Neutral Citation Number: [2019] EWHC 600 (Admin)

Case No: CO/435/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2019

Before :

MR JUSTICE MOSTYN

- -

Between :

THE QUEEN
(ON THE APPLICATION OF DEF LIMITED) **Claimant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS **Defendant**

- -
- -

David Bedenham (instructed by **Rainer Hughes**) for the **claimant**
Ben Hayhurst (instructed by **HMRC**) for the **defendant**

Hearing date: 7 March 2019

- -

Approved Judgment

Mr Justice Mostyn:

1. This is my judgment on the claimant's application for what is known as an *ABC* injunction (see *ABC Ltd v HMRC* [2017] EWCA Civ 956). Such an order is sought where:

   i) the defendant (HMRC) has withdrawn approval from the claimant's warehouse business to store duty-suspended alcohol;

   ii) the business has exercised its right of appeal to the First-tier Tribunal (FTT);

   iii) there will be a lengthy delay before that appeal is heard;

   iv) the defendant has refused to reinstate the approval temporarily pending the hearing of the appeal;

   v) the FTT has no power to reinstate the approval temporarily pending the hearing of the appeal; and

   vi) it is said by the business that it will suffer fatal harm if it is not allowed to continue trading in the period up to the hearing of the appeal.

   The details of the regulatory regime are fully described in *ABC* and do not need to be repeated here.

2. Although a substantial body of case law has been built up (and one aspect of the jurisprudence has even been considered by the Supreme Court, where judgment is awaited) there is, subject to one point, no dispute about law that I should apply.

3. In order to obtain the injunction, the claimant first has to show "to a high degree of probability" that if the order is not made its appeal would be rendered nugatory or illusory. This means that the business has to show to "a high degree of probability" that it faces collapse if it cannot trade in the period before the hearing of the appeal. I will explain below what the phrase I have quoted must be taken to mean.

4. The claimant then has to show that its appeal to the FTT is arguable and would not be susceptible to being struck out as disclosing no reasonable prospect of succeeding under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009 No. 273). This is the same as the test where there is a permission-to-appeal filter. In *ABC* at [85] Burnett LJ stated: "material would have to be deployed which provided a proper insight into the prospects of success in an appeal. There is no permission filter for an appeal to the FTT". When assessing whether the appeal has reasonable prospects of success it is clear that the court should not conduct some kind of "mini-trial": see, *Swain v Hillman* [1999] EWCA Civ 3053, [2001] 1 All ER 91 at [20], per Lord Woolf MR, but that is not to say that everything said by the claimant has to be taken at face value: see, *ED&F Man Liquid Products Ltd. v Patel & Anor* [2003] EWCA Civ 472 at [10] per Potter LJ.

5. Finally, the court must conduct a balancing exercise weighing the advantage to the claimant in being allowed to continue to trade against the disadvantage to the defendant (including detriment to the public interest) in that event. In this regard the defendant places great weight on the speech of Lord Goff of Chieveley in *R v*

Secretary of State for Transport, Ex p Factortame Ltd (No 2) [1991] 1 AC 603 at 673 where he said:

> "Turning then to the balance of convenience, it is necessary in cases in which a party is a public authority performing duties to the public that "one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed:" see *Smith v. Inner London Education Authority* [1978] 1 All E.R. 411, 422, per Browne L.J., and see also *Sierbien v. Westminster City Council* (1987) 86 LGR. 431. Like Browne L.J., I incline to the opinion that this can be treated as one of the special factors referred to by Lord Diplock in the passage from his speech which I have quoted. In this context, particular stress should be placed upon the importance of upholding the law of the land, in the public interest, bearing in mind the need for stability in our society, and the duty placed upon certain authorities to enforce the law in the public interest. This is of itself an important factor to be weighed in the balance when assessing the balance of convenience. So if a public authority seeks to enforce what is on its face the law of the land, and the person against whom such action is taken challenges the validity of that law, matters of considerable weight have to be put into the balance to outweigh the desirability of enforcing, in the public interest, what is on its face the law, and so to justify the refusal of an interim injunction in favour of the authority, or to render it just or convenient to restrain the authority for the time being from enforcing the law."

In that famous case the applicants sought an interim injunction to disapply generally until final trial the operation of Part II of the Merchant Shipping Act 1988 and the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988. It was in that context that Lord Goff gave his opinion. That is a far cry from what the claimant seeks here. It is not in its injunction application seeking to disapply the law of the land (although its appeal to the FTT does have grounds which could have that effect). It merely seeks to be allowed to continue trading pending that appeal. When assessing the public interest in this case the duty of a public authority to enforce the law of the land is certainly relevant, but so too is the right of an aggrieved citizen to have an effective remedy against a measure meted out to him by a public authority which he avers is unreasonable.

6. Of course, it is a blot on our legal system that this kind of case needs to happen at all. In an efficient, well-resourced tribunal service arrangements would surely be in place to ensure that in a case such as this, where the FTT has no power to award interim relief, the appeal would be heard extremely quickly. In this case the decision to withdraw approval was made on 11 January 2019 to take effect on 11 April 2019, although conditions were imposed which seriously hampered the ability to trade with effect from 25 January 2019. The appeal to the FTT was filed on 30 January 2019. Directions were given on 1 February 2019 which provide that the appeal will be heard between 14 June 2019 and 14 January 2020 – that is possibly as much as a year after

it was filed. This is frankly unacceptable. The system should provide in a case such as this that the appeal should be heard within a matter of weeks and certainly before the date on which the withdrawal of approval takes effect. Were that the norm then satellite litigation of the type on which I have spent two days (including reading and judgment writing), at some considerable expense to the parties, would be avoided, thus freeing up the court's most precious resource, namely judicial time.

7. I have to say that I find it disturbing that in this case one arm of the government fails to provide a sufficiently resourced appeal service to enable a challenge to a withdrawal of approval to be heard without harmful delay, while at the same time another arm of the government, namely HMRC, argues that it is reasonable for the claimant to be exposed to the risk of insolvency caused by that very delay.

8. The authorities say that the reason a stringent test is applied on the determination of the application is because in sec 16(4) of the Finance Act 1994 Parliament chose not to vest the FTT with the power to award interim relief. Therefore, it is said, the court should be cautious before it starts liberally wielding a power which Parliament, by design, did not include in the statutory scheme. I have to say, respectfully, that I doubt the logic of this argument. I have not been provided with any pre-legislative consultative material or extracts from Hansard to show that the framers of the legislation positively intended an appellant to be exposed to the risk of business failure simply by reason of the delay that would arise in the hearing of its appeal. I would be very surprised if such material existed. A far more likely legislative intention, I would have thought, would have been that the framers were well aware that the High Court had power to award interim relief in aid of an inferior tribunal, and that it was therefore unnecessary for that power to be additionally vested in the FTT. It is classic law that an injunction may only be granted in support of a legal or equitable right (*North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30, CA per Cotton LJ), but the definition of such a right has been vastly expanded since that decision and now extends to a right claimed in proceedings in a foreign court, arbitral body or inferior tribunal (see, for example, *Fourie v Le Roux and others* [2007] UKHL 1, [2007] 1 WLR 320 per Lord Scott).

9. Equally, the framers of the legislation would surely have thought that the appeal to the FTT would be heard very quickly. They would have been surprised not only by the delay in determining the appeal but by the practice which has arisen of the FTT, if and when it allows an appeal under sec 16(4), not to determine the issue conclusively but rather merely to remit the matter back to the defendant for it to reconsider its decision on the correct basis. Needless to say, this practice gives rise to further delay and can generate a yet further appeal. Lord Neuberger once memorably said that we only have one iron law in this country, and that is the law of unintended consequences. I cannot conceive that the framers of the legislation intended the situation here.

10. Sec 16(4) provides:

> "In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not

> reasonably have arrived at it, to do one or more of the following, that is to say-
>
> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
>
> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a further review of the original decision; and
>
> (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future."

11. In *Lindsay v Customs and Excise* [2002] EWCA Civ 267, [2002] 1 WLR 1766 the appellant's car had been forfeited at Dover by Customs and Excise. His appeal was allowed and purportedly pursuant to sec 16(4)(a) the Tribunal ordered the car to be returned to the appellant; alternatively that he be paid compensation if it had been disposed of by, or had deteriorated while in the possession of, Customs and Excise. On further appeal this order of a mandatory character was held by the Master of the Rolls to lie outside the power given by sec 16(4)(a). At [69] – [70] Lord Phillips stated:

> "The Tribunal have done more than direct that Mrs Florence's decision ceased to have effect. They have purported to reverse it. That is something that they had no jurisdiction to do. To make this plain it is only necessary to contrast subsection (4) of section 16 with subsection (5), which provides:
>
> "In relation to other decisions, the powers of an appeal tribunal on appeal under this section shall also include the power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal."
>
> I consider that the appropriate Order is that the Commissioners conduct a further review of Review Officer Florence's decision in the light of the decision of the Tribunal and this judgment."

12. As a result of this decision, I am told that the almost invariable practice of the FTT when allowing an appeal under sec 16(4) is to remit the matter for review under sub-paragraph (b). I can quite see why the kind of order made in *Lindsay* fell outside the terms of sub-paragraph (a) but I completely fail to see why the relief sought on appeal by the claimant here, namely that a direction be given that the decision given by the defendant on 11 January 2019 do cease to have effect from the moment it was given, does not fall squarely within its terms. If the claimant succeeds in its appeal I would expect the FTT to give a direction under sub-paragraph (a) that all or part of the decision of 11 January 2018 do cease to have effect from the date it was given.

13. It is said that the legal test which I have set out above represents a much higher standard than that generally applied on an injunction application. That general test derives from the famous and familiar case of *American Cyanamid v Ethicon* [1975] AC 396 where the court must consider where the 'balance of convenience' lies. This balance has been described as posing the question 'which course carries the lower risk of injustice?'

14. Therefore, in answering the question posed the court has to make an assessment of the competing risks of injustice. It must assess the risk to the claimant if the alleged mischief is not halted and it must balance that against an assessment of the risk to the defendant if it is prevented from doing something which it claims to be entitled to do. In making this assessment the court generally has in mind the well-known dictum of Chadwick J in *Nottingham Building Society v Eurodynamics Systems* [1993] FSR 468 at 474:

> "In my view the principles to be applied are these. First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be "wrong" … Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that, an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo. Thirdly, it is legitimate where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff would be able to establish this right at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted. But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted."

15. Personally, I cannot see the relevance of the distinction between prohibitory and mandatory injunctions because each, of course, may be the necessary tool to restore the status quo. In this case a prohibitory injunction is sought to prevent the withdrawal of approval coming into effect; however, if this application were heard on 12 April 2019 then the relief sought would be (in effect) a mandatory injunction to reinstate the approvals. Each seeks to maintain the status quo. In my opinion, the important message from this dictum is that before granting an injunction the court must have a "high degree of assurance" that the claimant will ultimately prevail. This is not really very different to the requirement in the application before me that the claimant must show that its appeal has a reasonable prospect of success.

16. In many injunction applications the relief sought is restraint of a threatened act. In making its assessment of risk the court, plainly, does not need to find that the mischief complained of is more likely than not, absent restraint, to happen. This is very

familiar terrain in the field of freezing orders. There the court has to be satisfied that there is a risk of dissipation. It does not have to be satisfied that it is more likely than not that dissipation will occur. The court is therefore making an assessment of likelihood of a future fact.

17. This is exactly what has to happen on this application. The claimant has to show to a high degree of probability that it will collapse if it cannot trade in the period before the hearing of its appeal. In setting out the test the Court of Appeal has not specified the degree of probability that is needed but prefers to use the rather imprecise adjective "high". This does not mean in my judgment that the claimant needs to show that it is more likely than not that the business will fail, or to put it more precisely and rigorously, there is a probability of more than 50% that the business will fail. Had the Court of Appeal intended to stipulate that threshold it would no doubt have said so.

18. The failure of the claimant's business would be an extremely serious consequence causing a number of people to lose their jobs. In such circumstances, in my judgment the risk assessment should be undertaken in accordance with the principles set out by Baroness Hale in *Re S-B Children* [2009] UKSC 17, [2010] AC 678 at [9]:

> "Thus, the law has drawn a clear distinction between probability as it applies to past facts and probability as it applies to future predictions. Past facts must be proved to have happened on the balance of probabilities, that is, that it is more likely than not that they did happen. Predictions about future facts need only be based upon a degree of likelihood that they will happen which is sufficient to justify preventive action. This will depend upon the nature and gravity of the harm: a lesser degree of likelihood that the child will be killed will justify immediate preventive action than the degree of likelihood that the child will not be sent to school."

19. Given the gravity of the consequence of the failure of the business it seems to me that the "high degree of probability" criterion will be satisfied even if the probability assessment is markedly less than 50%.

20. It can therefore be seen that it is my considered opinion that there is really very little difference between the test on an *ABC* application and the *American Cyanamid* test. However, I am bound by the view from above that there is a difference and that the former test is more stringent than the latter; and that is what I shall apply.

21. In paragraph 2 above I mentioned that there was one point of difference between the parties about the applicable law. On 11 February 2019 Mrs Justice Slade gave oral judgment in the case of *Q v HMRC*. An approved transcript of the judgment has not yet emerged although I have seen an agreed note of what she said. That was a similar case to this. The application for an *ABC* order was refused. However, given that the grounds of appeal to the FTT included European law challenges she held that the decision of the House of Lords in *Factortame*, which mandates domestic courts to give an effective remedy wherever a claim under EU law is raised and proved, meant that the general *American Cyanamid* should apply to the injunction application rather than the more stringent *ABC* test. Applying that lower test, the injunction was granted.

22. In the case before me the defendant says that I should not follow this decision and that it will be appealed to the Court of Appeal.

23. In *Willers v Joyce* [2016] UKSC 44, [2016] 3 WLR 534, Lord Neuberger at [9] stated:

> "So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so. And, where a first instance judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, then the second of those decisions should be followed in the absence of cogent reasons to the contrary: see *Patel v Secretary of State for the Home Department* [2013] 1 WLR 63, para 59."

24. I cannot discern any "powerful reason" for not following the reasoning of Mrs Justice Slade. Indeed, her reasoning seems to me to be unimpeachable given that in the same case the Court of Appeal has granted permission to the claimant to seek judicial review to challenge on EU law grounds certain aspects of the regulatory regime.

25. The same EU law challenges are raised in this case by the claimant in its appeal to the FTT.

26. Therefore, the claimant argues that its injunction application should be determined by reference to general *American Cyanamid* principles rather than the more stringent *ABC* standards.

27. However, for the reasons I have set out above I cannot see that there is very much difference, if any, between the two tests. Of course, if I grant the injunction on *ABC* principles then, as the greater includes the lesser, the *American Cyanamid* test will be satisfied.

28. I now turn to the first stage of the ABC test. The financial position of the claimant has been analysed by accountants instructed by each party. Mr Natt was instructed by the claimant. He has not been employed by the claimant before and has been instructed on an arms-length basis in order that his independence cannot be impugned. Mr Cashmore is an accountant employed by the defendant. Mr Cashmore pointed out some mistakes in Mr Natt's first witness statement and ventured some differences of opinion. Mr Natt accepted most of Mr Cashmore's points. The figures now are virtually entirely agreed, as counsel for both parties accept.

29. As a result of a quite recent change of ownership of the claimant and the appointment of new directors the trading profile of the business has altered significantly so that the proportion of turnover represented by excise and duty representative work has shot up from an insignificant level, as the following table shows:

Year to 30 June	
2015	2.88%
2016	2.38%
2017	18.48%

2018	62.22%
2019 (6 months)	87.68%

30. This change of profile is, needless to say, completely legitimate and has involved the formation of new trading relationships and the discarding of old ones. It is easy for the defendant to say, as it does, that there is nothing to prevent the claimant if they are prohibited in engaging in excise work to revert to the other warehousing work that formed the overwhelming majority of its revenue as recently as 2017. But such an argument ignores commercial reality. In the real world it is difficult to retrieve commercial relationships that have been discarded even if they were discarded only recently.

31. I now turn to the solvency of the business. The balance sheets for the most recently completed financial years, 2018 and 2017, show the following:

Year to 30 June	**2017**	**2018**
Tangible assets	8,664	12,194
Debtors	197,536	278,913
cash at bank or in hand	48,758	168,848
creditors < one year	(284,849)	(332,551)
other liabilities	0	(2,317)
net assets	(29,891)	125,087

It can be seen that by virtue of some recent improvements in trading results the business has clawed its way out of technical insolvency. It can also be seen that netting off debtors against short-term creditors still leaves a shortfall and that the true solvency of the company is represented by its net assets of only £125,087.

32. I now turn to the historic and projected trading results of the business. These are set out in the following table:

Year to 30 June	**2018**	**2019**	**2020**
Actual/Forecast	Actual	Mixed	Forecast
Excise and Duty Rep Work	1,062,205	2,139,943	0
Other warehousing work	644,973	617,865	618,000
credit note due		(222,096)	
Total sales	1,707,178	2,535,712	618,000
cost of sales	(1,085,591)	(2,196,105)	(391,774)
Gross profit	621,587	339,607	226,226
Administrative expenses	(450,995)	(446,101)	(320,250)
rent receivable	3,510	140	0
Pre-tax profit/(loss)	174,102	(106,354)	(94,024)

It can be seen that the consequence of the withdrawal of approvals is that a healthy profit of £174,102 (on which the defendant can expect to receive corporation tax at the rate of 19%) will become a loss of £106,354 in the current year which will shortly

end, and a loss of £94,024 in the year that begins on 1 July 2019. The business is therefore looking at aggregate losses for those years of £200,378. Those projected losses are of course to some extent speculative and presuppose that the business will not be in a position materially to increase its other warehousing work, but the evidence does not suggest that this is realistically achievable. Indeed the somewhat desperate nature of the defendant's evidence, given through Mr Cashmore, to the effect that the business can cash in on the prospect of a no-deal Brexit by offering warehousing facilities for essential goods being stockpiled by the government, or that it should go to its landlord and beg for a rent holiday, suggests that the defendant in truth recognises that a short-term reorganisation of the business profile is virtually impossible. In fact, the claimant's managing director, Mr Jackson, told its landlord that the March rent would be late and was told that the rent is needed to pay the mortgage over the claimant's business premises. He has therefore reasonably concluded that there is no point in asking for a rent holiday.

33. The business does not have reserves to meet aggregate losses over the next 15 months of just over £200,000 and therefore it can be seen that unless there is a dramatic change in its fortunes it will plunge into insolvency and probably collapse. I therefore conclude on the evidence, as a matter of fact, that there is a significant risk, or, put another way, a high degree of probability that the business will collapse if the injunction is not granted.

34. I now turn to the question whether the claimant has reasonable prospects of success on its appeal. Its grounds fall into two parts. On the one hand there are challenges to factual conclusions reached by the defendant. On the other hand, there are the EU law challenges to which I have referred.

35. So far as the factual challenges are concerned the appeal will be conducted in accordance with the principles set out in the decision of the Court of Appeal in *Gora & Ors v Commissioners of Customs and Excise & Ors* [2003] EWCA Civ 525, [2004] QB 93 that is to say the FTT will make decisions of primary fact and then in the light of those findings decide whether the decision of the defendant was reasonable. I have closely considered the schedule of contested facts and easily conclude that the appeal of the claimant in this regard is plainly arguable and has reasonable prospects of success. That is not a prognostication by me that it is more likely than not that the appeal will succeed, and I frankly recognise that the defendant has made some good points in rebuttal. But it is, as the authorities state clearly, quite wrong for me to conduct some form of mini-trial. I need go no further than to say that I am clearly satisfied on the material before me that the factual grounds are arguable and have reasonable prospects of success.

36. I am equally satisfied that the EU law grounds are arguable and have reasonable prospects of success. I agree entirely with Mrs Justice Slade that they are arguable and that view is fortified by the decision of the unidentified single Lord Justice who gave permission to seek judicial review in that case (and who directed that the judicial review be retained by the Court of Appeal).

37. I now turn to the third stage of the *ABC* test which is the balancing exercise. Mr Hayhurst spent some time developing eight points which he said demonstrated the serial delinquency of the claimant which well justified the defendant forming the view that the end of the road had been reached. However, I think that Mr Bedenham rightly

met this argument by saying that these issues were exclusively the business of the FTT appeal and were not relevant considerations in the balancing exercise. To my mind the balancing exercise comes down firmly in favour of the claimant. In its favour is the age-old common law principle, reflecting the traditional Roman Law legal maxim *ubi jus, ibi remedium*, which long pre-dates Art 6 of the European Convention on Human Rights, that where there is a vested right there must be an effective remedy: see, for a well-known historical example, *Marbury v Madison* (1803) 5 U.S. (1 Cranch) 137. The claimant has the right to challenge the reasonableness of the defendant's decision. That right is not given an effective remedy if the claimant is exposed to a high probability of collapse into insolvency because of the delay before the challenge can be heard. The right of the defendant as regulator to render its decision is undoubted but it is a qualified or conditional right since it is subject to the appeal process.

38. It is important that I record that while the defendant is highly critical of the claimant's alleged poor adherence to the due diligence requirements Mr Hayhurst clearly accepted before me that it was no part of the defendant's case that the claimant, or its owners or directors, had been dishonest in any respect or to any degree.

39. It is my clear evaluation that the balancing exercise falls firmly in favour of the claimant.

40. For these reasons the claim under the *ABC* principles succeeds and the injunction will be granted. Until a decision is given by the FTT on the claimant's appeal the decision made by the defendant on 11 January 2019 is suspended. There will be liberty to apply for an extension if the appeal is allowed but if for some reason the decision of 11 January 2019 is not immediately directed to cease to have effect (for example if there is there is a further appeal from that decision, or if the matter is remitted to the defendant under subparagraph (b) of section 16(4)). I record that the claimant has volunteered to abide by the first interim condition in the defendant's decision of 11 January 2019. That commitment will be recorded in the order giving effect to this judgment.

41. The conclusions I have reached plainly justify an injunction under the *American Cyanamid* principles if the presence of the EU law challenges within the claimant's appeal means that that is the applicable test.

42. Finally, I address the position if Parliament had not granted the claimant the right of appeal but had merely left it to seek judicial review. Had the claimant's grounds been before me on an application for judicial review permission I would have granted it; awarded interim relief to suspend the decision of 11 January 2019; and directed that the substantive hearing be expedited. It would seem, therefore, that the claimant is worse off by virtue of having a right of appeal than by not having one. This is another example of the application of the law of unintended consequences.

43. That concludes this judgment.
