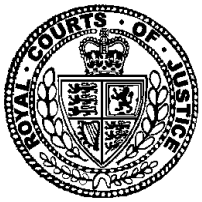

Neutral Citation Number: [2023] EWHC 2206 (Admin)

Case No: CO8432022/CO9372022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 September 2023

Before :

MRS JUSTICE FOSTER DBE

- -

Between :

THE KING
(on the application of)

(1) LONDON FLUID SYSTEM TECHNOLOGIES LTD

(2) MR ADRIAN WYNNE

(3) FLUID SYSTEMS TECHNOLOGIES (SCOTLAND) LIMITED

(4) MR PETER O'CONNOR

Claimants

- and -

HIS MAJESTY'S COMMISSIONERS FOR REVENUE AND CUSTOMS

Defendant

- -
- -

Mr Giles Goodfellow KC and **Mr Ben Elliott** (instructed by **Levy and Levy**) for the **Claimants**
Mr Christopher Stone and **Ms Ishaani Shrivastava** (instructed by the **General Counsel and Solicitor to HM Revenue and Customs**) for the **Defendant**

Hearing dates: 28-29 March 2023

- -

Approved Judgment

This judgment was handed down remotely at 04.00pm on 01 September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE FOSTER DBE

MRS JUSTICE FOSTER DBE:

INTRODUCTION

1. The substantive issue in this application for permission is the proper construction of the Disguised Renumeration Repayment Scheme 2020 ("the Scheme"). The claim was begun on behalf of two individuals, Mr Peter O'Connor and Mr Adrian Wynne, and on behalf of London Fluid System Technologies Limited ("LFST") connected to Mr Wynne, and Fluid Systems Technologies (Scotland) Limited ("FSTS") connected to Mr O'Connor.

2. Certain issues arise about proper service of the claim on HMRC, and, at one point there was a challenge to the legal standing of the two individuals.

3. The main issue, however, concerns the interpretation of the Scheme, and the Claimants case that properly applied, the Scheme operates to afford the Claimants' a repayment claim under it.

4. For the purposes of this application the detail of the Scheme is not necessary to set out with great particularity. The essence of the case is that HMRC have misdirected themselves in interpreting the Scheme and in particular one of the paragraphs of it which set out the conditions under which payments would be made to Claimants.

5. The Scheme arose to deal with a set of circumstances known generally as the disguised renumeration issues. In certain tax years between 2009 and 2013, the Claimants, whom I shall refer to compendiously as "*the taxpayers*", entered into one or more transactions disclosable under the Disclosure of Tax Avoidance Schemes ("DOTAS") Regulations under the Finance Act 2004 Part 7. For each year and in respect of all arrangements, save for one in 2012, HMRC issued determinations under The Income Tax (Pay-As-You-Earn) Regulations 2003 in respect of income tax alleged to be due and owing. In respect of national insurance contributions notices of decision under Section 8 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 were issued in respect of payments of national insurance contributions under the Scheme.

6. The arrangements entered into by the taxpayers, in broad terms, were the subject of later legislation under the Finance (No 2) Act 2017 enacted in order to take effect upon certain loans outstanding before a specified date in 2019. In light of this legislative development, the parties entered into certain settlement agreements with HMRC settling income tax, national insurance contributions and interest, the totality in respect of FSTS in two settlement agreements was in the sum of £5,373,035.33.

7. In respect of the LFST payments, likewise, determinations were issued under Regulation 80 and notices of decision. Settlement agreements were entered by LFST and HMRC for Income Tax, NIC and interest in the sum of £1,708,319.72; for the same reasons, avoiding the effect that the newly enacted loan charge would have upon them.

8. Following complaint and criticism, the government evolved a system to mitigate the effect of the loan charge which was deemed to be unfair on certain taxpayers. Under the Finance Act 2020 it evolved and brought into effect "*the disguised remuneration repayment scheme 2020*" whose terms are in issue in this claim.

9. It is in respect of the conditions referring to what is known as a "*voluntary restitution*" that the claim is sought to be made. A voluntary restitution is described in 3.1.27 of the Scheme as follows:

> "***Voluntary Restitution****" means the amount paid, treated as paid or due to be paid under a settlement agreement that, at the Commissioners' discretion, and having regard to paragraphs 4.3 to 4.7, the Commissioners may decide is or is referable to:*
>
> *3.1.27.1. an amount of:*
>
> *3.1.27.1.1. income tax; or*
>
> *3.1.27.1.2. National Insurance contributions;*
>
> *3.1.27.2. referable (directly or indirectly) to a loan or quasi-loan made on or after 6 April 1999 and before 6 April 2016;*
>
> ***3.1.27.3. that an officer of Revenue and Customs had no power to recover at the time the settlement agreement was made;***
>
> *3.1.27.4. that was treated for the purposes of the settlement agreement as an amount an officer of Revenue and Customs had no power to recover;*
>
> *3.1.27.5. that, in a case where the loan or quasi-loan in paragraph 3.1.27.2 was made on or after 9 December 2010, at a time when an officer of Revenue and Customs had the power to recover the amount a tax return, or two or more tax returns of the same type taken together, contained a reasonable disclosure of the loan or quasi-loan.*"
>
> Emphasis added.

10. The Revenue have refused to repay the Claimants, saying that the requirements of the Scheme are not met.

PRELIMINARY ISSUES

11. In addition to denying an arguable point arises, HMRC said that there are two preliminary matters which should ensure the court does not grant permission. The first is that the Claimants did not effectively serve HMRC with the judicial review claim.

12. I can deal with the second question that arose quickly - this was as to the individual Claimants. They have indicated they are content for the matter to go forward without them as Claimants, since the companies have standing and HMRC accept that that is so. Accordingly the individual Claimants are withdrawn from the claims, and the second point falls away.

13. Bourne J adjourned this application together with the service issue that had been raised by separate application of the Claimants dated 13 April 2022 in the form of an application for a declaration that the claim forms were validly served in accordance with the time limit in CPR 54.7, further, a declaration that HMRC are estopped from challenging the validity of service in the current proceedings and an order under CPR

6.15 authorising service by email on HMRC solicitor allocated to the case. All of those are, essentially, to the same effect, in order to allow the claims to continue if permission is granted. The Defendant has asserted they were not properly served under the rules with either of the remaining claims brought by LFST and FSTS, and may rely upon a limitation defence.

14. The facts which give rise to the need for that application are as follows.

15. By letters dated 10 December 2021 and 17 December 2021 HMRC reached certain conclusions concerning the substantive issues in the case and communicated them to the Claimants' solicitor Mr Levy. On the 21 February 2022 he sent a single letter before claim in two separate sets of proceedings challenging those conclusions in both cases to the preactionletters@hmrc.co.uk email address at HMRC. On 3 March 2022 Mr Gabbitas of HMRC responded by email agreeing HMRC would not object to proceedings being initiated for both companies in England and Wales, and he served a single PAP Letter response on 7 March, by email.

16. The 7 March response included a rejection of the taxpayers' substantive claim. It was headed with an HMRC postal address, (as set out below) and had Mr Gabbitas of HMRC's email address at the top. It indicated he was the solicitor at HMRC to whom the proceedings had been assigned. A section of the letter provided thus:

"*2. The Defendants*

2.1. HM Revenue and Customs ("HMRC") is an authorised government department within the meaning of s17 of the Crown Proceedings Act 1947. In accordance with the list of authorised government departments published by the Minister for the Civil Service pursuant to those provisions, HMRC's address for service is as follows:

General Counsel and Solicitor to Her Majesty's Revenue and Customs

HM Revenue and Customs
14 Westfield Avenue
Stratford
London E20 1HZ

2.2. Currently HMRC accepts service by electronic means where this is effected in accordance with guidance published online at:

https://www.gov.uk/government/news/hmrc-to-accept-service-of-legal-proceedings-by-email.

2.3. All correspondence in respect of this matter should be sent for the attention of the Strategic Litigation Team and marked with the references set out below.

3. Reference Details

3.1. Your matter is being dealt with by Sean Gabbitas. The references are LIT-11255-C-1 and LIT-11247-C-1."

17. Thereafter, the Claimants' solicitor served the relevant sealed claim forms upon Mr Gabbitas at the email address given at the top of the letter, and also via the SDES electronic document transfer system and understood, until the day the Acknowledgement of Service was served (after an HMRC request for extension of time to do so) that service had been correctly effected.

18. Put shortly, the Claimants' solicitor understood that he was effecting service of the claims in a manner acceptable to HMRC, and consistent with his understanding of HMRC's Press Release, by serving by email the claim forms on the address of the HMRC solicitor who had already been allocated to the case. HMRC do not dispute that they received the materials by email but state that the forms ought in fact, to have been sent to a different email address namely newproceedings@hmrc.gov.uk.

19. The document at the end of the link which Mr Gabbitas gave was as follows:

[The relative font sizes and layout has been maintained where possible].

"***News Story***

HMRC to accept service of legal proceedings by email

The service of new legal proceedings and pre-action letters on HMRC should be via email during the coronavirus (COVID-19) pandemic.

From: HM Revenue & Customs (/government/organisations/hm-revenue-customs)

Published
9 April 2020
Last updated
25 September 2020 —

Due to coronavirus (COVID-19), HM Revenue and Customs (HMRC) has requested that, where possible, new legal proceedings and pre-action letters should be served via email rather than by post.

This is to ensure that, during the pandemic, we can protect our staff by reducing the handling of paper documents where possible.

For new legal proceedings

New legal proceedings in England and Wales which are required to be served on the Solicitor for HMRC can be sent by email to newproceedings@hmrc.gov.uk.

Pre-action letters

Any correspondence which is required to be sent to the Solicitor for HMRC in compliance with any pre-action protocol to the Civil Procedure Rules,

including the Pre-Action Protocol for Judicial Review, can be sent by email to preactionletters@hmrc.gov.uk.
Unless you are requested to do so, please do not send hard copy duplicates.

Attachments

If you are including attachments with your email, please ensure they:

- *are in a common format such as PDF or MS Word*
- *do not exceed 25mb (in total)*

If you are likely to exceed the 25mb limit, please split the contents into smaller emails. If this is not practical, you should serve the principal documents (such as the claim form and particulars of claim) and ask HMRC to contact you to make alternative arrangements to serve the remaining documents.

Employment law claims

Please note that the service of employment law claims on HMRC, and associated documentation, must be sent to expertadviceservice@hmrc.gov.uk.

Other correspondence

These email addresses are for the service of new proceedings and pre-action letters only. They should not be used if you want to:

- *request a review of a tax decision by HMRC - for this please follow the guidance on the GOV.UK page Disagree with a tax decision (https://www.gov.uk/tax-appeals/decision)*
- *appeal to the First-tier Tribunal (Tax Chamber) - for this, please refer to the guidance on the GOV.UK page Appeal to the tax tribunal (https://www.gov.uk/tax-tribunal)*

Any other correspondence sent to these email addresses will be deleted unread.

For all proceedings (including in the Supreme Court) an HMRC lawyer will be allocated the case and all subsequent service should be effected on their, or any nominated successor's, HMRC email address.

If you need to contact HMRC with a general query about your tax position, please see Contact HMRC (https://www.gov.uk/contact-hmrc).

Published 9 April 2020
Last updated 25 September 2020

Published 9 April 2020

Last updated 25 September 2020 + show all updates

1. 25 September 2020 Added new section about where to send employment law claims

on HMRC.

2. 16 April 2020 Added information to 'Other correspondence' section to make more clear.

3. 9 April 2020 First published."

BACKGROUND

20. Mr Levy is a tax solicitor of some thirty years standing, with 10 years' previous experience at Inland Revenue (latterly HMRC) as a Senior Legal Advisor in the Revenue Solicitor's Office. He has over 20 years as private tax specialist, and deposes that his practice was always to serve all judicial review proceedings physically by delivering the documents to HMRC's solicitors office, but he altered his practice in light of the Press Release. He explained he would identify the relevant HMRC solicitor at the pre-action stage but normally would not know who that was, so would email the general email for pre-action correspondence (preactionletters@hmrc.gov.uk), and the solicitor allocated would then respond and provide their email address. The new proceedings email address was to be used if one did not know who the assigned solicitor was. He assumed the use of the general email was because a solicitor had not yet been appointed. He had had significant experience of the system operating in this way.

21. The facts in more detail are as follows.

22. The Claimants' solicitor read the Press Release when it was issued, during the early stages of the COVID-19 pandemic. He read it as, sensibly, saying that where possible new legal proceedings and pre-action letters should be served via email during the COVID-19 pandemic. He explained he had no reason at all to doubt that, as in other cases, HMRC, had interpreted their guidance in this case to mean that service of the claim form on the assigned solicitor was good service until the point on service was taken.

23. Mr Levy points to a course of dealing with HMRC and deposes to three judicial review applications filed since the introduction of the 9 April 2020 Press Release, before the present proceedings, and various discussions with HMRC solicitors, and certain other matters. The papers in one claim were served upon a contact of his at HMRC, and the assigned solicitor, to whom they were then sent, corresponded to note service of the sealed claim form and documents by email indicating HMRC were content to accept service in this manner, so long as she and a colleague were both served and HMRC were likewise entitled to serve upon him at his email address. She was not aware of any written guidance on the issue, he did not pursue the point and no issue was ever raised by HMRC on service.

24. In another case, believing a solicitor was assigned to the case, an unsealed claim form was sent to her by email at HMRC. She emailed back to him, saying he would be aware service must be effected on the solicitors acting for HMRC, and therefore requested all papers be served upon herself and another solicitor in the office who was acting. He understood from the words "*as you are aware service must be effected on the solicitors acting for HMRC*" as being a reflection of the meaning of the Press Release, that where it was known who was acting, service should be effected upon them. He did not serve

on the new proceedings email address, and no issue was ever taken with service. In a further case, where there had been PAP letter correspondence with a particular solicitor at HMRC, the sealed claim form was served upon him at his email, a discussion about the date of service took place and summary grounds were served. Again, no point was taken about service, nor was it suggested that service was required to be on the new proceedings email.

25. Mr Levy explained in one case he had served a N161 for permission to appeal by email on the relevant solicitor/s instructed to which service was acknowledged and no objection to it made. Likewise, in other matters, on appeal from the Tribunal, service was made by him on the named solicitor without objection.

26. On the basis of this experience Mr Levy considered he had been acting in accordance with the Press Release to the effect that once a solicitor had been allocated to a case he should serve them directly with any documents including the claim form.

27. He noted HMRC said the purpose of the Press Release it was "*to ensure that, during the pandemic, we can protect our staff by reducing the handling of paper documents where possible*". He noted there was also non-compulsory language used regarding service of new proceedings:

"*New legal proceedings in England and Wales which are to be required to be served on the Solicitor for HMRC* ***can*** *be sent by email to newproceedings@hmrc.gov.uk.*"

And observed that after the case had been allocated "*all subsequent service should be effected on their … email address*" in these terms:

"*For all proceedings (including in the Supreme Court) an HMRC lawyer will be allocated the case and all subsequent service should be effected on their, or any nominated successor's, HMRC email address.*"

28. He read this as indicating that where a solicitor had not been allocated it was necessary to serve the relevant document on the general "*pre-action letter or new proceedings email*", but once a lawyer had been allocated, subsequent service should be upon him or her. He did not read the Press Release as compelling service on the general email address if the case had already been allocated. Here they had exchanged correspondence between them, the solicitor knew of the impending claim, and received it without adverse comment.

29. He explains that he was very happy, in order to further the protective aim, to switch to a system whereby they dispensed with hard copies and used email at HMRC's request. In other words, the language did not carry the imperative of a rule of court or other mandatory requirement failure to comply with which might be fatal to litigation. In other parts of the notice the word "*must*" was used, but not here. The wording seemed clear to him. We were in a pandemic, HMRC wished, very properly, he said, to protect their staff and were asking us to avoid paper and serve by email instead.

30. He read the use of the specific new proceedings email as permissive if and until the Claimants could not identify the specific solicitor allocated.

31. The relevant detailed chronology is as follows.

i) 10 December 2021 and 17 December 2021: Decision Letters in respect of LFST and FSTS were sent to the Claimants' solicitors.

ii) 21 February 2022: A PAP letter was served on the pre-action email address because the assigned solicitor was not known at that stage.

iii) 3 March 2022: An email was sent from Mr Gabbitas of HMRC agreeing that there would be no objection to proceedings being initiated for both companies in England and Wales, rather than requiring proceedings to be filed in Scotland in respect of the Scottish company.

iv) 7 March 2022: A substantive answer to the PAP letter served by Mr Gabbitas on Mr Levy's email address, which letter included a link to the Press Release.

Upload links were requested by Mr Levy from the Administrative Court Office.

Mr Gabbitas was informed that the Claimants were ready to file in the FSTS matter, (thus, Mr Levy says, he knew the claim form and accompanying documents would be in the bundle of files for upload).

v) 9 March 2022: Permission bundle, including the claim form and detailed statements of grounds, in the FSTS matter were uploaded for court to consider and issue claims. Because the only way to serve large bundles was to use HMRC's SDES system; Mr Levy emailed the assigned solicitor to ask, as was required by the system, for them to ask their IT colleagues to send an upload link so the solicitor might log onto the system and upload the files.

13.10 Mr Levy received notification from SDES he could upload the bundle.

13.11 Upload confirmed by the system stating the bundle had been received. Some minutes thereafter a further email stating that the bundle had been "*checked and delivered*" and that another HMRC department "*will now check your documents and contact you if necessary*" was received. The bundle included the as yet un-sealed claim form, statement of grounds, witness evidence and the supporting documents in FSTS.

16.01 The sealed claim form in FSTS was issued.

16.28 Mr Levy emailed Mr Gabbitas a short message referring him to the enclosed sealed claim form in FSTS; this was, so Mr Levy understood, in compliance with Part 6 of the CPR including PD 6A and the Press Release concerning service, which could be effected by email to Mr Gabbitas for FSTS.

vi) 16 March 2022: 10.04 Mr Levy asked for another link for the SDES server for LFST. (Mr Gabbitas had already been copied in to Mr Levy's request of the Administrative Court regarding forms and documents).

14.46 The Administrative Court emails to Mr Levy the sealed claim form for LFST's claim.

21.38 Mr Levy was informed by Mr Gabbitas the same link as used for FSTS was to be used for LFST.

vii) 17 March 2022: 10.44 Mr Levy uploads a sealed claim form and bundle labelled "*sealed claim form letter*"; he believes it to be in respect of LFST, but it is wrongly named as FSTS.

10.47 and 10.48 SDES system informs Mr Levy LFST claim form, and decision letter, and bundle received.

10.50 Email indicating "*another HMRC department will now check your documents and contact you if necessary*".

10.52 Mr Levy emailed Mr Gabbitas to tell him he had uploaded the bundle for LFST asking him to acknowledge receipt – which he does not do.

c11.18 Mr Levy notices the error in the claim form, emailed the Administrative Court (copying in Mr Gabbitas) for a re-sealed claim form.

14.46 Corrected claim form emailed from Administrative Court.

14.51 Corrected claim form for LFST sent to Mr Gabbitas by Mr Levy. This was, so Mr Levy understood, in compliance with Part 6 of the CPR including PD 6A and the Press Release concerning service, which could be effected by email on Mr Gabbitas for LFST.

viii) 22 March 2022: Core bundles served on Mr Gabbitas in both claims.

ix) 23 March 2022: Mr Gabbitas' colleague, Ms O'Hanrahan, emailed the court, copying Mr Levy and Mr Gabbitas in, indicating HMRC had no objection to the claims being joined, and that they "*seek leave to file a joint acknowledgment of service and Summary Grounds in respect of both matters by 7th of April 2022*" permission was required because this date was 21 days after the date when the amended claim form in the LFST application had been served, as Mr Levy understood it, and 29 days after the date of service of the FSTS claim form.

x) 24 March 2022: Date of decision in the case of *R (Good Law Project) v Secretary of State Health and Social Care* [2022] EWCA Civ 355 [a case on a similar but different policy for the government legal service] which the Claimants suggest caused HMRC to resile from their previous approach to service of claim forms in the acknowledgement of service in this case.

xi) 25 March 2022: Mr Levy was invited to sign a consent order allowing the extension of time to HMRC to file their Acknowledgement of Service until 7 April 2022.

xii) 28 March 2022: Mr Levy signed the consent order and returned it to the Administrative Court.

xiii) 7 April 2022: HMRC filed and served their AOS and Summary Grounds of Defence in which they disputed the court's jurisdiction, including, on the basis that proper service had not been effected.

xiv) 8 April 2022: Mr Levy seeks to serve on the new proceedings email for the government legal department.

xv) 27 April 2022: Mr Levy serves again on the new proceedings email for HMRC, without prejudice to his argument he had already served HMRC correctly. It is the service of 27 April alone which HMRC recognise.

THE CLAIMANTS' ARGUMENT

32. Mr Levy in his evidence, and Mr Goodfellow KC in argument, highlighted that at no point did Mr Gabbitas indicate that he considered service was defective in any way. Mr Levy had understood Mr Gabbitas to be accepting, in the same way as the other solicitors within the office, service of the claim form and the accompanying documents by means of the sealed claim form being emailed to him, as the solicitor allocated to the case, and by uploading the documents to the link provided to Mr Levy by HMRC at Mr Gabbitas' direction. He explained that when Mr Gabbitas said he might use the same link for Fluid London as had been used for Fluid Scotland, he thought no objection was taken to that course of action.

33. He also adverts to positive steps taken by HMRC in the case. On 23 March 2022 when Mr Gabbitas' colleague, Ms O'Hanrahan, sought permission to file a joint Acknowledgement of Service and Summary Grounds in respect of both matters by 7 April 2022, which required an extension of time. Although aware that the authorities recognise there is no positive obligation on a defendant to take a point about time until (in judicial review) the acknowledgment of service, he notes that at no point was an issue indicated – until the time of the Good Law Project case (infra). Mr Levy states no HMRC solicitor has ever taken this point before and it runs counter to his experience of the operation of the Press Release in all the judicial reviews he has conducted since its promulgation.

34. The Claimants argue as a first argument that service <u>was</u> properly effected, given the statements in the Press Release. Mr Goodfellow KC for the Claimants submitted the document was not to be read as a statute. When the claim forms were sent to the email address of Mr Gabbitas, identified on 3 March 2022, and again when he stated his email address in the pre-action letter response the claim forms were properly served. With respect to service of the other documents by SDES, the Claimants referred to that part of the Press Release headed "*attachments*". The guidance indicates that attachments with an email must be in a particular format and must not exceed 25 mb. If it is not practical to split the content into smaller emails the guidance says, "*you should serve the principal documents (such as the claim form and particulars of claim) and ask HMRC to contact you to make alternative arrangements to serve the remaining documents.*" That is what happened with the SDES, because HMRC provided Mr Levy with a link in order to upload, and serve the materials. The documents which he uploaded on 16 March 2022 to the SDES contained he said a complete suite of documents, including the claim forms and detailed statements of facts and grounds and voluminous supporting documentation. It is fully accessible to HMRC's IT team in the event of any unexpected 'absence' and so management issues, raised by HMRC, need not arise on service by this method.

35. The use of language in the Press Release was at best ambiguous, say the Claimants, as to whether or not service to the new proceedings email address was a matter of choice, or was compulsory. The explanation given by HMRC, in these proceedings, is not a natural reading of the words of the paragraph. Further, the last section of the Press Release headed "*other correspondence*" should be construed in the following way. The wording "*other correspondence …*" down to "*will be deleted unread*" show that the specific email addresses provided for new proceedings, et cetera may not be used for statutory reviews, or appeals to the first-tier Tribunal: that is to say proceedings which are not commenced under the CPR. These proceedings are "*other correspondence*". The passage beginning "*for all proceedings …*" relates plainly to CPR proceedings, and cannot relate to the "*other correspondence*" in respect of other forms of action. This indicates that once the HMRC lawyer was allocated, service subsequent to that allocation must be upon that lawyer. On such a reading, service was effected, within the time, upon Mr Gabbitas who had identified himself to Mr Levy as the assigned lawyer in correspondence dated 3 March 2022. They say it may be significant that HMRC have stated elements of this text were added, by others, following the original publication of the guidance.

36. Whilst HMRC explain the use of the word "*can*" as explicable because hard copy personal service was still, technically, acceptable, the Claimants say the permissive nature of the language indicated rather, an option. There is a clear distinction, they argue, between the use of the word "*must*" in respect of employment claims, and "*can*" in respect of HMRC judicial review proceedings.

37. Importantly, Mr Levy's experience of other HMRC personnel conditioned and reinforced his understanding. His evidence was he looked at the Press Release when it first was published, in April 2020 and that is when he formed his view about what it meant, shared, not only with a number of litigants (as conceded by HMRC in their Grounds of Defence, paragraph 6) but also a number of lawyers assigned to proceedings. Mr Goodfellow KC noted that the reasons now given by HMRC to the effect it would be administratively inconvenient and otherwise risky for individual lawyers to be served, were not stated, nor implicit in the Press Release itself. Mr Levy was clear that the new proceedings email was for those cases where one did not know who the assigned solicitor was: much in the same way as he used the pre-action email at a time when he did not know that Mr Gabbitas had been assigned. Using a known solicitor at HMRC was a methodology he had employed before, so that the material could be served directly on the assigned solicitor, as his evidence stated. These experiences were consistent with his understanding of the policy, and HMRC did not seek to put in contrary evidence in this case to suggest he was mistaken, or provide material to show that the evidence that other HMRC solicitors had a different understanding of the operation of the policy from Mr Gabbitas was wrong. Their position was the material was irrelevant.

38. As an alternative submission, if, contrary to their case the correct or an available reading of the Press Release is to compel service only to the new proceedings email address, then the Claimants rely alternatively on CPR 6.15. This explains the power the court has to authorise service by a method not otherwise permitted if there is *good reason* to do so, which power may be exercised retrospectively.

39. Mr Goodfellow KC argued that even if it may be said the Claimants are wrong about the Press Release and its meaning, HMRC were estopped from relying upon what they

now say is the true meaning of the Press Release. They point to undisputed evidence that HMRC's solicitors considered service by email to the allocated solicitor to be valid. This was a common assumption that had been shared between HMRC solicitors and Mr Levy for which they bear responsibility.

40. Mr Goodfellow KC argued that the facts of the present case were similar to the position in *Tinkler v Revenue and Customs Commissioners* [2021] UK SC 39, and it was possible to say there was here a common assumption that it was possible to serve on a solicitor's personal email address. Those principles, about which there was no dispute set out in the speech of Lord Burrows at paragraph [45];

"*In my judgment, the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings…are as follows:*

(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."

41. Mr Goodfellow KC asserted that as there was a common practice and a number of solicitors had communicated that same view, there was therefore a "*crossing of the line*" in the sense understood in *Tinkler*, see paragraph [37] between the parties, so that what was done or not done had produced a belief or expectation in the other party so it was unconscionable to resile from the belief or expectation that had been engendered. There had to be communication whether by speech or conduct, express or implied to the effect that the assumption made was shared. Here that could be spelled out.

42. It was relevant, he submitted, to bear in mind that in respect of LFST, their claim form was required to be served by 24 March 2022 however for the earlier case, of FSTS, it required to be served by 16 March 2022. The letter dated 23 March was clearly implying that service had been properly made, when it referred to leave to serve a joint Acknowledgement of Service, and a date given which required an extension of time. At this point it was possible to serve the (corrected) LFST claim form within the time

if this were done by 24 March 2022. Mr Goodfellow KC did not concede that the first service of the FSTS claim form was invalid: the name could have been amended thereafter, but in any event, his secondary case was to the effect that the steps already taken constituted good service.

43. It was submitted that the "*good reason*" was plainly made out.

44. In respect of the *Good Law Project* case, he drew a distinction, the court was of the view that the policy in that case "*indicated clearly*" what was to be done. That was a difference from the present case – the Press Release was confused and arguably misleading. No explanation was given by the solicitors as to how the unsealed claim had been sent "*by way of service*" and yet the sealed claim not so. In the *Good Law Project* case, the relevant email was set out in the letter, and held to be completely clear. There had been no attempt in that case to serve by reference to what was the rule, nor a suggestion of lack of understanding. In the present case, it was quite different.

45. The essence of this part of his submissions was there had been a change of approach and it is unconscionable for them to challenge the validity of service in this case. The Claimants accept the fact that service was disputed only in the Acknowledgement of Service does not give rise to an estoppel on its own, but they point to what they describe as HMRC's conduct and communications. This is the first time, they assert, that the established practice has been resiled from, and they recall the recognition in paragraph 6 of the response from HMRC that the circumstances of this case are "*far from unique*". The agglomeration of circumstances amount to an estoppel in their submission.

THE DEFENDANT'S EVIDENCE and OBJECTIONS to SERVICE

46. Mr Gabbitas stated in evidence that at no time up to the date when time expired, was service effected within the true meaning of the Press Release. He notes that the only reference to his direct email address in the response was within the head note of his letter of response. It did not include any indication that the email address could be used for service which is what is required by CPR PD6A 4.1(b). SDES is similarly not within rules as an acceptable mode of service. He points to the fact that Mr Levy made a mistake in using the government legal new proceedings email too.

47. HMRC assert it was clear from the guidance Mr Levy was required to serve electronically only at the newproceedings@hmrc.gov.uk address. Service upon Mr Gabbitas directly was not good service and Mr Gabbitas, although including his email at the top of the PAP letter response, did not in terms indicate that he could be served at that address.

48. HMRC through Mr Stone argued that Mr Levy ought to have ascertained which address he should serve, once he had read the guidance in the Press Release. Further, as to the language of the Press Release, the phrase indicating that new legal proceedings "*can be sent by email to newproceedings@hmrc.gov.uk*", rather than "*must*" just reflects the fact that Claimants could still serve in hard copy. The guidance cannot be read as providing any proper indication under CPR 6APD 4.1 that HMRC would accept service at any other email address (or via other electronic means e.g. by SDES).

49. Regarding the Claimants' reliance upon:

> "*For all proceedings (including in the Supreme Court) an HMRC lawyer will be allocated the case and all subsequent service should be effected on their, or any nominated successor's, HMRC email address.*"

HMRC say this passage is further down the page, under a sub-heading "*Other correspondence*" so "*other*" is to be read as in contradistinction to service of new legal proceedings and pre-action letters. The reference to "*subsequent service*" can only be understood as referring to documents that must be served after a claim has been issued and served.

50. Mr Levy's experience of HMRC's repeated contrary interpretation, which chimes with his and derives from the actions of other HMRC solicitors in respect of other proceedings HMRC say "*cannot affect the rules regarding proper service for these claims*".

51. Uploading the bundles for the claims to SDES is not valid service: and in any event the FSTS claim form in the bundle uploaded to SDES was unsealed and in the claim by LFST, the incorrect company, had been named.

52. As to the estoppel argument, HMRC submitted there was no common assumption and no evidence supporting HMRC and the Claimants sharing a common assumption concerning service. HMRC were not required to reserve the position and could not be taken to have acquiesced in service by asking, effectively administratively, for extra time in which to serve the acknowledgement which was the proper place to take the point on jurisdiction.

53. Mr Stone for HMRC argued there was no element of responsibility here, and it was he said only one side of the transaction that made the assumption: it was not shared. The fact of putting in an Acknowledgement of Service, in these circumstances does not give rise to a common understanding that service has been properly achieved. There was insufficient reliance by Mr Levy on action or inaction by HMRC: he does not say he was affected by the steps that were taken by the solicitors. Further, it could not be said they'd done anything to prevent proper service.

54. It was not accepted that Mr Levy took reasonable steps to effect service in accordance with the CPR and the fact that HMRC accepted they were aware of the claims is insufficient to say they acquiesced in service. The loss of the limitation defence is a very real prejudice and should not be overlooked. They draw a parallel with the *Good Law Project* case (infra), and emphasise that although hard, the decision was upheld by the Court of Appeal.

55. I mean, by the brevity of this encapsulation of submissions, to do no injustice to the length and complexity of the submissions on both sides with respect to this preliminary issue. I have fully considered all the parties' arguments. However, I turn now to the framework within which this decision must be made, mindful as ever that the matter will turn upon the particular facts and their significance and nuance.

FRAMEWORK

56. The relevant framework was not in dispute and may be shortly set out.

57. CPR 54.7 provides

"*Service of claim form 54.7*

The claim form must be served on –

(a) the defendant; and

(b) unless the court otherwise directs, any person the claimant considers to be an interested party, within 7 days after the date of issue."

58. Under CPR 6.10 service on a government department (this includes HMRC) must be effected on the solicitor acting for the department.

"***Service of the claim form in proceedings against the Crown***

6.10 In proceedings against the Crown –

(a) service on the Attorney General must be effected on the Treasury Solicitor; and

(b) service on a government department must be effected on the solicitor acting for that department."

59. Among the potential means of service, CPR 6.3 indicates that any means of electronic communication in accordance with Practice Direction 6A is included or (e) any method authorised by the court under Rule 16. Practice Direction 6A provides:

"***Service by fax or other electronic means***

4.1 Subject to the provisions of rule 6.23(5) and (6), where a document is to be served by fax or other electronic means –

(1) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving –

(a) that the party to be served or the solicitor is willing to accept service by fax or other electronic means; and
(b) the fax number, e-mail address or other electronic identification to which it must be sent; and

(2) the following are to be taken as sufficient written indications for the purposes of paragraph 4.1(1) –

(a) a fax number set out on the writing paper of the solicitor acting for the party to be served;

(b) an e-mail address set out on the writing paper of the solicitor acting for the party to be served but only where it is stated that the e-mail address may be used for service; or

(c) a fax number, e-mail address or electronic identification set out on a statement of case or a response to a claim filed with the court.

4.2 Where a party intends to serve a document by electronic means (other than by fax) that party must first ask the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means (for example, the format in which documents are to be sent and the maximum size of attachments that may be received)."

60. As explained in *R (Good Law Project Ltd) v Health Secretary* (CA) [2022] 1 WLR, ("*Good Law Project*") CPR r 6.15(2) was introduced following the decision in *Elmes v Hygrade Food Products plc [2001] CP Rep 71* where it was held (at paragraph 13) that the power to authorise service by an alternative method in rule 6.8 of the Civil Procedure Rules at the relevant time, could not be exercised retrospectively. Its object was to give the possibility that in appropriate cases a claimant might escape the consequences for limitation when a claim form expired without having been validly served.

61. The principles applicable have recently been helpfully set out in that case, and explained by Carr LJ. They include what she said (at paragraph [54]), echoing *Barton*: namely, what constitutes "*good reason*" is essentially a matter of factual evaluation; and that over-analysis and copious citation of authority will not assist (see *Barton* at para [9]). I propose, with that in mind, to set out her short but clear exposition of the framework.

62. Carr LJ said the following with regard to the relevant factors:

"*54. CPR r 6.15 is directed specifically to the rules governing service of a claim form, which contain the conditions on which the court will take cognisance of a matter at all. The relevant principles have been well-travelled in the authorities, with the decision in Barton [2018] 1 WLR 1119, endorsing the earlier Supreme Court decision in Abela v Baadarani [2013] 1 WLR 2043, at the helm.*

…

55. The following summary suffices for present purposes:

(i) The test is whether in all the circumstances, there is good reason to order that steps taken to bring the claim form to the attention of the defendant are good service;

(ii) Service has a number of purposes, but the most important is to ensure that the contents of the document are brought to the attention of the person to be served. This is a critical factor. But the mere fact that the defendant knew of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under CPR r 6.15(2);

(iii) The manner in which service is effected is also important. A bright line is necessary to determine the precise point at which time runs for subsequent procedural steps. Service of the claim form within its period of validity may have significant implications

for the operation of any relevant limitation period. It is important that there should be a finite limit on the extension of the limitation period;
(iv) In the generality of cases, the main relevant factors are likely to be:
(a) Whether the claimant has taken reasonable steps to effect service in accordance within the rules;
(b) Whether the defendant or his solicitor was aware of the contents of the claim form at the time when it expired;
(c) What, if any, prejudice the defendant would suffer by the retrospective validation of a non-compliant service of the claim form.
None of these factors are decisive in themselves, and the weight to be attached to them will vary with all the circumstances. (See Barton at paras 9, 10 and 16.)"

63. To this should be added CPR r 3.1(2) which sets out the court's general case management powers, and includes:

"*Except where these Rules provide otherwise, the court may ... (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired) ...*"

CONSIDERATION

64. The Claimants' first argument is that the meaning of the Press Release is such that good service was effected in this case. Accordingly, turning first to the meaning of the policy document and the question, were the Claim Forms properly served? I have concluded that the documents were not properly served.

65. However, I say at once I am clear that the provisions of CPR 6.15 must be applied so as to direct that good service took place in this case in respect of both claims. In my judgement this is a clear case for the exercise of that jurisdiction.

66. I have concluded that there is an available reading of the policy document, which is consistent with what Mr Gabbitas contends; accordingly I cannot say that Mr Levy did effect service according to the Press Release. However, there are a number of matters which in my judgement make the interpretation placed upon the Press Release by Mr Levy and, obviously, a significant number of other HMRC solicitors, entirely understandable. The language used to convey vital meaning, namely that service may be effected only at the new proceedings email is disappointing. The Press Release is not without ambiguity, and particularly in light of Mr Levy's experience of its interpretation by HMRC, lends itself to an alternative reading consistently with his own understanding.

67. I have no doubt that the intention behind the promulgation of the new policy document regarding service in the pandemic was a well-intentioned step taken in very pressured times by HMRC to meet the difficulties presented by the onset of the pandemic. Nonetheless, as I have indicated, and possibly because of the circumstances under which it was drafted, including as Mr Gabbitas helpfully indicated during the hearing, input by numerous people to the one document, this policy as drafted was in my judgement at best ambiguous.

68. As Carr LJ also said in *Good Law Project*, service of the claim form requires the utmost diligence and care to ensure that the relevant procedural rules are properly complied with (at paragraph [63]). By the same token, in my judgement, where instructions are purported to be given, especially new instructions, regarding an important litigation step, they must be clear, logical, unequivocal and readily understood.

69. The reasons given by Mr Levy for his reading to the effect that where a solicitor has been allocated to a case, that solicitor is the proper recipient of service, are compelling. HMRC's case is that the document has effect as a strict rule of procedure. The language of the Press Release did not assist the reader to understand that although the word "*can*" was used, it in truth meant "*must*". Further, the criticisms made by Mr Levy (which I do not repeat here) are well made. I accept, however, from Mr Gabbitas that HMRC intended that all new proceedings should be served upon the new proceedings email, essentially for the reasons given in respect of the government legal service position in *Good Law Project*, repeated to an extent by Mr Gabbitas. The guidance ought, in the present case, to have stated words to the effect (without intending to draft) of "*if you choose to effect service by email, rather than by hardcopy, it is essential that you serve the new proceedings email with the materials first. This is so, whether or not an HMRC solicitor has already been assigned to the case*".

70. Further, I do not accept that the SDES system comes within the practice direction description. PD 6A 4.1 requirements have not been complied with insofar as the Press Release does not suggest that the claim form may also be served in this manner – it refers to attachments. However, it does come quite close to suggesting that service of everything that requires to be served, including the claim form, may be effected by this route. In similar vein, it would help the reader for a simple statement to be included that the claim form may <u>not</u> be served by means of the SDES. In my judgement, and given the wide variety of materials to which this Press Release might apply, a note to the effect that parties should consult PD 6A, whilst not essential, would assist.

71. As I have suggested, the strongest part of Mr Levy's argument is regarding the "*other correspondence*" section of the guidance. He is a seasoned practitioner, with knowledge in addition of HMRC and yet, he, and others, misunderstood the guidance. That section could perhaps helpfully be redrafted. In the context of the present case, Mr Levy's experience in his other three judicial reviews is highly significant and would necessarily inform his reading of correspondence and reinforce his understanding of the intended meaning of the Press Release.

72. I am not persuaded that this is a case similar to *Tinkler*. I do not consider that it is possible to spell out the requisite kind of "*crossing the line*" or a responsibility for a common assumption on the part of HMRC. Mr Levy was relying upon his own interpretation, that was fortified by his previous experience and those matters, (particularly since the fortification came from HMRC) rather feed into the balance when the court decides what it must do. In the context of service of a Claim Form, and in the present case where the Acknowledgement of Service correspondence is central to the submission, in my view it does not reach the level of the estoppel by convention cases. I acknowledge that a claimant does not need to rely solely on a defendant's affirmation of or subscription to a common assumption, as opposed to the claimant relying upon its own mistaken assumption. However, I do not believe I can spell out of these facts a sufficient Defendant's affirmation. In the present context it is the behaviour and potential affirmation of Mr Gabbitas that is an issue and which I do not

find to be present. The point, however, is nonetheless relevant and must be taken into account in the overall balance.

73. Accordingly, I exercise the jurisdiction under CPR 6.15 by reference to *Barton v Wright Hassall LLP* and by reference to the analysis of the relevant factors to be considered when considering the exercise of that jurisdiction, as set out in *Good Law Project*.

74. Dealing with the matters referred to by Carr LJ in turn:

(1) **whether the Claimant took reasonable steps to effect service in accordance with the rules;** Answer: In the context of the wording of the Press Release and Mr Levy's understanding of its meaning, particularly in light of his experience with HMRC, yes he did take reasonable steps to effect what he reasonably understood to be required in accordance with the rules. This case was not a careless slip – up case. This is not a solicitor who did not care to inform himself, or was careless and slipshod. This solicitor took care within the system which he understood to be operating and which he had previously operated as he understood it successfully and consistently with HMRC's direction, after the introduction of the email service policy. He believed he had effected service in accordance with the "*rules*". In my judgement that belief was not unreasonable. Furthermore, it was suggested at one stage by HMRC, that if in doubt, Mr Levy ought to have asked for clarification. The point is, Mr Levy was not in doubt, and I have held that his absence of doubt was in all the circumstances, reasonable.

(2) **whether the Defendant/his solicitor was aware of the contents of the claim form at the time when it expired;** Answer: Overwhelmingly, the answer to this question is yes. There were numerous occasions on which the relevant materials reached the relevant solicitor. The purposes of service had been plainly achieved, and the case was progressing, with concessions made as to a joint acknowledgement of service, and so forth with core bundles served and no doubt considered. There is no question but that HMRC were made aware on the several occasions on which the materials were provided to them, and were able to take such steps as they believed appropriate in the proceedings – indeed acted as if those proceedings were properly brought until the last minute.

(3) **the prejudice if any the Defendant would suffer by retrospective validation of non-compliant service bearing in mind what he knew about its contents;** Answer: Necessarily, as in all cases the serious prejudice of losing a limitation period will fall upon the defendant. I do not underestimate the prejudice caused but, however, I balance it against the other circumstances including in particular the apparent acquiescence of HMRC in asking for extra time in which to acknowledge service, and the absence of operative carelessness on the part of Mr Levy (the later miss-filing to the GLD email address is irrelevant to the central issue here). As stated this was not a "*careless mistake*" case. The solicitor for HMRC here knew clearly, and early, what the issues were and what case he had to meet. Acknowledging the presence of the limitation prejudice, there is no other detriment to HMRC in allowing service by the alternative means of direct email.

75. I bear in mind also that the Court should look to see whether there has been any impediment imposed upon compliance with good service by the Defendant. In light of my conclusions about the drafting of the Press Release, my answer is there has been.

The impediment is the difficulty with the Press Release, and the reassurance to Mr Levy through the position of other HMRC solicitors – indeed all those with whom he had come into contact in his previous relevant judicial reviews.

76. As stated by Carr LJ:

"*(i) The test is whether in all the circumstances, there is good reason to order that steps taken to bring the claim form to the attention of the defendant are good service;*"

I am clear that there is a good reason so to order, namely that in the present context, balancing all the factors, justice requires that the claim forms be treated as properly served, for the reasons I have given.

77. Further, I have considered carefully:

"*The mere fact that the defendant knew of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under CPR r 6.15(2);*"

In this case, for all the reasons given, there are numerous other factors playing into the good reasons which support this order.

78. Lastly, the manner in which service is effected is also important. No issue arises here with uncertainty over time or date, or the content of service. The service of the claim form was upon Mr Gabbitas personally, the documents were also made available through an approved format. I am prepared to decide that good service took place on 17 March 2022 in respect of LFST, when it was served personally by email.

79. In my judgement the facts of this case are highly unusual and unlikely, to occur again, particularly if some fairly simple steps at amendment are made to the Press Release. This is of course on the assumption that it is still in operation in similar form.

80. I reiterate, the court sympathises with those placed in the difficult position of seeking to keep the wheels of justice turning at such a pressured and uncertain time as early April 2020. I mean no criticism of the individuals involved, and in particular, none of Mr Gabbitas who was most helpful to the court with evidence and information. This was a case in which HMRC felt assistance would be helpful and I have recorded there were a number of other instances in which the guidance document had been differently understood from the meaning which HMRC have said it intended it should bear.

81. I have accepted that it can bear that intended meaning, but have indicated ways in which that meaning could and should be made clearer. Accordingly this application is granted, and I determine that good service took place on 9 March 2022, and on 17 March 2022 in respect of these claims.

PERMISSION APPLICATION

82. I heard considerable detailed argument on the substantive issue and have read all of the materials indicated to me in respect of the claims. In my judgement the points raised are arguable, accordingly I grant permission.

83. In respect of the claims to repayment for loans made prior to 9 December 2010, a single condition is in dispute namely whether HMRC had "*power to recover*" the tax and NICs. For loans made after that date that criterion is in issue, and a second, namely, whether "*reasonable disclosure*" was made in the returns. For the pre-9 December 2010, HMRC did not issue some determinations which suggests that part of the claim may well succeed in any event. Where a determination or decision was issued in respect of amounts ultimately paid under the settlement, HMRC assert this comes within "*power to recover*" because they were able to increase the determinations by agreement or vary them by further process. The Claimants say this is a matter of choice, not HMRC's power to recover. It is at the taxpayers' call whether the decision is challenged. This seems to me to be an arguable point. Having considered the material which the taxpayers rely upon as disclosure, the issue as to reasonable disclosure, is likewise, arguable, particularly in circumstances where HMRC appear to have applied an admittedly erroneous statutory test in respect of their Updated Repayment Decision. It may be, I make no determination, that they can show that this would not have made a substantial difference to the final outcome, however it is not plain to me that at this stage that that is a knockout blow.

84. I shall say no more about the substance of the claims in light of that determination.