of grounds and in due course issued assessments to income tax in respect of amounts said by HMRC to have been overpaid.
2. JSL appealed against the assessments to the First-tier Tribunal (Tax Chamber) (the “FTT”). In its decision issued on 15 August 2024 (the “Decision”), the FTT dismissed the appeal.
3. JSL has been granted permission to appeal against the Decision, but only on one ground. That ground is that the FTT erred in law in deciding that it did not have jurisdiction in the appeal before it to determine a claim by JSL that it had a legitimate expectation that the income tax assessment would not be issued.
4. HMRC argue that JSL should be refused permission to run this ground of appeal, on the basis that it is a new point, not run before the FTT, and it would be procedurally unfair for this Tribunal to allow it to be run now in the appeal.
5. In order to succeed in the appeal, JSL must win on both the question of jurisdiction (“the jurisdiction issue”) and on the new point issue (“the procedural issue”).

PRE-HEARING DIRECTIONS

6. As we discuss below, JSL says that its substantive legitimate expectation claim arises from a telephone call between JSL and HMRC Officer Bulch.
7. On 3 September 2025, HMRC made an application to the Tribunal for a direction (1) refusing JSL permission to run its sole ground of appeal, or (2) in the alternative, allowing HMRC to file a witness statement from Officer Bulch regarding the alleged telephone call and to cross-examine JSL’s own witness regarding the alleged call.
8. We initially directed that HMRC’s application should be dealt with at a single rolled-up hearing with the substantive appeal. However, in preparing for the hearing, and having seen the witness statement which HMRC sought to file, we reached the view that it would be an inefficient use of resources to deal with HMRC’s alternative direction only at the stage of the hearing. Such an approach would mean that the parties would have to prepare in advance for the possibility that each of them would have to have witnesses available and ready for examination and cross-examination, even though we might decide that the alternative direction was unnecessary, or that we would decline to grant it. They would also have to do so in relation to a total allocated hearing period of 1.5 days.
9. In addition, any evidence regarding the telephone call would be only one piece of the jigsaw in relation to an issue which would arise for determination if but only if JSL succeeded on both the jurisdiction issue and the procedural issue, and we decided to set aside the Decision on this issue, namely whether or not any claim for legitimate expectation would succeed on the facts (“the substantive issue”).
10. We informed the parties in advance of the hearing that we would not determine the substantive issue in the hearing, and as a result would not need to hear submissions or evidence on it, for two reasons. First, because the FTT decided it lacked jurisdiction, it did not consider the substantive issue at all, so there are no findings of fact by the FTT on the critical elements of a legitimate expectation claim against HMRC. Second, the sensible place to determine those

facts, if jurisdiction to do so arose because we decided to set aside the Decision, would be in a separate hearing, either before the FTT or this Tribunal.

11. We are grateful to the parties for agreeing to this approach, as it enabled the hearing to take place efficiently in terms of both time and resource.

THE FTT'S DECISION

12. References below in the form [x] are to paragraphs of the Decision unless indicated otherwise.

13. The appeal heard by the FTT dismissed JSL's appeal in relation to a number of technical issues of contention between the parties relating to the correct calculation of the CJRS claims made by JSL. None of those issues arises or requires discussion in this appeal.

14. The FTT summarised its conclusion on jurisdiction at [227]:

Similarly, the tribunal has no jurisdiction to consider complaints about HMRC or HM Government or a breach of legitimate expectation or to consider the inability to pay any assessment.

THE PROCEDURAL ISSUE

15. The sole ground on which JSL has been granted permission to appeal is that "the FTT erred in finding that it had no jurisdiction to consider whether the assessments were invalid because JSL had a legitimate expectation that HMRC would not make the assessments".

16. HMRC object to this ground on the basis that it is a new argument raised by JSL for the first time on appeal, and JSL should not be allowed to rely on it.

17. It is logical to consider and decide the procedural issue first, because if we determine that it is a new point on which JSL cannot rely, the jurisdiction issue would fall away and the appeal must be dismissed.

New points on appeal

18. The fact that JSL was granted permission to appeal on this issue by the Upper Tribunal means that the point identifies an arguable error of law. Here, "arguable" means that the argument has a realistic as opposed to fanciful prospect of success. However, it does not follow from this that JSL has an automatic right to rely on the issue in the appeal.

19. In *Mullarkey v Broad* [2009] EWCA Civ 2 ("*Mullarkey*"), permission to appeal had been granted ahead of the substantive hearing, but the question nevertheless arose at the subsequent hearing of whether the appellant should be allowed to present its case on appeal on new points that had not been raised in the case below under appeal. Lloyd LJ explained that the grant of permission to appeal "does not amount to a grant of leave, binding on both parties, to rely on the new point. All it means is that the Appellant was given the right to argue in favour of this at a full hearing". In *Mullarkey*, the Court of Appeal refused to allow the new point to be relied on. In this Tribunal, the same decision was reached in relation to certain arguments in *CF Booth Limited v HMRC* [2022] UKUT 00217 (TCC) and *Cozy Pet Limited v HMRC* [2024] UKUT 00096 (TCC).

20. The principles to be applied in deciding whether to allow reliance on a new point raised on appeal are set out most helpfully in *Singh v Dass* [2019] EWCA Civ 360 ("*Singh*") and *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337 ("*Notting Hill*").

21. In *Singh*, Haddon-Cave LJ said this:

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]).

18. Third, even where the point might be considered a ‘pure point of law’, the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (*R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24...

22. In *Notting Hill*, Snowden J (as he then was) considered *Singh* and the earlier authorities and stated as follows:

26. These authorities show that there is no general rule that a case needs to be “exceptional” before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.

27. At one end of the spectrum are cases such as [*Jones v MBNA International Bank Limited* [2000] EWCA Civ 314] in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight. As Peter Gibson LJ said in the *Jones* case (at para 38), it is hard to see how it could be just to permit the new point to be taken on appeal in such circumstances; but as May LJ also observed (at para 52), there might none the less be exceptional cases in which the appeal court could properly exercise its discretion to do so.

28. At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court: see e g *Preedy v Dunne* [2016] EWCA Civ 805 at [43]–[46]. In such a case, it is far more likely that the appeal court will permit the point to be taken, provided that the other party has time to meet the new argument and has not suffered any irremediable prejudice in the meantime.

Is the point new?

23. We do not understand these principles to be disputed by JSL.

24. However, Mr Becket Bedford appearing before us for JSL says that they are simply not engaged in this appeal, because the point raised by the sole ground of appeal is not “new”.

25. Before we discuss the submissions of the parties and what is meant by “a new point” in this context, it is necessary to understand both the legal and factual bases for the argument

raised by JSL in its ground of appeal, because these frame and define the “point” on which JSL has been granted permission.

The essential elements of a claim of legitimate expectation as a defence to a tax assessment

26. Legitimate expectation is a public law concept. Broadly, it has the effect that a public authority (such as HMRC) which has, by a promise or practice, conferred on a person a legitimate expectation of a procedural or substantive benefit may not frustrate that expectation if to do so would be so unfair as to amount to an abuse of power. In the taxation context, the relevant principles were established in *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agencies Ltd* [1990] 1 W.L.R. 1545 (“*MFK*”). In that case, Bingham LJ, as he then was, explained as follows, at pages 1569-1570:

The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen. The Revenue’s discretion, while it exists, is limited. Fairness requires that its exercise should be on a basis of full disclosure. Counsel for the applicants accepted that it would not be reasonable for a representee to rely on an unclear or equivocal representation. Nor, I think, on facts such as the present, would it be fair to hold the Revenue bound by anything less than a clear, unambiguous and unqualified representation.

27. Case law establishes that three essential requirements must be met in a claim to legitimate expectation based on a representation from HMRC:

- (1) The taxpayer, when seeking the ruling, must have put all their cards face upwards on the table by giving HMRC full details of the specific transaction, and making plain that a fully considered ruling was being sought.
- (2) HMRC's ruling must be clear, unambiguous and devoid of relevant qualification.
- (3) The taxpayer must demonstrate that it would not be fair to depart from the clear, unambiguous and unqualified ruling. Unfairness in this context is generally understood to mean conspicuous unfairness. In determining whether there is unfairness (and an abuse of power), the extent to which the taxpayer has relied on HMRC's words or conduct and the extent of any detriment resulting from that reliance must be taken into account.

28. So, where, as in this appeal, a taxpayer wishes to run an argument that a tax assessment by HMRC cannot stand because the taxpayer has a legitimate expectation that no such assessment would be issued, the taxpayer must explain how these elements are satisfied.

The factual basis of the claim in this appeal

29. The factual basis of the claim for which JSL sought and was granted permission to appeal by the Upper Tribunal is simply stated. Mr Joshua, a director of JSL, alleges that in a telephone call in December 2020 (the “*Bulch Call*”), Officer Bulch of HMRC said to Mr Joshua that his calculations of the claimed CJRS payments had been accepted, he had found no issues regarding JSL’s compliance with HMRC’s investigation into the claimed payments, and JSL should not anticipate any further developments.

Submissions of the parties

30. Mr Bedford argues that the factual basis of JSL’s legitimate expectation claim was raised before the FTT and was known to HMRC before the FTT hearing. He says that no new factual allegation is being introduced in this appeal, and all the relevant facts were both before the FTT and known to HMRC. Further, the FTT found as a fact that Officer Bulch had given Mr Joshua the assurance said to have been given. HMRC did not ignore the point before the FTT, but

chose to argue that the FTT lacked jurisdiction to entertain it. Therefore, the point is not genuinely new.

31. Mr Bedford says that if we do not accept his argument on newness, permission to rely on the point should be granted, taking into account the following factors:

- (1) Any issue concerning the FTT's jurisdiction should be considered by the FTT of its own motion. In this case, the question of jurisdiction was obvious, and the FTT should itself have identified it.
- (2) The hearing would not have been conducted fundamentally differently if the point had been argued.
- (3) The Appellant was a litigant in person and should not be held to the standards of pleading of a represented party.
- (4) To the extent that the Appellant identified the relevant facts without identifying all their legal consequences, the consequences should be treated as having emerged from the material before the FTT.
- (5) There is a strong public interest in determining the correct tax position.

32. Mr Harry Winter appearing for HMRC argues that it is necessary to focus on the asserted factual basis of the claim being run in this appeal. That basis is not the same as the factual basis of any legitimate expectation argument put forward by JSL in the FTT. Indeed, the Appellant made no submissions in the FTT, formal or informal, on any legitimate expectation based on the Bulch Call. Therefore, properly understood, it is a new point sought to be raised for the first time on appeal.

33. Mr Winter submits that advancing a primary fact (the contents of a phone call) which is only one element of a theoretically possible but unarticulated legitimate expectation argument is not enough.

34. Since the point is new, says Mr Winter, permission to run it should be refused. The authorities clearly establish the hurdles which must be overcome where an argument was not raised at first instance, and if HMRC had known that the Appellant sought to construct a legitimate expectation case on the basis of the Bulch Call, they might have adduced evidence, and also cross-examined Mr Joshua on the call. The issue is not a question of pure law, but involves significant questions of fact.

When is a point “new” and why does it matter?

35. The first issue to be determined is whether, as HMRC contend, the argument being raised by JSL was one which was not identified, or sufficiently identified, before the FTT. Only if we accept HMRC's contention does it become necessary to determine the second issue, namely whether permission to rely on the argument in this appeal should be given.

36. However, in our opinion the guidance in the authorities as to the second issue informs the proper consideration of the first issue. In assessing whether an issue is “new”, it is necessary to consider both the clarity with which the issue was identified in the first instance proceedings and also the stage in proceedings at which the issue was identified. In relation to both of those tasks, the authorities (summarised in *Singh* and *Notting Hill*) illustrate the purpose and rationale of the principle that a new argument requires permission in order to be relied on, and, in our view, that purpose and rationale shed valuable light on the exercise to be undertaken at the first stage of deciding whether the point is new.

37. Put simply, in deciding whether a point is new, it is necessary to take into account why it matters.

38. In *Rehana Azhar v All Money Matters T/A TFC Home Loans* [2023] EWCA Civ 1341 (“*Rehana Azhar*”)¹ (to which we were not referred), the Court of Appeal considered an appeal against a case management decision to refuse to allow a point to be advanced by the appellant on the basis that it was a new point, where that point was (as in this appeal) the only issue on which permission to appeal had been granted. Lewison LJ (with whom Nugee and Falk LJ agreed) set out his conclusions as follows:

24. It is true that Mrs Azhar had been granted permission to appeal on this very point, but where an appellant has been given permission to appeal that does not preclude the respondent from objecting on the ground that it is a new point: *Mullarkey v Broad* [2009] EWCA Civ 2 at [29]; *Brent LBC v Johnson* [2022] EWCA Civ 28 at [37]; *Gill v Lees News Ltd* [2023] EWCA Civ 1178 at [63]. HHJ Lethem was thus fully entitled to consider the objection.

25. Even though this was a case allocated to the fast track, elementary fairness requires that each side knows what points the other side will take. In *Prudential Assurance Co Ltd v HMRC* [2016] EWCA Civ 376, [2017] 1 WLR 4031 in the judgment of this court (Lewison, Christopher Clarke and Sales LJ) it was stated at [20]:

“Our procedural system is and remains an adversarial one. It is for the parties (subject to the control of the court) to define the issues on which the court is invited to adjudicate. This function is the purpose of statements of case. The setting out of a party's case in a statement of case enables the other party to know what points are in issue, what documents to disclose, what evidence to call and how to prepare for trial. It is inimical to a fair hearing that a party should be exposed to issues and arguments of which he has had no fair warning. If a party wishes to raise a new point, he should do so by amending a statement of case.”

26. As Lord Phillips MR also said in *Loveridge v Healey* [2004] EWCA Civ 173, [2004] CP Rep 30 at [23]:

“It is on the basis of the pleadings that the parties decide what evidence they will need to place before the court and what preparations are necessary before the trial.”

27. In *UK Learning Academy Ltd v Secretary of State for Education* [2020] EWCA Civ 370 David Richards LJ said at [47] that:

“... the statements of case play a critical role in civil litigation which should not be diminished.”

28. Having referred to the spectrum of cases described in the *Notting Hill* case the judge decided that potential prejudice to AMM was likely to be significant; and that it was not a case in which he could simply rely on the evidence in the lower court. He concluded, therefore, that it was not a case in which he could properly permit a new point to be taken. In my judgment, just as there is a spectrum of cases in the sense described, there is also a spectrum of “newness”. The overriding question in each case is whether the party against whom the point is raised has had fair warning of it and is able properly to deal with it, with the aid (if appropriate) of evidence designed to confront or neutralise the point. That question should not be answered with the benefit of hindsight.

39. The Court of Appeal upheld the case management decision, stating as follows:

¹ On 21 March 2024, the Supreme Court refused permission to appeal against the decision.

32. The first question is whether the point really was a new point. Mr Thrower argues that it was not because it was raised by the judge, put to Mr Smethurst in cross-examination, and argued in the course of closing submissions. I do not consider that this is a complete answer. The underlying question is whether AMM had been given fair warning before trial of the points it would have to deal with. Mr Thrower asserted in his skeleton argument that no further oral evidence could assist AMM in the absence of a confirmation of instructions letter. But in the first place, as Lloyd LJ said in *Mullarkey* at [49]:

“A party who seeks to advance a different case, in circumstances such as this, bears a heavy burden as regards showing that the case could not have been conducted differently, in any material respect, as regards the evidence.”

40. This is discussing the position in a court rather than in a tribunal. In practice, a tribunal (such as the FTT) may on occasions adopt a more inquisitorial approach to proceedings than a court, particularly where a party is unrepresented. However, that does not mean that the procedural safeguards which support an adversarial system somehow assume less importance in the tribunals.

41. Therefore, in deciding if a point is new and, if so, whether to allow reliance on it, the answer to “why it matters” lies in procedural fairness. As Lewison LJ explains in the passages above, “elementary fairness requires that each side knows what points the other side will take”. As he also explains, that means that each side knows that in advance of the trial. For this reason, the pleadings, and the statement of case, are critical in the process of advance warning.

Chronology and the proceedings before the FTT

42. In order to establish the extent to which HMRC were aware, in the FTT proceedings, of the argument which JSL seeks to rely on in this appeal, we have adopted the approach taken by Mr Bedford in his oral submissions, of considering the relevant materials and events chronologically. The position is as follows:

- (1) Between April and August 2020, JSL submitted the claims for CJRS support payments.
- (2) On 30 November 2020, HMRC wrote to JSL to advise that HMRC were opening a check into the claims to make sure that they met all the statutory conditions and the correct amounts had been claimed.
- (3) On approximately 17 December 2020, the Bulch Call is said to have taken place.
- (4) On 5 July 2022, HMRC wrote to JSL stating that they planned to raise an assessment due to an overclaim.
- (5) On 14 September 2022, Mr Joshua emailed HMRC asking for an HMRC review, He set out five reasons, one of which stated as follows (sic):

In December 2020 I was contacted by [Officer Bulch] and through various phone conversations and he did confirm that after checking all the claims. He is satisfied there was NO overclaimed.

- (6) On 12 December 2022, HMRC sent to JSL their review conclusion letter. This upheld the assessments. The letter did not refer to the Bulch Call.
- (7) On 2 February 2023, JSL filed its grounds of appeal to the FTT. The reasons given section does not refer specifically to the Bulch Call, although it does include the statement “the money has been paid to the employee who has now left the business, why

are the hmrc not chasing them because when we were making the claim the HMRC approved before payment”.

(8) On 11 April 2023, HMRC filed an application for Further and Better Particulars. This submitted that the grounds of appeal contained in the Appellant’s Notice of Appeal had not been properly particularised such that HMRC were prevented from responding in their Statement of Case. It also stated that some of the grounds could be interpreted as ones for which the FTT did not have jurisdiction. It submitted that “The Respondents contend that the Appellant’s grounds of appeal are the starting point for proceedings, such that they must state the Appellant’s case in sufficient detail. This ensures that the Respondents are able to respond in their Statement of Case”. The Application referred to a number of the grounds raised, but not the assertion that “HMRC approved before payment”.

(9) On 19 September 2023, JSL filed “amended grounds of appeal”. These made no reference, explicit or implicit, to either the Bulch Call or to any HMRC “approval” or to any claim of or tantamount to legitimate expectation.

(10) On 15 November 2023, HMRC filed their Statement of Case. This was a detailed document of over 30 pages. This does not refer to the Bulch Call taking place at all, including in the detailed chronology. The detailed descriptions of the points at issue and the Appellant’s original and amended grounds of appeal make no reference or allusion to the Bulch Call. A section headed “Jurisdiction” describes a number of points raised by JSL over which HMRC say the FTT lacks jurisdiction. A sentence in that section (at paragraph 152) refers to an assertion by the Appellant that “HMRC approved the payment”. The Statement of Case sets out (at paragraph 154) HMRC’s view that the FTT “does not have a judicial review jurisdiction to consider public law arguments that the Appellant had a legitimate expectation of being entitled to the grant they claimed for, based on fairness, reasonableness, reliance on guidance, approval of payments or because they feel that they acted within the spirit of the legislation”. Paragraph 158 states that “Any claim to legitimate expectation which might be alleged at this stage or inferred from the Appellant’s case is not within the jurisdiction of the Tribunal, and further is not established on the facts that have been presented”.

(11) On 18 March 2024, Mr Joshua filed his Witness Statement. This included the following paragraphs:

7. On 10 December 2020 I submitted a comprehensive set of documents to Mr. Bulch. These documents included the employee's name, address, date of birth, national insurance number, payslips, pension contribution details, work payroll number, and claims for each month from April to August 2020.

8. Approximately one week later, I received a phone call from Mr Bulch to verify the receipt of the email. He stated that he had examined the matter and found no issues regarding the company's compliance with his investigation. As a result, he advised me not to anticipate any further developments.

...

12. During [the process of HMRC reviewing the support payment claims], the HMRC account manager would contact us to ask various questions and, upon receiving satisfactory answers, would proceed to approve the payments. How is it possible that payments, which were approved by at least 5 separate account officers (with at least one officer assigned to each claim) at the time of submission and also approved by Mr. Bulch, were now being considered as overclaimed by you?

(12) On 26 June 2024, HMRC lodged their skeleton argument for the hearing before the FTT. In a section headed “Jurisdiction”, it is recorded (at paragraph 95) that in its original grounds of appeal, “the Appellant has submitted that they felt unsupported by the Respondents at the time. Further, the payments were approved, and they adhered to the guidance. They have also referred to delay and conduct during the compliance check”. There is no reference in the skeleton argument to the Bulch Call or a claim of legitimate expectation based on the Bulch Call.

(13) We were provided with a transcript of the FTT hearing. Relevant passages include the following:

(a) In the cross-examination of Mr Joshua:

So on 10 December, I submitted a comprehensive set of documents, to prove that every claim was paid, and about a week later, I received a phone call from Mr Bulch, to verify the receipt of the email. He stated that he has examined the matter and found no issue. That is on number 8. He found no issue regarding the Company’s compliance with this. As a result, he advised me not to anticipate any further development. So that is what Mr Steven Bulch told me.

(b) The FTT judge was scrupulous to clarify with Mr Joshua the grounds of his appeal, as understood by HMRC (“we need to get some clarity on what actually they think and some clarity on what you actually think.”). He did this by walking Mr Joshua through JSL’s grounds as filed and clarifying the points which JSL wished to be considered. This concluded with the following exchange:

JUDGE GEMMELL: I am trying to make up some of the lost time here, by summarising that. Is that an accurate summary of your case, Mr Joshua, or is there anything else that you think I – or HMRC, have missed out, because it was they who provided it?

MR JOSHUA: Yes, Judge. I think that is – that is very clear. The other thing that I want to look at is page 620 of this bundle.

Page 620 refers to published Government guidance on CJRS payments.

The importance of this passage is that the detailed discussion said nothing, explicit or implicit, about the Bulch Call or any HMRC “approval” or any claim of legitimate expectation. Mr Joshua agreed that the summary was accurate and complete.

(c) Mr Joshua stated that “...I want to put this on record: Mr Steven Bulch checked – the assessment checked first by each individual in the HMRC at the times of claim, they had no problem with it. Mr Steven Bulch checked the assessment, had no issue with it”.

(d) The judge explained to Mr Joshua that complaints about HMRC or the rules being unfair were outside the FTT’s jurisdiction. He stated:

...the Upper Tribunal have said we cannot take fairness into account, when making decisions. It is just, much as though, you know, it might be – it might be human, perhaps, even to be fair to HMRC, or fair to a taxpayer, we are not allowed to do it. We have to take the facts and apply them to the law – in this case, these Directions – and decide whether what HMRC did, or what the taxpayer did, was correct or not. So that is, just to let you know, that is the sort of basis on which we have to work, and complaints about HMRC are not something for the Tribunal. We are a statutory Tribunal, and we have got a

very limited jurisdiction, and it is not, you know, making judgements on the efficiency (or inefficiency) of HMRC. So just so you know that.

(e) The submissions by HMRC's counsel, Ms Louise Dawson, ended with the following exchange:

...I have notes prepared on fairness and legitimate expectation, Judge. We have already dealt with that, and I notice you have, as well, and I was going to go through the usual cases that we rely on, in Hok and Noah. Would you like me to go through that, or are ---

JUDGE GEMMELL: Well, are there any – these are in paragraphs 95 to 104 of your skeleton?

MS DAWSON: Yes. I do not know whether you want me to go through that in any detail, Judge?

JUDGE GEMMELL: No. I think ---

MS DAWSON: But we would say that any – just reiterate the point ---

JUDGE GEMMELL: I think, in view of the time constraints, probably not, no.

MS DAWSON: Yes. Just to reiterate that, you know, regardless of any complaint about process delay, or – it does really fall outside the jurisdiction of the Tribunal, Judge, and just to make that point.

(f) In his closing submissions, Mr Joshua stated as follows:

Now, when Officer Steve Bulch contacted us, to say, “Look”, he wanted to just do a compliance check. We complied, we cooperate, we sent everything to them, and he came back and said, “Look, I have checked you out, you are fine”.

(14) In the Decision, the main discussion by the FTT of public law issues is set out at paragraphs 14 and 15 above. At [63], the FTT records Mr Joshua's evidence as to the Bulch Call:

Approximately a week later, EJ said HMRC Officer Steve Bulch, told him that there were no issues with this claim that payment would be approved and as far as EJ was concerned, the matter was closed although there was no written evidence to this effect.

(15) At [105], the FTT records as one of JSL's submissions that “HMRC's Steven Bulch approved the payments when the claim was first intimated” (sic).

(16) At [197], the FTT states:

EJ had been initially told by Officer Steven Bulch that his calculations had been accepted and he considered that the matter was closed and then several months later that HMRC were opening a check into JSL's claim to make sure the conditions for receiving CJRS support payments had been correctly adhered to.

(17) In its application to the FTT for permission to appeal the Decision, JSL's first ground of appeal was that “the tribunal erred in its decision that it did not have jurisdiction at common law to allow a collateral challenge to the validity of the

administrative decision to issue the impugned assessments on the ground of legitimate expectation”. In its decision refusing permission to appeal² the FTT stated as follows:

6. The Application contains several submissions which were not made by the Appellant at the hearing, including legitimate expectation, validity on public law grounds, validity under the Convention, and lawfulness and proportionality of the Coronavirus Directions.

7. A number of these are submissions that could have been made by the Appellant at the hearing but were not and, accordingly, were not capable of being addressed by the Respondents or considered by the Tribunal. This process is not in accordance with the overriding principle of the First-tier Tribunal set out at Rule 2 of the Rules.

8. The challenges to the validity of the assessments on public law and Convention grounds, the lawfulness and proportionality, if not the fairness of the Coronavirus Directions, and a duty to decide a public law error for itself are all new points in the appeal.

...

10. I consider that the new points involve a great variation in the case and that the Respondents will be at risk of prejudice if they are allowed because the Respondents might have adduced other evidence at the hearing or otherwise conducted the case differently.

...

24. No submissions were made by the Appellant in relation to legitimate expectation and the only reference to this was by HMRC at [187] of the Decision which stated that “any claim to legitimate expectation which might be alleged at this stage or inferred from JSL’s case is not within the jurisdiction of the tribunal and further is not established on the facts or evidence presented”. Consequently, it was on this basis that ‘legitimate expectation’ which ‘might be inferred from the Appellant’s case’ was considered by the Tribunal.

...

30. As there were no submissions made by the Appellant on public law grounds nor on the grounds of legitimate expectation and, in any event insufficient evidence that the test for such an expectation was met, we considered that the administrative decisions made by HMRC were reasonable in refusing the appeal.

Summary

Prior to the FTT hearing

43. In relation to HMRC’s ability to understand that JSL relied on the Bulch Call as the basis for a claim of legitimate expectation, the position by the time of the hearing was as follows.

44. The materials discussed above show that the Bulch Call was mentioned in JSL’s request to HMRC for an internal review (September 2022) and in Mr Joshua’s witness statement (March 2024).

² Mr Bedford said in oral submissions that the FTT decision refusing permission was “not admissible”. However, while it may not normally be cited as authority or relied on as a legal precedent (Practice Direction (Citation of Authorities) [2000] 1 WLR 1001), there is nothing to prevent it being referred to, as here, in order to shed light on the understanding of the FTT in relation to the appeal hearing.

45. Other than in these two documents, there is no indication that HMRC understood, or were assisted by JSL to understand, that in the FTT appeal JSL relied on the Bulch Call as the basis for a claim of legitimate expectation. In particular:

- (1) JSL's original grounds of appeal do not refer to the Bulch Call. The original grounds do include the complaint that "the money has been paid to the employee who has now left the business, why are the hmrc not chasing them because when we were making the claim the HMRC approved before payment". However, this could not reasonably be read as referring to the Bulch Call, because that took place after the payments.
- (2) Neither the Bulch Call nor any potential claim for legitimate expectation are mentioned in the (comprehensive) HMRC review letter.
- (3) JSL's amended grounds of appeal, lodged in September 2023 in response to HMRC's application for further and better particulars, do not identify or allude to the Bulch Call or to any HMRC "approval" or to any claim for legitimate expectation.
- (4) JSL did not file any skeleton argument or pleadings other than its amended grounds of appeal.
- (5) HMRC's Statement of Case (November 2023) does not refer to the Bulch Call taking place in its detailed chronology³, or in its description of the grounds of appeal. It contains a reference to an assertion by the Appellant that "HMRC approved the payment". Since there was no such assertion in the amended grounds of appeal which had been lodged two months previously, and since the reference to approval in Mr Joshua's Witness Statement only arose six months later, this must be construed as being a reference to the complaint in the original grounds of appeal that "when we were making the claim the HMRC approved before payment". As explained, that could not reasonably be read as referring to the Bulch Call, which took place after payment. HMRC's Statement of Case refers to legitimate expectation in broad terms, in an attempt to close off as issues in the appeal various complaints made by JSL. It claims there is no "judicial review jurisdiction to consider public law arguments that the Appellant had a legitimate expectation of being entitled to the grant they claimed for, based on fairness, reasonableness, reliance on guidance, approval of payments or because they feel that they acted within the spirit of the legislation". It also states that "Any claim to legitimate expectation which might be alleged at this stage or inferred from the Appellant's case is not within the jurisdiction of the Tribunal, and further is not established on the facts that have been presented". Again, we consider that the reference to "approval of payments" cannot reasonably be read as referring to the Bulch Call.
- (6) HMRC's skeleton argument (June 2024) includes, in a section headed "Jurisdiction", a reference to the allegation in the original grounds of appeal (not contained in the amended grounds of appeal) to payments being "approved", but does not refer to the Bulch Call or to potential reliance on the Bulch Call as a basis for legitimate expectation.

During the FTT hearing

46. Mr Joshua referred to the Bulch Call several times during the hearing. He did not state or indicate that JSL relied on that call as creating a legitimate expectation.

³ HMRC's position in this appeal is that they do not accept that such a call took place.

47. Mr Joshua's reference at [105] to Officer Bulch having "approved the payments when the claim was first intimated" cannot sensibly be interpreted as referring to the Bulch Call, because the claims had been submitted well before that call.

48. Importantly, when Mr Joshua was carefully walked through what the FTT judge understood to be JSL's grounds of appeal, by reference to what HMRC understood them to be and to the pleadings, there was no reference to either the Bulch Call or to HMRC approval of the payments. When the judge then asked Mr Joshua "is that an accurate summary of your case...or is there anything else that you think I or HMRC have missed out, because it was they who provided it?", he replied "Yes judge...that is very clear", adding only a reference to JSL's reliance on published Government guidance.

49. HMRC's statements as to the FTT's jurisdiction regarding legitimate expectation are set out at paragraph 42(13)(e) above.

Conclusions

50. Taking into account all of these points, our conclusions are as follows:

(1) In advance of the FTT hearing, HMRC were on sufficient notice that (1) the Appellant asserted that the Bulch Call had taken place, and (2) the Appellant had various complaints as to Government actions in relation to CJRS payments, published guidance on HMRC's website, the fairness of the statutory regime relating to support payments, lack of HMRC support and HMRC conduct in the enquiry.

(2) However, HMRC were not on sufficient notice that the Appellant sought to rely on the Bulch Call as the basis for a claim of legitimate expectation that no assessments would be made. This is a new point on appeal.

(3) The FTT did not err in law or fall into procedural error by failing of its own volition to identify that the Appellant sought to rely on the fact of the Bulch Call as the basis for a claim of legitimate expectation that no assessments would be made.

51. In reaching these conclusions, we have taken into account various arguments raised by Mr Bedford.

52. First, the fact that the Appellant was not represented before the FTT is a relevant factor, but in determining what is at heart a question of procedural fairness, it does not carry significant weight, either in assessing whether the point is new or in deciding whether it can be relied on. We respectfully endorse the approach of Snowden J In *Notting Hill*, at [36]:

Although...the Defendant acted in effect as a litigant in person when attending the hearing, for my part I consider that this factor carries little weight in the equation. As Lord Sumption said in *Barton v Wright Hassell LLP* [2018] UKSC 12 at [18], the rules and procedures of court apply equally to represented and unrepresented parties, and the fact that a party is unrepresented can at most have a limited effect in increasing the weight to be given to some other, directly relevant, factor. In this case, the CPR 55 procedure and the defence forms to which I have referred are designed to be straightforward and accessible to litigants in person, and the other factors to which I have referred have sufficient weight on their own. Accordingly, I do not consider that the Defendant's arguments are materially enhanced by the fact that he was effectively unrepresented before the District Judge.

53. Second, Mr Bedford relied on the "venerable principle" that the FTT has a duty to establish the correct amount of tax payable in an appeal. It might be said that in this appeal, given that no permission has been granted to challenge any aspect of the Decision other than in relation to legitimate expectation, that is what the FTT has done. In any event, we do not

consider that the operation of that principle could or should erode basic principles of procedural fairness relating to the need for each party to know in advance the other party's case.

54. Third, Mr Bedford argued that the FTT should of its own volition have identified that the Appellant sought to rely on the Bulch Call as the basis for a legitimate expectation claim. He referred to *Mervyn v BW Controls Ltd* [2020] EWCA Civ 393 (in particular at [42]) as showing that where an appellant identifies the relevant facts without identifying all their legal consequences, the legal consequences should be treated as having emerged from the material before the tribunal. However, in that case, "it "shouted out" from the contents of [the claimant's] Particulars of Claim that, on a proper analysis, she was alleging that she had been constructively dismissed": [42]. In this case, as we discuss further below, all the Appellant had done was to refer to the Bulch Call. At its highest, that might in principle be relevant to one element of an unidentified legitimate expectation claim, but the other necessary elements were not identified or readily evident from the primary facts. The argument in question cannot be said to have "shouted out" to the tribunal for further inquisition.

55. In reaching our conclusions, we have taken into account a number of factors, including the following:

(1) The meaning of the Bulch Call is, in our opinion, ambiguous. The only record of it is the evidence of Mr Joshua. It is said to have taken place a few weeks after HMRC told JSL that they were opening a check into the claims made and a week after JSL sent various documents to Officer Bulch. Mr Joshua's evidence was that Officer Bulch "stated that he had examined the matter and found no issues regarding the company's compliance with his investigation. As a result, he advised me not to anticipate any further developments"⁴.

Mr Joshua apparently took this to mean that Officer Bulch had approved the payments. While we make no finding as to whether this was the natural meaning of the words, it is at least arguable that all Officer Bulch was saying was that (in effect) he now had all the materials he needed for HMRC's investigation to proceed.

This is relevant because in order for HMRC (or the FTT) to identify that this call was said by the Appellant to found the basis of a claim for legitimate expectation, the call would need to have been a clear, unambiguous and unqualified representation that no assessments would be issued (as explained at paragraph 27 above). As we have explained, we are not determining the substantive issue in this appeal, but we consider it as arguable that the call would not have been seen by HMRC (or the FTT) as such a representation.

(2) The other essential elements of a claim for legitimate expectation in this context (summarised at paragraph 27 above) were not put forward by the Appellant at any stage.

(3) In relation to the extent to which HMRC were on notice before the FTT hearing that the Appellant sought to run this argument: the original grounds of appeal do not refer to the Bulch Call; the Appellant's amended grounds of appeal, filed in response to HMRC's request for further and better particulars, did not refer to the Bulch Call or any HMRC "approval" or any claim for legitimate expectation; the Appellant did not file any skeleton argument or other pleadings, and HMRC's Statement of Case and skeleton argument largely discuss legitimate expectation in general terms, to the extent it might be alleged or inferred.

⁴ Mr Joshua's witness statement at paragraph 8.

(4) During the FTT hearing, no argument of legitimate expectation based on the Bulch Call was put forward, and Mr Joshua did not refer to it when walked through his other grounds of appeal by the judge. By contrast, in relation to the Appellant's reliance on published guidance, Mr Joshua identified and added this point to the judge's summary, and it is recorded (at [113]) that "JSL submit that as it adhered to the published guidance and paid the employees in full it did not need to pay back the amounts claimed to HMRC".

56. We agree with HMRC that reliance on the Bulch Call as a basis for a claim of legitimate expectation is a new point sought to be taken by the Appellant in this appeal. It was not sufficient notice before the FTT hearing that the Bulch Call was at some stages (and not others) referred to by the Appellant, or that the Appellant raised other complaints as to HMRC guidance and behaviour. As Lewison LJ stated in *Rehana Azhar*, "elementary fairness requires that each side knows what points the other side will take". That requirement is not satisfied simply by asserting a primary fact; in *Prudential Assurance*, the Court of Appeal said that "it is inimical to a fair hearing that a party should be exposed to **issues and arguments** of which he has had no fair warning" (emphasis added to original).

57. We agree with the statement in *Rehana Azhar* at [28] that as well as there being a spectrum of cases in which it may or may not be appropriate to admit a new argument on appeal, "...there is also a spectrum of "newness". The overriding question in each case is whether the party against whom the point is raised has had fair warning of it and is able properly to deal with it, with the aid (if appropriate) of evidence designed to confront or neutralise the point. That question should not be answered with the benefit of hindsight". In this case, HMRC did not have fair warning that the Appellant relied on the Bulch Call as giving rise to a legitimate expectation that no assessments would be issued, and was unable to confront that argument with evidence.

58. Having concluded that the point requires permission in order to be relied on in this appeal, we refuse such permission.

59. Applying the principles set out above in *Notting Hill* and *Singh*, in terms of the "spectrum" identified in *Jones v MBNA*, the point is towards the prejudicial end of the spectrum as being "a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual enquiry". Unlike the jurisdiction issue it is not a pure question of law. This can be seen from the pre-hearing discussions summarised above. HMRC applied to adduce evidence regarding the Bulch Call, and wished to cross-examine Mr Joshua about it, and the Appellant would likely have wished to cross-examine Officer Bulch. Additionally, HMRC would likely have put the Appellant to proof in relation to the other essential elements of a legitimate expectation claim based on the Bulch Call.

60. We have taken into account the status of the Appellant as a litigant in person, the "venerable principle" and the inquisitorial aspect to the role of the FTT. We have concluded that, on the facts in this appeal, these factors are materially outweighed by the significant prejudice to HMRC which would arise if this new point could be relied on in this appeal and by the policy arguments in favour of finality in litigation.

61. The procedural issue is determined in favour of HMRC.

62. As this was the only factual basis for the Appellant's sole ground of appeal, the appeal is dismissed.

THE JURISDICTION ISSUE

63. Our decision on the procedural issue means that the jurisdiction issue is academic. However, since we heard argument on it, we set out below our views.

64. In relation to jurisdiction, the FTT stated as follows, at [183]-[187]:

183. JSL say it felt unsupported by HMRC. Further, the payments were approved, and it adhered to the guidance. It has also referred to delay and conduct during the compliance check.

184. HMRC submit that such grounds relate to matters which are more appropriate to a complaint or at its highest, a breach of legitimate expectation. The tribunal does not have a judicial review jurisdiction to consider public law arguments based on a clear line of authority provided by the Upper Tribunal in *HMRC v Hok Ltd* at [54-58], *Abdul Noor v HMRC* at [95] and followed in the context of direct taxes by the Court of Appeal in *Trustees of the BT Pension Scheme v HMRC* at [142-143].

185. In the above-mentioned cases, the Upper Tribunal and Court of Appeal concluded that the better view regarding the jurisdiction of the FTT is that the tribunal has no general jurisdiction to determine matters which are so decided during an action for judicial review in the Administrative Court, including matters of fairness and/or legitimate expectation.

186. HMRC submit that the FTT has a purely statutory jurisdiction given to it by the Tribunals, Courts & Enforcement Act 2007 and the relevant taxing statute which provides for a right of appeal.

187. Any claim to legitimate expectation which might be alleged at this stage or inferred from JSL's case is not within the jurisdiction of the tribunal, and further is not established on the facts or evidence presented.

65. The jurisdiction of the FTT in relation to legitimate expectation is a question of statutory construction. However, the authorities do not speak as one in relation to the appropriate starting point for that exercise. The position was recently summarised in *MWL International Ltd v HMRC* [2026] UKUT 00062 (TCC)⁵ as follows:

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?

...

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.

⁵ Permission has been granted to appeal this decision to the Court of Appeal.

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...

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*.

...

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:

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 set out its conclusion on jurisdiction as follows:

...

84. ...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]).

...

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.

...

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.

66. Mr Bedford argued that in determining the FTT’s jurisdiction, there is a very strong presumption that it has jurisdiction to consider a claim of legitimate expectation. In addition to *Beadle* and *Zeman*, he relied for this proposition on the decisions in *Dill v Secretary of State for Housing, Communities and Local Government* [2020] UKSC 20 (“*Dill*”) and *Boddington v British Transport Police* [1999] 2 AC 143 (“*Boddington*”).⁶

67. *Dill* concerned an appeal against certain planning enforcement proceedings regarding the correct treatment of a pair of early 18th century finials. One issue which arose was whether it was possible in the appeal to challenge designation as a listed “building” under the relevant appeal provisions, or whether the only avenue of challenge was by way of judicial review. Lord Carnwath held that it could be challenged under the statutory appeal procedure. Mr Bedford referred to the following statement at [20]:

⁶ Mr Bedford also referred in oral submissions to *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, but we do not consider that this decision adds anything useful to the debate.

The principles are not in doubt. As Mr David Elvin QC for the Secretary of State rightly accepts (in the words of his written submissions, citing *Boddington v British Transport Police* [1999] 2 AC 143):

“The issue of statutory construction is subject to the rule of law that individuals affected by legal measures should have a fair opportunity to challenge these measures and to vindicate their right in court proceedings, and there is a strong presumption that Parliament will not legislate to prevent individuals from doing so.”

The same principle is reflected in the European Convention for the Protection of Human Rights and Fundamental Freedoms article 6, under which an individual must have a clear, practical opportunity to challenge an act that is an interference with his rights: *Bellet v France* CE:ECHR: 1995:1204JUD002380594, para 36. However, as Mr Elvin also correctly submits, that principle needs to be read in the context of the particular statutory scheme in question (citing Lord Hoffmann in *R v Wicks* [1998] AC 92, 117B)...

68. *Boddington* concerned a criminal prosecution for contravention of a byelaw banning smoking on trains. The House of Lords held that that the defendant was not precluded from raising in a criminal prosecution the contention that the decision to impose the byelaw by way of a “no smoking” notice on the trains was ultra vires and unlawful. As Lord Irvine observed (at page 152D):

These arguments are regularly raised in the courts in cases in the public law field, concerned with applications for judicial review. The issue is whether the same arguments may be deployed in a criminal court as a defence to a criminal charge.

69. Mr Bedford relied in particular on the following passage from the decision (at pages 161-162):

...where subordinate legislation (e.g. statutory instruments or byelaws) is promulgated which is of a general character in the sense that it is directed to the world at large, the first time an individual may be affected by that legislation is when he is charged with an offence under it: so also where a general provision is brought into effect by an administrative act, as in this case. A smoker might have made his first journey on the line on the same train as Mr. Boddington; have found that there was no carriage free of no smoking signs and have chosen to exercise what he believed to be his right to smoke on the train. Such an individual would have had no sensible opportunity to challenge the validity of the posting of the no smoking signs throughout the train until he was charged, as Mr. Boddington was, under byelaw 20. In my judgment in such a case the strong presumption must be that Parliament did not intend to deprive the smoker of an opportunity to defend himself in the criminal proceedings by asserting the alleged unlawfulness of the decision to post no smoking notices throughout the train. I can see nothing in section 67 of the Transport Act 1962 or the byelaws which could displace that presumption. It is clear from *Wandsworth London Borough Council v. Winder* [1985] A.C. 461 and *Reg. v. Wicks* [1998] A.C. 92, 116, per Lord Hoffmann that the development of a statutorily based procedure for judicial review proceedings does not of itself displace the presumption.

70. We do not consider that *Dill* or *Boddington* have any material impact on the authorities discussed in *MWL International* in the passages above, which address the specific question of the jurisdiction of the FTT, rather than the broader principle of access to a judicial remedy. *Dill* emphasises the need for a fair opportunity to challenge administrative decisions and the need

to analyse the relevant statutory provisions. Neither principle is controversial. The question of whether an application for judicial review, which is the usual means of pursuing a claim for legitimate expectation against an administrative act, is a “fair opportunity” is not answered by *Dill*. *Boddington* is referred to in *Beadle* (at [46]) for the proposition, which is again uncontroversial, that it is necessary “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”. In *Boddington*, it was clear that unless the claim could be made under the relevant statutory appeal provisions, there might well be no opportunity, fair or otherwise, to challenge the impugned decision in the criminal enforcement proceedings. That is not the situation in this appeal, where an application for judicial review was available.

71. Neither *Dill* nor *Boddington* address the issue in this appeal, which is whether under the legislation which confers powers on the tribunals and the specific provisions engaged in this appeal, the FTT has a judicial review jurisdiction in this appeal.

72. We do not accept Mr Bedford’s argument that we must construe the relevant provisions starting from the presumption that a public law jurisdiction is included unless it is clearly or by implication excluded. We endorse the approach of the Upper Tribunal 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.

73. The relevant statutory provisions which fall to be construed are: (1) the legislation conferring jurisdiction on the FTT, (2) the provisions imposing the liability which is the subject of the appeal, (3) any provisions which relate to assessment, and (4) the provisions governing the related appeal rights, including 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” by HMRC.

74. The FTT is a creature of statute, with no inherent common law powers. The tribunal system was created by the Tribunals, Courts and Enforcement Act 2007 (the “TCEA”). As section 3(1) makes clear, a tribunal’s powers are confined to those in statute: “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”. As the Court of Appeal identified in *BT Pensions*, the drafter of the TCEA clearly had in mind the issue of a tribunal’s judicial review jurisdiction (encompassing a public law remedy such as legitimate expectation), because sections 15 to 21 TCEA (headed “Judicial review”) set out the judicial review powers of the Upper Tribunal. With very limited exceptions, the jurisdiction of the Upper Tribunal to decide applications for judicial review is limited to applications made in and transferred from the Administrative Court. There are no equivalent provisions, or indeed any provisions at all, relating to the FTT.

75. In this appeal, the income tax liability imposed by the assessments arose under Schedule 16 to the Finance Act 2020 (“Schedule 16”). Under paragraph 8(1) of Schedule 16, a recipient of an amount of a coronavirus support payment is liable to income tax if the recipient is not entitled to the amount in accordance with the scheme under which the payment was made. Paragraph 8(4) provides that, in the circumstances relevant to this appeal, that liability arises

at the time the coronavirus support payment is received. By paragraph 8(5) the amount of income tax chargeable is the amount equal to so much of the coronavirus support payment as the recipient is not entitled to, and as has not been repaid.

76. An assessment to income tax is made under paragraph 9 of Schedule 16. This provides as follows (with references to TMA 1970 being to the Taxes Management Act 1970):

(1) If an officer of Revenue and Customs considers (whether on the basis of information or documents obtained by virtue of the exercise of powers under Schedule 36 to FA 2008 or otherwise) that a person has received an amount of a coronavirus support payment to which the person is not entitled, the officer may make an assessment in the amount which ought in the officer's opinion to be charged under paragraph 8.

(2) An assessment under sub-paragraph (1) may be made at any time, but this is subject to sections 34 and 36 of TMA 1970.

(3) Parts 4 to 6 of TMA 1970 contain other provisions that are relevant to an assessment under sub-paragraph (1) (for example, section 31 makes provision about appeals and section 59B(6) makes provision about the time to pay income tax payable by virtue of an assessment).

77. The effect of paragraph 9 of Schedule 16 is to import into the process of appealing an assessment under paragraph 9 the machinery of various provisions of the TMA. These include the basic right of appeal arises under section 31 TMA. In addition, section 50(6) and (7) TMA provide (so far as relevant) as follows:

(6) If, on an appeal notified to the tribunal, the tribunal decides—

- (a) that the appellant is overcharged by a self-assessment;
- (b) that any amounts contained in a partnership statement are excessive; or
- (c) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

(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.

78. So, as a matter of purposive statutory construction, do these provisions confer jurisdiction on the FTT in this appeal to consider a claim of legitimate expectation in order to nullify the relevant assessments?

79. The context in which the liability, assessment and appeal provisions must be construed includes the extent of the jurisdiction conferred under the TCEA, discussed above, and the availability of an existing mechanism to claim legitimate expectation by making an application to the High Court for permission to bring a claim for judicial review against HMRC. It also includes the “exclusivity principle” in *O’Reilly v Mackman*, [1983] 2 AC 237, that public law issues should generally be raised in judicial review proceedings in the High Court.

80. Having regard to the reasoning in *Beadle* and *Zeman*, it is also relevant to consider whether the proceedings before the FTT were “enforcement action”. That is because, as explained in those cases, a litigant defending enforcement action is not bound by the exclusivity principle. While it is arguable that in appealing against an HMRC assessment a taxpayer is defending an enforcement action, that question was not addressed by Simler LJ in *Beadle*, and we consider that in the context of the exclusivity principle, the better view is that a tax assessment is not of itself an enforcement proceeding⁷. Mr Bedford stated in his oral submissions that he did not seek to argue that the Appellant’s FTT appeal was a defence against enforcement proceedings.

81. In relation to the statutory construction of the provisions engaged in this appeal, the high point of the argument in favour of FTT jurisdiction is that paragraph 9 of Schedule 16 permits an assessment if an HMRC officer “considers” that a person has received a Support Payment to which they are not entitled, and provides that the officer “may make an assessment in the amount which ought in the officer’s opinion to be charged under paragraph 8”.

82. This language could be argued to confer a discretion on HMRC to decide whether or not to issue a paragraph 9 assessment and in what amount, which signals an intention by Parliament that the discretion must be capable of challenge if it is not exercised reasonably and in conformity with principles of public law. We are not persuaded by that argument. An assessment can only impose a liability which arises under paragraph 8, and neither the paragraph 8 liability nor the paragraph 8 amount depend on the exercise of any HMRC discretion. Assessment provisions in the tax legislation very commonly require some sort of HMRC administrative action in order to raise an assessment. Apart from any other consideration, that is consistent with both the distinction between liability and assessment in the taxation process, and HMRC’s general care and management powers. In our opinion, the fact that such action is described in the statute in terms of an officer’s decision or opinion is not enough to indicate an intention by the drafter that the relevant administrative action should be capable of a public law challenge before the FTT in an appeal.

83. The wording of the appeal provisions, in particular section 50(6) TMA, points away from a legitimate expectation jurisdiction for the FTT in the appeal. In our opinion, in stipulating that unless an appellant is overcharged by an assessment, then “otherwise the assessment...shall stand good”, the drafter has directed the FTT’s powers on appeal to the amount charged by an assessment. The language does not indicate that the power on appeal extends to determining that (because of legitimate expectation or estoppel) the assessment could never have been raised at all.

84. Mr Bedford argued that section 50(6) was “concerned with procedure, not jurisdiction”. We do not agree: it describes the FTT’s jurisdiction on an appeal. In any event, the powers of the FTT on appeal must be taken into account in the exercise of statutory construction. If, for example, those powers are framed in terms of the *Wednesbury* reasonableness of an HMRC decision, that may be distinguished from the language of section 50(6).

85. We mention for completeness that Mr Winter proposed a novel construction of section 50(6), under which the word “assessment” in that subsection should be read as referring only to a formally valid assessment (meaning one which complies on its face with all relevant statutory provisions such as time limits) which has not previously been quashed by the High Court on public law grounds. We consider it appropriate for that argument to be considered in an appeal where the issue of jurisdiction is determinative, and express no view on it.

⁷ That was also the conclusion recently reached by the Upper Tribunal in *Queenscourt Limited v HMRC* [2026] UKUT 195 (TCC) (at [151]). Permission to appeal that decision to the Court of Appeal has been granted.

86. In conclusion, if it had been necessary to determine the issue, we would have reached the view that the FTT did not err in law in finding that it lacked jurisdiction in respect of a claim of legitimate expectation.

DISPOSITION

87. Since permission to rely on the claimed factual basis for a claim of legitimate expectation is refused, the appeal is dismissed.

**MR JUSTICE MICHAEL GREEN
JUDGE THOMAS SCOTT**

Release date: 14th October 2026