Neutral Citation Number: [2023] EWHC 350 (Admin)

Case No: CO/3963/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/02/2023

Before :

THE HON. MR JUSTICE BOURNE

- -

Between :

THE KING on the application of
NOURISH TRAINING LIMITED **Claimant**

- and -

THE COMMISSIONERS FOR HIS MAJESTY'S
REVENUE AND CUSTOMS **Defendant**

- -

Richard Clayton KC and Rebecca Murray (instructed by **Jurit LLP**) for the **Claimant**
Howard Watkinson (instructed by **HMRC**) for the **Defendant**

Hearing date: 1 February 2023

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Approved Judgment

This judgment was handed down remotely at 10am on 20 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

The Hon. Mr Justice Bourne :

Introduction and background

1. The claimant, Nourish Training Limited, applies for (1) permission to apply for judicial review, and (2) interim relief in the form of an injunction. The claimant has also made a late application for permission to rely on further evidence.

2. The judicial review claim is directed against a decision made by the defendant, HMRC, by a letter dated 5 September 2022, cancelling the claimant's VAT registration with immediate effect from that date.

3. The claimant describes itself as "an employment business which, principally, provides industrial blue-collar type workers including warehouse staff, food processors and pickers to industries such as recycling, food, and logistics". Its clients are companies which, themselves, provide workers and recruitment services to businesses in areas such as retail, warehouse and food processing. Its Statement of Facts and Grounds (SFG) states that its top five clients account for around 82% of its total business turnover. The workers in question are themselves recruited by other companies who supply them to the claimant. So each worker is supplied by a recruiter to the claimant, supplied by a claimant to a provider and then supplied by the provider to an end-user. The recruiter charges the claimant for the worker's services, plus VAT at the current rate of 20%. The claimant in each quarter's VAT return will reclaim the VAT paid, or "input tax", from HMRC. The claimant meanwhile charges the provider for the worker's services, plus VAT at 20%, and accounts to HMRC in each quarter's VAT return for the VAT received or "output tax".

4. The effect of deregistration is that the claimant cannot reclaim the input tax. It would therefore need to increase the price it charges to providers by around 20% in order to maintain its current margins. It says that in a competitive market, that would not be realistic.

5. Paragraph 1 of schedule 1 to the Value Added Tax Act 1994 ("VATA") requires certain persons to be registered for VAT, based on the value of their taxable supplies. Paragraph 9 of schedule 1 entitles others to be registered where they make taxable supplies below the threshold. Paragraph 13 of schedule 1 empowers HMRC to cancel registration where they are satisfied that the person has ceased to be registrable and is not entitled to be registered.

6. In *Ablessio SIA* (Case C-527/11), the Court of Justice of the European Union ruled that a trader may be refused VAT registration where there is "sound evidence giving objective grounds for considering that it is probable that the VAT identification number assigned to that taxable person will be used fraudulently" (paragraph 34).

7. In such a case, VAT registration may be cancelled, subject to the power of domestic courts to decide whether the tax authority has established to the requisite standard the existence of such "sound evidence": see *R (Tidechain Ltd) v HMRC* [2015] EWHC 4031 (Admin) at [21] per Simler J (as she then was).

8. Similarly, the CJEU has decided that the right to recover input tax can be denied where transactions are connected with the fraudulent evasion of VAT and the trader knew, or should have known, that they were so connected: *Kittel* (Case C-439/04).

9. It is common ground in this case that proof that the *Kittel* test is met is sufficient to satisfy the *Ablessio* test for refusal, or removal, of registration, and also that these principles have remained applicable following the UK's departure from the EU.

10. Section 83(1)(a) of VATA gives a statutory right of appeal to the FTT against the cancellation of a VAT registration. The question on such an appeal is whether, on all the evidence before the FTT (not limited to the evidence considered by HMRC), HMRC's decision was right. If it was wrong, HMRC must restore the registration.

11. The FTT has no jurisdiction to grant interim relief in such a case: see *Tidechain* at [14].

12. According to the defendant, the labour provision market is very vulnerable to fraud and tax evasion. Where there is a chain of suppliers as described above and where one supplier in the chain bears the overheads of employing the workers in question – such as payment of national minimum wage, NI contributions and taxes – margins may become too small to sustain a commercial enterprise. The defendant says that sometimes the supplier at the bottom of the chain may resort to practices such as fraudulently pocketing monies charged as VAT and failing to account to HMRC for it.

13. The decision letter of 5 September 2022 alleges that such practices occurred in the present case and that the claimant knew or ought to have known that supplies were connected with VAT fraud:

> "I consider that the following factors indicate that you are principally or solely registered to abuse the VAT system by facilitating VAT fraud:
>
> 1. Labour charge rates from suppliers are too low and not commercial. For example, there are instances where labour was supplied to Nourish Training Limited in October 2020 at £8.72 per hour which was National Minimum Wage at time of supply. Therefore, based on rates Nourish Training Limited paid to its suppliers, it would not have been possible for their suppliers to comply with National Minimum Wage, meet its statutory obligations as an employer and make a sustainable profit. As Nourish Training Limited also employ temporary workers via PAYE, they would be aware of the additional costs associated with employing a worker such as Employers National Insurance Contributions and other statutory obligations e.g., holiday pay. Therefore, Nourish Training Limited ought to have known the rates they were being offered were too good to be true.
>
> 2. Timeline of engagements demonstrate that Nourish Training Limited have consistently used labour providers whose supplies are connected with VAT fraud resulting in substantial tax losses to HMRC. Once a provider is deregistered for VAT, they are immediately replaced by a new supplier, and in most cases, these transactions are later connected with fraudulent

evasion of VAT. The only reasonable explanation for this pattern of behaviour is that the relationships between Nourish Training Limited and its suppliers were contrived to further an overall fraud.

3. £8,230,124 of input tax claimed by Nourish Training Limited from VAT period ending 09/18 up to and including 03/22 has been traced back to the fraudulent evasion of VAT. This represents a high percentage of total input tax claimed by Nourish Training Limited. In some periods all input tax reclaimed in relation to supplies of labour was connected with fraudulent evasion of VAT. Such high percentages are considered to be evidence for contrivance, and for Nourish Training Limited's complicity in such.

4. Nourish Training Limited finds the workers, then places them with labour providers who then supply them back to Nourish Training Limited – charging VAT on the whole supply. As Nourish Training Limited finds the workers, this arrangement does not make commercial sense as this would increase Nourish Training Limited costs, given it would be expected that the labour provider would be adding an additional profit margin on labour supplies made to Nourish Training Limited.

   This arrangement also does not make sense from a cashflow perspective, as Nourish Training Limited would be paying out an additional 20% on each invoice to account for VAT, which would not be present if they engaged the workers directly via PAYE.
   Therefore it is not clear what value if any, these labour providers provided to Nourish Training Limited. The fact that Nourish Training Limited did not seek to question the integrity of such outwardly uncommercial practises indicates at the very least it ought to have known that the supplies were connected with fraud.

5. Despite receiving education on due diligence and notifications from HMRC of suppliers being deregistered for VAT, Nourish Training Limited on several occasions, continued to trade with and/or obtain recommendations from the same individuals, resulting in further tax losses to HMRC. I have concluded that Nourish Training Limited chose to ignore the advice and warnings given to it by HMRC given its high incidence of participation in fraudulent supply chains over a sustained period.

   Whilst Nourish Training Limited may satisfy the formal requirements for VAT registration under Schedule 1 of the VAT Act 1994, HMRC considers that the VAT registration is being used to facilitate VAT fraud, and in accordance with the principles recited above, its VAT registration should be cancelled."

14. The claimant immediately lodged an appeal against the decision letter at the First Tier Tribunal (Tax) ("the FTT"). However, it is feared that a hearing before the FTT will not take place for some time, a subject to which I return below. Since the FTT cannot grant interim relief, the claimant has issued this claim in the hope of obtaining an

order by way of interim relief to restore its VAT registration pending resolution of the issues. It contends that it will become insolvent if it does not obtain that relief.

15. HMRC opposes the grant of permission and interim relief, contending in particular that there is no arguable ground of judicial review and that the claimant has a suitable alternative remedy in the form of its FTT appeal.

Application to rely on further evidence

16. Before I deal with permission and interim relief, it is necessary to consider the claimant's application to rely on further evidence, namely a second witness statement by the claimant's director Mr Purviss and what is described as a first witness statement by a Mr Christopher Dix FCA.

17. The application was filed and served on 26 January 2023, four working days before this hearing. The Court directed the claimant to file a proper application notice in form N244 although I have not yet seen this, and directed the defendant to make any representations by 30 January 2023. The defendant complied with that direction.

18. The claim itself was filed on 27 October 2023 together with the application for urgent consideration and interim relief. On 10 November 2022, Julian Knowles J ordered the defendant to file and serve its Acknowledgment of Service within 6 days of service of his order and provided for the papers to be placed before a judge within 14 days thereafter for consideration of permission and interim relief. The defendant duly filed summary grounds of defence and witness evidence on 16 November 2022. These included voluminous exhibits and, the claimant says, raised issues of which it had not previously been aware. It has taken some 75 days for the claimant to put together evidence in response and to make this application.

19. In the meantime, the defendant's Statement of Case in response to the FTT appeal was submitted on 25 November 2022. The FTT ordered the claimant to file evidence in response by 13 December 2022.

20. The listing of today's hearing was confirmed on 8 December 2022. That was pursuant to an order of Lang J on 30 November which included liberty to apply, though the judge noted that she did not consider any further bundles or skeleton arguments to be necessary.

21. At that point the claimant instructed new junior counsel, Ms Murray, because her predecessor had insufficient availability in December and January. It is not clear why that step was not taken until the listing date was confirmed, given that the claimant was pressing for urgent relief and given the likelihood that previous counsel's unavailability would pose a problem. Unfortunately, Ms Murray's home internet was affected by an outage in her area between 12 and 19 December and rail strikes apparently prevented her from travelling elsewhere to work between 13 and 16 December. Delivery of hard copy bundles was delayed by postal strikes, though these could of course have been sent by courier. Ms Murray was however able to work on documents for the FTT proceedings (the appeal to which I have referred, and a second appeal against a linked decision to deny the claimant input tax on the ground that it

knew or ought to have known that it arose from transactions connected with VAT fraud). These were filed on 16 December 2022 and further evidence was filed at the FTT on 21 December.

22. The claimant's solicitor was on holiday from 19 December 2022. She returned to work on 9 January 2023 but was unwell that week. There were also rail strikes from 3 to 7 January. The claimant's leading counsel, Mr Clayton KC, was on holiday from 29 December, returning on 24 January 2023. However, some sort of discussion occurred on 16 January, when the view was taken that further time was needed to analyse the defendant's defence and witness statements. A conference with Mr Dix could not take place until 19 January. The application was made a full week later, on 26 January 2023 as I have said.

23. I acknowledge that strikes, internet problems, pressure of work and holidays placed the claimant's legal team under pressure. Nevertheless, as the defendant has argued in response to this application, it is not acceptable that this application to adduce statements and exhibits totalling 669 pages was made so late in the day, with no prior notice or warning to the Court or to the defendant. The fact is that if counsel or solicitors are unavailable for urgent business, replacement or additional counsel or solicitors may have to be found. I am therefore not satisfied that there is a good explanation for the lateness of the application.

24. Despite that fact, I will permit the claimant to rely on the second witness statement of Helen Cummings which just contains a brief updated summary of the claimant's correspondence with the FTT. That information is helpful to the Court, particularly when considering the question of whether permission for judicial review is barred by the availability of a suitable alternative remedy. Indeed, it is information which the claimant was bound to provide by way of full and frank disclosure as part of its application for interim relief. Its late provision causes no material prejudice to the defendant.

25. With more misgivings, I will also permit the claimant to rely on the second witness statement of Karl Purviss. It updates the Court on the claimant's financial position and the claimed risk of insolvency. In that regard it is helpful because at least some of the information provided with the claim back in October is now out of date. The statement, 39 pages long, also takes issue with some of the factual or evidential assertions made by HMRC in the proceedings. Those passages could in places be regarded as straying into advocacy, but the other side of that coin is that the same points could probably be made by Mr Clayton in his role as advocate even if the statement is not admitted. No specific contention in the statement has been identified by the defendant's counsel, Mr Watkinson, as being both (1) important for today's purposes and (2) difficult for the defendant to deal with at short notice.

26. I then turn to the witness statement of Christopher Dix dated 25 January 2023. Mr Dix is an accountant and, with permission granted by Julian Knowles J on 10 November 2022, the claimant is already relying on an expert report by him dated 5 September 2022 and updates dated 20 October and 15 November 2022, commenting on the financial viability of the claimant following the loss of its VAT registration.

27. The defendant, opposing the application, first points out that the statement does not comply with the requirements of CPR 35.10 and PD35, e.g. for experts' reports to include appropriate declarations about their instructions and their understanding of their duties to the Court. Although it is framed as a statement of fact rather than as a further expert report, the defendant also points out that there are passages which express opinion (not necessarily on subjects confined to accounting) and/or stray into advocacy.

28. In order to be able to rule on this application, I have read the new statement. That fact itself lends an air of artificiality to the exercise of deciding whether to admit it in evidence.

29. It is necessary to focus on the purpose of Mr Dix's statement, which is to persuade the Court that the claimant's insolvency is imminent and therefore that its right of appeal to the FTT will be rendered illusory or futile.

30. If the statement involved analysis of accounting documents, on the basis of which the Court was being invited to infer conclusions about the risk and the timing of an insolvency, that would make it expert evidence. It seems to me that the very late provision of expert evidence of that kind, effectively without the possibility of the defendant responding in kind, would create unfairness. That fact would be seriously exacerbated by the lack of compliance with the rules on expert evidence. Therefore, to the extent that the statement contains matters of pure opinion, they should not be admitted and I have disregarded them. I do not consider it necessary to set out a line-by-line analysis identifying the offending material.

31. To the extent that Mr Dix's evidence is factual, it resembles that of Mr Purviss, in that it provides an update on what is happening in the claimant's business, in particular about the departure of a key client and the threat of withdrawal of a credit facility. Indeed, these are facts to which Mr Purviss also could (and to some extent does) testify. The inferences, if any, to be drawn from those facts would be a matter for legal argument.

32. To the extent that updated facts have been identified in the statement, Mr Watkinson has not suggested that he is unable to deal with them. On the contrary, he has made effective submissions about the limits to any inferences which can be drawn from them. Nor has it been suggested that they need further investigation for present purposes.

33. I have therefore reached the pragmatic conclusion that, although the usual conditions for the admission of late evidence are not satisfied, the purely factual parts of Mr Dix's statement can be admitted because they will not cause real prejudice to the defendant.

The nature of the application for interim relief

34. The parties agree that the merits of the dispute over the cancellation of the claimant's VAT registration are for the FTT and cannot be decided by this Court in this judicial review claim.

35. It is also common ground that trading without VAT registration is apt to cause difficulty for the claimant although the degree of that difficulty is in dispute.

36. Mr Clayton relies on his client's right of access to the courts under Article 6 of the ECHR. That right is inherent in the rule of law, and any interference with it must be proportionate. See the well known cases of *Golder v United Kingdom* (1976) 1 EHRR 524 at [34-35], *R (Unison) v Lord Chancellor* [2017] UKSC 51 at [66-77] and *Bank Mellat v HM Treasury (No 2)* [2014] A.C. 700 at [20].

37. This Court and the FTT as public authorities are obliged by section 6(1) of the Human Rights Act 1998 to act compatibly with ECHR rights.

38. Section 37 of the Senior Courts Act 1981 provides, so far as material:

> "(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.
>
> (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just."

39. In *R (S&S Consulting Services (UK) Ltd v Commissioners for Her Majesty's Revenue and Customs)* [2021] EWHC 3174 (Admin), the issues were similar to those in the present case. HMRC had revoked the claimant's VAT registration, the claimant said that it was at risk of insolvency as a result and it had commenced an appeal to the FTT but was concerned that it would become insolvent before the appeal could be heard. It issued an application for permission to seek judicial review and applied for an injunction by way of interim relief in those proceedings. Permission had not yet been considered on the papers and so in that case, unlike this one, the issue of permission was not before the court and the court was dealing only with the injunction application.

40. In that case Julian Knowles J reviewed the authorities and summarised the relevant principles:

    (1) In an application for an interim injunction in a public law case, the basic principles which are familiar from *American Cyanamid v Ethicon Ltd* [1975] AC 396 are applied with some modification [51].

    (2) Accordingly, "… whether to grant an injunction in a public law case involves the exercise of a discretion which takes all relevant matters into account, including the strength of the case advanced by the party seeking relief, but without applying a rigid test to that aspect, such as requiring a 'strong prima facie case'. The context of the particular decision under challenge, the interests of the public in general that are involved, and the broader legal framework will obviously be important factors for the court to take into account" [52].

    (3) In *CC & C Ltd v Revenue and Customs Commissioners* [2015] 1 WLR 4043, Underhill LJ said:

> "43. I do not therefore believe that the court is entitled to intervene to grant interim relief where the registration of a trader in duty-suspended goods is revoked simply on the basis that there is a pending appeal with a realistic chance of success. But it does not follow that there are no circumstances in which the court may grant such relief; and, as noted above, HMRC do not in fact so contend. The correct principle seems to me to be this. If a 'relevant decision' is challenged only on the basis that it is one to which HMRC could not reasonably have come the case falls squarely within section 16 of the 1994 Act [*which conferred the relevant right of appeal in that case*], and the court should not intervene. However, where the challenge to the decision is not simply that it is unreasonable but that it is unlawful on some other ground, then the case falls outside the statutory regime and there is nothing objectionable in the court entertaining a claim for judicial review or, where appropriate, granting interim relief in connection with that claim …
>
> 44. In short, therefore, I believe that the court may entertain a claim for judicial review … in cases where it is arguable that the decision was not simply unreasonable but was unlawful on one of the more fundamental bases identified above. Such cases will, of their nature, be exceptional."

(4) *R (ABC Ltd) v Revenue & Customs Commissioners* [2018] 1 WLR 125 concerned similar issues relating to registration for wholesale supply of duty-paid alcohol, for which the Commissioners were required to apply a statutory "fit and proper person" test. Burnett LJ (as he then was) said:

> "61 ...
> (i) The High Court has jurisdiction to grant an injunction maintaining registration pending appeal to the FTT, which has been revoked by HMRC, when a parallel challenge to that decision is made in judicial review proceedings.
> (ii) The jurisdiction should not be exercised simply on the basis that the person concerned has a pending appeal with a realistic chance of success.
> (iii) If the decision is challenged only on the basis that HMRC could not reasonably have come to it, the case falls within section 16 of the Finance Act 1994 and the court should not intervene.
> (iv) If the challenge to the decision is on some other ground outside the statutory regime the court may entertain judicial review or grant interim relief.
> (v) A definition of the additional element needed is elusive but would include 'abuse of power', 'impropriety' and 'unfairness' as envisaged in *Harley Development Inc v Comr of Inland Revenue* [1996] 1 WLR 727 .
> …
>
> 81. In my opinion, a statutory appeal against a refusal of approval which is unable to provide a remedy before an appellant has been forced out of business, rendering the appeal entirely academic (or theoretical or illusory

> in the language of the Strasbourg Court) is capable of giving rise to a violation of article 6 which the High Court would be entitled to prevent by the grant of appropriate injunctive relief under section 37 of the 1981 Act . To that extent, the exceptions enumerated by Underhill LJ in the *CC & C Ltd* case … can be expanded to include cases in which a claimant can demonstrate, to a high degree of probability, that the absence of interim relief would violate its ECHR rights. Moreover, such an injunction need not be ancillary to a claim for judicial review of any decision of HMRC, although it might be.
> …
>
> 85. A claimant seeking an injunction would need compelling evidence that the appeal would be ineffective. It would call for more than a narrative statement from a director of the business speaking of the dire consequences of delay. The statements should be supported by documentary financial evidence and a statement from an independent professional doing more than reformulating his client's stated opinion. Otherwise, a judge may be cautious about taking prognostications of disaster at face value. It should not be forgotten that a trader who sees ultimate failure in the appeal would have every incentive to talk up the prospects of imminent demise of the business, in an attempt to keep going pending appeal. Equally, 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. The High Court would not intervene in the absence of a detailed explanation of why the decision of HMRC was unreasonable. It must not be overlooked that the FTT is not exercising its usual appellate jurisdiction in these types of case where it makes its own decision. Finally, there would have to be detailed evidence of the attempts made to secure expedition in the FTT and the reasons why those attempts failed. Whilst the jurisdiction exists to grant interim relief in this way, its use is likely to be sparing because steps (i) and (ii) identified above should provide practical relief in cases which justify it and the circumstances in which it would be appropriate for injunctive relief to issue will be rare."

(5) *ABC* was appealed to the Supreme Court under the name of *R (OWD Ltd trading as Birmingham Cash & Carry) v RCC* [2019] 1 WLR 4020. Lady Black at [70-72] expressed "unease" with the proposition that the Revenue could be required to re-register a person whom they did not believe was fit and proper, but noted Burnett LJ's reasoning about the court's injunctive powers and the fact that, permission having been refused on that ground, that proposition could not be challenged in that case.

(6) *R (Ingenious Construction Ltd) v HMRC* [2020] EWHC 2255 (Admin) also concerned a removal of VAT registration. Sir Ross Cranston ruled that there was a power to grant the injunction sought but (1) the public interest would carry significant weight in the balance of convenience, (2) an applicant would need to establish to a high degree of probability that the absence of interim relief would render its appeal rights illusory and (3) that, following *CC & C*,

an applicant had to show not just a realistic chance of success but something akin to an abuse of power, impropriety or unfairness.

(7) Although there were differences between the relevant statutory schemes, these did not mean that there should be different approaches to the grant of injunctive relief [92].

(8) If insolvency were to become a real prospect, the claimant's primary remedy should be to seek further expedition of its FTT appeal [126].

41. On the facts of *S&S*, Julian Knowles J found "very considerable force" in the submission that the balance of convenience (if the requisite risk of insolvency were shown) came down against the grant of interim relief for reasons including the "overwhelming public interest in protecting the Revenue".

42. Like the judges in *S&S* and *Ingenious*, I consider myself to be bound by the ruling of Burnett LJ in *ABC* notwithstanding the note of doubt expressed by Lady Black in *OWD*. That doubt, it seems to me, concerned the existence of the jurisdiction to grant an injunction rather than the conditions which apply to such a grant if the jurisdiction exists.

43. It is clear from paragraph 81 of *ABC* that section 37 of the SCA 1981 gives the Court a general power to grant injunctions whether or not the application is made in judicial review proceedings.

44. There was some brief debate before me as to whether I could grant an injunction if I dismissed the application for permission to seek judicial review. My provisional view is that I could not, because the refusal of permission would terminate the proceedings in which the injunction application is made.

45. That is potentially significant because it is at least questionable whether the permission application in this case can succeed. Mr Clayton conceded that he raises no ground for judicial review other than a prospective breach of his client's Article 6 rights. The author of that alleged breach is not HMRC, which is the defendant to this claim, but the FTT.

46. However, the reasoning in *ABC* shows that a claim could be commenced in the High Court for the sole purpose of seeking an injunction to restrain a breach of ECHR Article 6. The question of whether to grant such an injunction should be answered with regard to matters of substance rather than form. That being so, I consider that it is fair and proper in this case to focus first on the injunction application. If injunctive relief is granted, the permission application can if necessary be stayed pending a decision by the FTT on the appeal.

<u>The merits of the application for interim relief</u>

47. I begin with the first limb of the *American Cyanamid* test. In its underlying dispute with the defendant, the claimant has shown that there is a serious question to be tried. In other words, I cannot predict the outcome of the FTT appeal. The FTT will not just review the decision but will consider all evidence available at the hearing before it,

whenever that is, and will decide whether the claimant should be re-registered for VAT or whether the defendant's decision should be maintained.

48. In support of his client's prospects before the FTT, Mr Clayton particularly relies on *Mobilx and others v HMRC* [2010] EWCA Civ 2010. There the Court considered what is meant by "should have known" when the *Kittel* test is applied (see paragraph 8 above). Moses LJ, with whom Sir John Chadwick and Carnwath LJ agreed, said:

> "59. The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who "should have known". Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in *Kittel*.
>
> 60. The true principle to be derived from *Kittel* does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion."

49. So, to succeed before the FTT, the defendant will have to show either that the claimant knew that transactions were connected with fraud or that that was the "only reasonable explanation" for the circumstances of them.

50. The defendant's summary grounds of defence give more detail about its investigation that led to the decision. They refer to repeated communications with the claimant over a long period, reminding it to conduct due diligence and alerting it to the risks of fraudulent activity. Between 16 November 2020 and 18 March 2022, the defendant told the claimant about fraudulent activity affecting supplies from nine of its suppliers. Three other examples are identified in the summary grounds of defence. The total alleged tax loss exceeds £8.2 million, as the decision letter said, and it affected 77% of all supplies to the claimant over the relevant period.

51. The defendant contends that the offending transactions were part of an overall orchestrated scheme to defraud the Revenue. It emphasises that the claimant had no obvious commercial purpose in the supply chains, because its suppliers could simply have supplied the labour required by the end user. It alleges a pattern whereby, when one defaulting supplier was deregistered, a new one was brought in to replace it. It points to connections between several of the suppliers and some of the individuals involved with them as directors or otherwise. It relies on "indicia of contrived trading" i.e. "several initial registrations for VAT in trade classifications that had nothing to do with labour supply/payroll", "traders with sudden and commercially inexplicable increases in turnover", "traders going missing from their premises" and

> "traders refusing to produce their records, failing to comply with Sched.36 information notices, and failing to meet with the Defendants when asked to".

52. The strength of the parties' cases becomes relevant at the next stage when the balance of convenience is considered: see paragraph 40(2) above. Although I acknowledge Mr Clayton's point about the demanding nature of the *Kittel* test as clarified in *Mobilx*, I do not consider that the claimant has a strong case. The defendant based its decision on repeated instances of substantial tax losses. I have no reason to doubt that those losses occurred. A chain of suppliers to the claimant appear to have been responsible. In this application with only paper evidence, I have not been able to test each party's case. But my impression to date is that the evidence of Mr Purviss tends merely to pick away at points made by the defendant rather than robbing them of force.

53. One example is the point that the claimant paid only National Minimum Wage (NMW) rates to its suppliers so that those suppliers, discharging their own obligations as employer, could not have made a profit on the supply. Mr Purkiss points out that the claimant paid the NMW rates for over-25s, meaning that if workers were under 25 they could be paid less, leaving a margin for the supplier. That argument may be valid for those younger workers but it does not answer the point that the supplier was left with no margin in the case of the older workers.

54. Another example concerns the allegation that the claimant instructed a series of providers which failed one after another. The response is that some of the providers were engaged at the same time, not in series. That, however, leaves unanswered the point that there nevertheless was a series of failed providers.

55. A third example is the claimant's point that it was not alerted to problems with some suppliers until after it had ceased to work with them. That leaves unanswered the allegation that the claimant failed to take heed of the emerging pattern of such problems and to change its business practices more generally.

56. For an injunction to be granted in this type of case, *ABC* shows that something more than a serious issue to be tried is needed. In the present case, that something is said to be the apprehended breach of Article 6 rights. As Burnett LJ explained, that breach, brought about by the claimant's insolvency occurring before its FTT application will be heard, must be proved "by compelling evidence" and "to a high degree of probability". There must also be "detailed evidence of the attempts made to secure expedition in the FTT and the reasons why those attempts failed".

57. At this hearing I was told of the up-to-date position at the FTT. There will be a hearing on 27 February 2023 at which the FTT will consider whether to order expedition of the appeal. I am told that the defendant is opposing expedition. If the appeal is expedited it is possible, but not certain, that the necessary 5-day slot will be 6-10 March 2023.

58. When the claim was issued it included the report of Mr Dix dated 4 October 2022. His opinion in summary was:

> "In my opinion, as a consequence of the VAT registration number being withdrawn, it is clear that the two larges customers will be forced to seek an

> alternative to Nourish with the loss to the company of approximately 63% of its turnover. The loss of the GLAA licence will result in a further 35% of revenues being lost from a further 12 clients seeking an alternative to Nourish.
>
> I am of the opinion that the loss of these revenue levels will render the company insolvent within a matter of a few weeks."

59. The reference to a "GLAA licence" is because a part of the claimant's business, said to be 35%, concerns workers in sectors where labour suppliers must be licensed by the Gangmasters and Labour Abuse Authority (GLAA). The GLAA's licensing standards require licensees whose business exceeds the VAT threshold to be registered with a VAT number.

60. In an updating letter dated 20 October 2022, Mr Dix noted that the claimant's GLAA licence remained in place. He said:

> "However, should the GLAA Licence be revoked, the company would become insolvent in a matter of weeks from the Licence being revoked. I would estimate as quickly as two to three weeks from the date of Revocation but it is difficult to put an exact time span on the failure."

61. It seems that the claimant still has its GLAA Licence. It was suggested before me that this is a matter of chance. There is no admissible evidence before me of the likelihood of action by the GLAA in a case where a VAT number has been removed but an appeal to the FTT is pending. Mr Dix in his new statement accepts that he is not "a GLAA licence expert".

62. There is also a risk that the claimant will lose its "Invoice Discounting" facility, presently provided by Close Brothers PLC ("CB"). That facility allows the claimant to borrow money against the value of the unpaid invoices and therefore is important for the company's cash flow. On 7 November 2022, CB wrote to the claimant to confirm that the defendant's decision to deregister triggered a right of termination under its contract with the claimant. However, there has to date been no termination. The claimant has had discussions with alternative providers but none has agreed to step in. Mr Purviss in his new statement says that he does not know when the CB facility will be withdrawn.

63. Mr Purviss also states that the claimant's biggest customer, Ralph Coleman International, has now left. I have seen a letter from that company dated 28 October 2022, seeking agreement to contract changes whereby the claimant would no longer be an exclusive provider to RCI, but I have not seen documentary evidence of the relationship being terminated. According to Mr Dix's new statement the position is more nuanced:

> "Mr Purviss has now confirmed that Ralph Coleman International Limited will remove 33% of its business within two weeks with the rest to follow once suitable alternatives have been arranged to avoid fatal business disruption. I have been informed that they are moving two of their five sites to alternatives in the next two weeks."

64. The admissible parts of Mr Dix's new statement identify profit figures associated with some customers such as RCI, and estimate the financial impact of customers leaving or of the GLAA Licence being revoked or of the CB facility being withdrawn. He identifies assumptions which underlay his original report, by way of explanation for the predicted insolvency not having occurred. He notes, finally, that no expert could predict exactly when the company will fail and that "the situation could change in days or weeks dependant upon other companies and the ID Facility provider making decisions".

65. The defendant points out that the dire predictions originally made by Mr Dix have not eventuated despite the passage of 4 months since his report. It seems that the claimant's sales figures for September to December 2022 have amounted to some 78% of previously forecast figures and therefore its business has not collapsed. The defendant invites me to treat Mr Dix's views with caution.

66. Meanwhile CB has not removed the ID facility despite the passage of a further 3 months and the GLAA licence has not been revoked.

67. The defendant also notes that during 2021 the claimant paid an interim dividend of £2.345 million. It was paid to Nourish Training Holdings Ltd (NTHL) which was incorporated on 17.2.21 and exists only as a holding company. Mr Purviss is a director of NTHL, which replaced him as a person with significant control of the claimant on 1 March 2021. I am told that the interim dividend was used to pay part of the consideration to Mr Purviss for the sale of his shares to NTHL.

68. The defendant argues that this materially weakened the claimant company before the deregistration. Mr Dix has forecast that if the claimant lost its GLAA Licence and did not regain its VAT number, by August 2023 it would have a negative bank balance of £2.349 million. Thus the amount removed would have seen the company remain in credit, or close to it, until August 2023, even on Mr Dix's projection. There has been no further information from Mr Purviss or any material analysis by Mr Dix about this point.

69. Considering all of this material in combination, I am not satisfied that the claimant has shown a "high degree of probability" that insolvency, arising from the matters complained of (rather than from the withdrawal of £2,345 million by way of dividend), will occur at a time which will render its appeal rights illusory. Whilst there is a risk of insolvency, and a risk of it happening before an FTT decision, that risk is contingent on events which will not necessarily occur. There is a real chance that an FTT hearing will take place in early March, though it might not. If expedition is ordered to comply with the requirements of Article 6, such a hearing may lead to a quick decision, though that too is not certain. Meanwhile the GLAA Licence may or may not remain in being while the claimant's appeal is outstanding. I cannot say whether CB will terminate the ID facility, much less when. I do not know how much client business has actually been lost, and I cannot say how much more will probably be lost within a specific timescale. Overwhelmingly, the evidence of what will or may happen consists of assertion by Mr Purviss. Mr Dix has contributed some arithmetic but there is little if anything by way of expert analysis which helps to prove that insolvency is highly likely within an identifiable timescale.

70. That is fatal to the injunction application. It is not necessary to decide the other issues which are relevant to the application and so I will record my conclusions on them more briefly.

71. The claimant also has not satisfactorily complied with the requirement for "detailed evidence of the attempts made to secure expedition in the FTT and the reasons why those attempts failed".

72. For one thing, the attempts have not failed. As I have said, there is a chance that expedition will be ordered with a final hearing in early March.

73. As to the lack of expedition so far, I accept that the notice of appeal to the FTT filed on 15 September 2022 included a request for expedition. But it also stated that details about the claimant's financial situation would be submitted later. The evidence of Ms Cummings is that there were telephone conversations with FTT officers in early October "to discuss when an expedited hearing could be listed". On 7 and 20 October the claimant indicated that it intended to make representations. That being so, the FTT can hardly be criticised for awaiting those. I have been told that the promised financial details were filed with the FTT on 2 November 2022, 7 weeks after the appeal was issued.

74. On 25 November the FTT indicated that the earliest date for a 5-day hearing in Birmingham would be in March 2023. The claimant sought updates, without any response, on 1, 5, 13 and 19 December. Only on 17 January 2023 did the FTT ask the parties for their availability. Ms Cummings on 17 January also wrote a letter asking for the expedition request to be put before a judge urgently. On 23 January she provided the claimant's dates to avoid, which were 1-15 and 17 February 2023.

75. These documents reveal a surprising lack of urgency. The claimant could have made a formal application at any time after 15 September, alleging a breach by the FTT of Article 6 and section 6 of the HRA 1998. It could have threatened an application for judicial review and for interim relief requiring the FTT to make a decision. The FTT in my view should have dealt with the expedition request much more quickly, but one apparent reason why it did not was the lack of the anticipated representations and of further action by the claimant.

76. In the circumstances, I am also satisfied that the balance of convenience does not favour the grant of an interim injunction. Significant weight must be given to the public interest. In this case the defendant has acted to halt tax losses which to date appear to have exceeded £8 million. My tentative assessment of the underlying merits is that although the claimant identifies a serious issue to be tried, it has not so far shown that it has a strong case, as I have said. And the test to be satisfied by the claimant may be somewhat more exacting in this case because a mandatory injunction is sought, though I do not regard that factor as decisive. And, if the claimant now finds itself in financial difficulty, that is at least partly self-inflicted as I have said. If interim relief is granted, and if the defendant's view of the case turns out to be correct, then there is a real likelihood that further losses will have been caused to the Revenue in the same way, with no apparent prospect of such losses being recovered.

The application for permission

77. In the circumstances it is not necessary to stay the permission application.

78. The proposed judicial review claim is in reality just a vehicle for the injunction application. The merits of the case will be for the FTT to decide. There is no arguable ground for judicial review, still less any ground of the "fundamental" kind identified in *CC & C*.

Conclusion

79. The applications for an interim injunction and for permission to seek judicial review are therefore dismissed.