

## APNs: A SETBACK FOR TAXPAYERS?

### *DUNNE v. HMRC*

Robert Venables Q.C.<sup>1</sup>

#### 1. Scope of this Article

In this article, I examine an apparent setback for a taxpayer on whom is served an Accelerated Payment Notices which he claims is invalid.<sup>2</sup> I examine the decision of Mrs Justice Elisabeth Laing given on March 31<sup>st</sup> 2015 in *Dunne and Gray v. HMRC* [2015] EWHC 1204 (Admin).<sup>3</sup>

The challenging of an Accelerated Payment Notice and the seeking of interim relief in relation to a purported Accelerated Payment Notice involves a great deal of law with which tax practitioners who are not barristers with experience of judicial review proceedings would not normally be acquainted. It is therefore not surprising that there has been widespread misunderstanding and misstatement of the position.

The judgment in *Dunne* is particularly difficult to understand simply from reading it. One needs to know what the tactical strategy of the taxpayers was. When I myself first read it, the reasoning seemed patently flawed. It was only when I was

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<sup>2</sup> The notices in question were in fact served under Finance Act 2014 Schedule 32 as a partnership was involved. That schedule provides in such a case for a "Partner Payment Notice" to be given instead of an Accelerated Payment Notice. While there are minor differences between the two, for the purposes of this article there are no material differences. In order to make a difficult decision more easy to understand, I shall in this article ignore the differences. What is said in relation to a Partner Payment Notice is, *mutatis mutandis*, generally relevant to an Accelerated Payment Notice and *vice versa*.

<sup>3</sup> It is stated in paragraph 3 of the judgment that "a similar application for interim relief was decided by Simler J on 26 March of this year in a the case of Nigel Rowe and others v HMRC. She rejected an argument that the court should grant interim relief in this form and in fact made an order in the form suggested in this case by HMRC." No transcript of the judgment in *Rowe* was available at the *Dunne* hearing. At the time of writing I have been unable to trace any transcript of *Rowe* and therefore do not consider it further in this article.

very kindly provided by Keith Gordon of Counsel, who appeared for the taxpayers, with an explanation of the nature of the proceedings, that it began to make some sense.

## 2. The Background

Accelerated Payment Notices were introduced by Finance Act 2014 Part 4. HMRC may serve such a notice on a taxpayer subject to certain conditions being satisfied. If the notice is valid, the taxpayer must *prima facie* pay tax in dispute up-front. If he does not, he is *prima facie* liable to *ad valorem* and time-based penalties for not doing so. Even if he subsequently wins the substantive dispute, if he has not made payments in accordance with the Accelerated Payment Notice, he is still *prima facie* liable to the penalties and no penalty paid will be recoverable. There is no statutory appeal against the service of an Accelerated Payment Notice. The validity of a purported Accelerated Payment Notice can therefore be attacked only by judicial review proceedings (or by collateral attack in other proceedings, should they arise). In practice, in the vast majority of cases it will be appropriate for a taxpayer who wishes to challenge a purported Accelerated Payment Notice to do so by judicial review, which will mean he will have to act very quickly.

For more on Accelerated Payment Notices, see my article *Attacking Follower Notices and Accelerated Payments Notices* of July 29<sup>th</sup> 2014 published in Key Haven Publications Ltd's *The Tax Planning Review*.

## 3. The Problem

A purported Accelerated Payment Notice is served on T, a taxpayer. T wishes to challenge it by means of judicial review yet the chances are slim of his getting a decision, even at first instance, before the time for making the first payment falls due. If the notice is ultimately held to be invalid, he will have no problem. Yet what action should or can he take in case the notice turns out to be valid?

If he has the liquidity, the best course may well be for him to make a payment as required by the purported notice. **The terms of the payment will require very careful consideration so as best to protect his position.** Thus, even if at the end of the day the Accelerated Payment Notice is held to be valid, although he will have to pay the amount assessed, he will not be liable for *ad valorem* penalties for failing to pay on time.

Yet what if he does not have the liquidity?<sup>4</sup> In such a case he may be tempted, having launched his judicial review proceedings, or at least having sought leave to bring them, to seek interim relief from the Administrative Court. Yet what form should the interim relief take?

There has been much confusion between two different types of interim relief.

Relatively straightforward is an order restraining HMRC from enforcing or purporting to enforce the Accelerated Payment Notice pending final determination of the judicial review proceedings. If such an order were made, it would mean that T would not have to pay anything until such time. What is so often not appreciated, however, is that if T does finally lose the judicial review proceedings, HMRC would then not only be able to claim the amount due under the Accelerated Payment Notice but penalties for non-payment. For while the order of the court would have prevented the *enforcement* of, inter alia, penalties for the time being, it would not have prevented them being *incurred*.

The optimum relief T might therefore require is an order from the Court that not only should HMRC be restrained as in the first type of order but should in addition be perpetually restrained from ever seeking penalties on the grounds that the payments were not made at a time which was a reasonable time (say, one month) after before the judicial review proceedings were finally concluded. That is clearly a taller order and involves relief which is at least in part perpetual rather than interim.

A reading of the judgment in *Dunne* might give the impression that the Court was saying that, no matter what the merits of the main judicial review proceedings or the balance of convenience, no interim relief of even the first type would be given. While, for the reasons given in paragraph 6 below, that could well have been a hollow victory for HMRC, it was not at all what *Dunne* decided. As will be seen, *Dunne* involved a sophisticated third way. In order to understand the argument, it is necessary first to delve further into the mechanism of Accelerated Payment Notices.

#### **4. The Statutory Mechanism**

The following short account is taken from the judgement in *Dunne*.

“7. I should say something about the statutory scheme ... The 2014 Act introduced two new regimes as part of the policy of countering

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<sup>4</sup> Or what if he thinks he can get a better return on his money that he would get from HMRC on repayment following the success of the judicial review proceedings?

tax avoidance. ... The second set of relevant provisions concern accelerated payment notices ("APNs") and PPNs. The provisions about those are in Chapter 3 of Part 4 of, and Schedule 32 to, the 2014 Act.

8. A PPN can only be issued if three conditions set out in paragraph 3 of Schedule 32 to the 2014 Act, are met. Condition A is that there is a tax enquiry in relation to a partnership return for an appeal. Condition B is that the return or appeal is made on the basis that a particular tax advantage results from the particular arrangements. Condition C is that one or more of the several requirements is or are met. One of those conditions is that the chosen arrangements are DOTAS arrangements.
9. In this case HMRC has issued PPNs on the basis that condition C was satisfied, by reason of the fact that the chosen arrangement was a DOTAS arrangement. DOTAS arrangements are defined in section 219(5) of the 2014 Act as including notifiable arrangements to which HMRC has allocated a reference number under section 311 of the Finance Act 2004.
10. One of the points of challenge that is raised by Mr Gordon on behalf of the claimants in this case is that these are not DOTAS arrangements. ...
11. The effect of a PPN is to require its recipient to pay the amount specified in the PPN. ...
- ...
14. The effect of the statutory scheme is that if a PPN is issued validly the relevant partner has 90 days beginning with the day on which the PPN is given to make written representations to HMRC (paragraph 5 of schedule 32.) Paragraph 5(1) says that this paragraph applies where a PPN has been given to a relevant partner and has not been withdrawn. By paragraph 5(2) the relevant partner has 90 days beginning with the day when that notice is given to send written representations to HMRC objecting to the notice on the grounds that Condition A, B or C in that paragraph has not been met, or objecting to the amount specified in the notice under paragraph 4(1)(b).
15. Paragraph 5(3) then imposes a duty on HMRC to consider any representations that have been made in accordance with sub-paragraph (2). Sub-paragraph (4) imposes a duty on HMRC, having considered the representations, to determine if representations have been made under sub-paragraph (2)(a)

whether to confirm the PPN with or without amendment, or to withdraw the PPN, and, if representations have been under sub-paragraph (2)(b), and the notice has not been withdrawn under sub-paragraph (a), to decide whether a different amount ought to have been specified as the understated partner tax, and then to confirm the amount specified in the notice, or amend the notice to specify a different amount. A duty is imposed by paragraph 5(4) to notify P, that is the tax payer, accordingly.

16. So paragraph 5 of Schedule 32 to the 2014 Act imposes three different obligations on HMRC if the tax payer, as in this case, submits representations to HMRC. The obligations are to consider the representations, to make various determinations, having considered the representations, and finally to notify the tax payer of the decisions made on the representations. If a PPN has been issued validly the relevant partner has 90 days beginning with the day on which the PPN is given to make representations. I have already dealt with the matters about which the representations may be made. If the PPN is not withdrawn and the relevant partner has made representations and a decision has been made on those representations, the relevant partner has 30 days in which to pay the amount specified. Where the amount specified in the PPN is not paid on time a regime of penalties applies under paragraph 7 of Schedule 32, which provides that section 26 (penalty for failure to make accelerated payment on time) applies to accelerated partner payments as if references in that section to the accelerated payment were to the accelerated partner payment (b) references to P were to the relevant partner, and (c) “the payment period” had the meaning given by paragraph 6(5).”

Paragraphs 14, 15 and 16 are particularly important in the case of the *Dunne* Strategy.

## 5. The *Dunne* Strategy

The Applicants in *Dunne* sought leave to bring judicial review proceedings to quash the Partner Payment Notices in question (which leave I understand has since been obtained).

They then asked HMRC to conduct a review of the Partner Payment Notices. That brought into play Finance Act 2014 Schedule 32 paragraph 5 (3) and (4). Paragraph 5 provides:

- “(1) This paragraph applies where a partner payment notice has been given to a relevant partner under paragraph 3 (and not withdrawn).
  - (2) The relevant partner has 90 days beginning with the day that notice is given to send written representations to HMRC-
    - (a) objecting to the notice on the grounds that Condition A, B or C in that paragraph was not met, or
    - (b) objecting to the amount specified in the notice under paragraph 4(1)(b).
  - (3) HMRC must consider any representations made in accordance with sub-paragraph (2).
  - (4) Having considered the representations, HMRC must-
    - (a) if representations were made under sub-paragraph (2)(a), determine whether-
      - (i) to confirm the partner payment notice (with or without amendment), or
      - (ii) to withdraw the partner payment notice, and
    - (b) ...
- and notify P accordingly.”

What the Applicants were seeking was an order that HMRC defer any performance of their duties under paragraph 5(3) and (4) until after the determination of the judicial review proceedings. If that order had been made, the Applicants would have been sitting pretty. For unless and until P is notified, the time for making payment under a Partner Payment Notice does not start running. Hence, there would be no possibility of any penalties being levied for non-payment in time.<sup>5</sup>

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<sup>5</sup> It may strike the reader that the strategy might involve a degree of apparent inconsistency on the part of T who first asks HMRC to conduct a review and then seeks an injunction preventing them from doing, at least for the time being, exactly that which he has asked them to do. Yet the Judge took no point on this and, if she had, the applicant could rely by way of precedent on the famous prayer of St Augustine: “Lord, make me chaste - but not yet.”

## **5. The Judge's Response**

### **5.1 The Response**

#### **5.1.1 Dismissal of Application**

The Judge's response was very simple. Whether it was a question of whether she had jurisdiction to make the order sought (which point she stated (in interchanges she had with Mr Gordon after she had given judgment) she had not decided, but merely seriously doubted whether she had power to make the order) or whether it was a question of deciding whether or not to exercise a power she did have to make the order, she would not make it.

Her reasoning involved two elements, neither of which I find entirely convincing. I shall call them the "statutory duty" point and the "statutory scheme" point. The statutory scheme point also to some extent depends on the statutory duty point.

#### **5.1.2 The Statutory Duty Point**

HMRC are under no duty to issue a Partner Payment Notice. They merely have a power to do so. Yet once they have issued one and the taxpayer has asked for a review, the Judge rightly pointed out that Schedule 32 paragraph 5 (3) and (4) imposes on them duties, rather than simply conferring powers. When Counsel for the Applicants pointed out that there was no timescale within which the duties were to be performed, she stated that it was implied that they were to be performed within a reasonable time: see paragraph 24 of the judgment.<sup>6</sup> She did not pause to consider that what was a reasonable time might depend on many factors, such as whether they had been prevented by an injunction from performing their duty during a certain period!

She stated, blandly, at paragraph 26

"The real dispute about the terms of this order is whether the court should grant relief which directly interferes with the performance by HMRC of the three duties imposed by paragraph 5 of Schedule 32(2)<sup>7</sup> to 2014 Act, or not. My initial view would have been that the court has no power at all to interfere with the performance by a public body of a duty imposed on it by the statute in the way that Mr Gordon seeks to persuade me to."

While she did not finally decide the case on this point alone, she gave a strong hint

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<sup>6</sup> That might be capable of being used against HMRC in a case where they had dawdled.

<sup>7</sup> RV NOTE: This appears to be a typographical error for "32".

that she would have done: “If I do have jurisdiction to grant an injunction on the facts of this case, and I have to say given the mandatory language of paragraph 5 of Schedule 32 I am not sure that I have ...”

The apparent problem with the Judge’s argument is that it proves far, far too much. If there was no valid Partner Payment Notice in the first place, then paragraph 5 could not come into play and so it could not impose any duties at all on HMRC. The whole point of the main proceedings was indeed to determine whether the Partner Payment Notices were valid. No interim relief would ever be given in any case if one assumed that the stance being maintained by the person who resisted the relief being given was correct! Time and time again, interim relief is awarded against persons, such as public bodies, company directors and trustees which prevents them for the time being performing duties to which they claim they are subject. Had this not been an emergency application and had the judgment not been an *ex tempore* one and had the Judge had more time to consider it, I am sure she would have realised how untenable this line of reasoning was.<sup>8</sup>

### 5.1.3 The Statutory Context Point

The Judge then considered the decision of the Court of Appeal in *CC & C Ltd v HMRC* [2014] EWCA Civ 1653. The facts of that case were so very different, as was the statutory background and the relief sought - a mandatory injunction that the applicant be granted by HMRC a privilege pending determination of the principal proceedings. To be fair to the Judge, she herself accepted that “This case is not on all fours with *CC & C* because in this case the statutory right of appeal solely relates to an excuse for not paying the penalty.”

She nevertheless laid a great deal of reliance on it.

I have no problem with her statement, at paragraph 28:

“It is also clear from Underhill LJ’s judgment<sup>9</sup> that a very important factor in the court’s approach to interim relief in this type of case was the nature of any statutory scheme which Parliament had enacted.”

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<sup>8</sup> For good measure, there is also the peculiar nature of the duties in this case. To whom were they owed? If they were owed to no one in particular, who could enforce their performance by judicial review proceedings? Clearly, HMRC could not owe the duties to themselves. While T could clearly enforce them, he is the very one asking that they do not comply with them for the time being. It is difficult to see who else would have standing to bring judicial review to compel HMRC to perform the duties. So the *de facto* position is that T, the only person who has standing to enforce performance of the duties, is dispensing HMRC from having to comply with them. What sort of duties are they?

<sup>9</sup> RV NOTE: he gave the lead judgment in *CC & C Ltd*.



What I think she fully failed to appreciate was that a statutory scheme is relevant only if one can be sure, having considered it, that Parliament intended to exclude the possibility of interim relief in the case before one. One can see how, in *CC & C Ltd.*, given the particular nature of the express rights of appeal given in that case, and given that the relief sought was mandatory and would have put the applicant into a privileged position, the Court of Appeal formed the view that the relief should not be granted. Yet *Dunne* was very different indeed. There is no right of appeal at all against an Accelerated Payment Notice. The Applicants were claiming simply that HMRC be restrained for the time being from acting, not that the Court should issue a mandatory order that they should act. Nor were the Applicants seeking to be put into a privileged position: they simply wanted the status quo maintained pending final determination of the main judicial review proceedings.

In deciding that the statutory scheme of Partner Payment Notices precluded interim relief of the type claimed, the Judge relied principally on the statutory duty point. Her second point, that there is an express right of appeal against a penalty, was clearly irrelevant.

It is the Judge's third point which goes to the heart of the matter:

"A third important feature of the statutory scheme is that Parliament has precisely provided that when PPNs are issued, if they are not paid, then penalties follow. And it seems to me that the overall effect of this statutory scheme is that if a PPN has been issued it is for the tax payer to decide, if he or she wishes to challenge the PPN by judicial review, whether or not he pays the sum demanded by the PPN or takes his or her chances on the judicial review and in relation to a possible statutory appeal against any penalty should the judicial review application fail. And all of that, it seems to me, is the effect of what Parliament has provided for."<sup>10</sup>

Counsel for the Applicants had relied on the manifest unfairness on the applicants of being put in this position. It seems extraordinary that the Judge should have felt that the exiguous statutory provisions lead inexorably to such unfairness. Obviously, the case for the Applicants would have been that much stronger if long-established Court of Appeal authority and other authority had been cited in support of it.

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10 Yet even here, what she said is very much influenced by her view on the defective statutory duties point. For in the very next sentence she says: "In those circumstances, I would be extremely unwilling to order HMRC to refrain from taking any of the steps which Parliament has said HMRC should take when it receives representations in response to the service of a PPN."

## 6. The Wider Picture

### 6.1 Relief of the First Type

It might be asked whether interim relief of the first type is in fact needed. How would HMRC in fact enforce their Partner Payment Notice pending final determination of the judicial review proceedings? The obvious way would be by suing in normal civil proceedings for the sum alleged to be due. Yet any such proceedings would usually be stayed pending the final determination of the judicial review proceedings as HMRC could succeed in them only if the Accelerated Payment Notice were valid.

It is most unlikely that HMRC would even seek, let alone obtain, in the civil proceedings an interim injunction requiring payment before the final determination of the judicial review proceedings.<sup>11</sup>

There could be a real problem if HMRC were foolish enough, notwithstanding the issue of the judicial review proceedings, to attempt to proceed to get money they alleged was owed to them by means of extra-judicial proceedings, such as distraint on goods and chattels. In that case, it would be necessary for the taxpayer to obtain an interim injunction prohibiting the threatened distraint, which I would normally expect to be forthcoming.

### 6.2 Relief of the Second Type

What of relief of the second type, i.e. a combination of interim relief and (limited) perpetual relief? This would be to combat the manifest unfairness of the taxpayer having to take a view on whether he should comply with the purported Accelerated Payment Notice pending the determination of the judicial review proceedings. In my view, while the position is not 100% covered by existing judicial authority, there is such authority which could be cited in support of such relief being granted.

Further, I see no reason why an application for interim relief should not combine an application in the alternative for relief of the second type with the type of relief claimed in *Dunne*. Of course, such an application would have to deal with the judgment in *Dunne* which is hostile to the latter type of claim. I have indicated above my views on the defects of the reasoning in that judgment.

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<sup>11</sup> While there are in theory other steps they could take in the civil proceedings, I again consider that in the normal case they would not even attempt to do so and, if they did, would succeed.