Neutral Citation: [2024] UKFTT 00516 (TC)

Case Number: TC09204

FIRST-TIER TRIBUNAL
TAX CHAMBER

Manchester Tribunal Centre
Alexandra House
14-22 The Parsonage
Manchester
M3 2JA

Appeal reference: TC/2022/00949

VAT – penalties – director's liability notice – sections 60 and 61 of the Value Added Tax Act 1994 – appellant's application for a stay or alternatively for a direction barring HMRC from taking further part in these proceedings upon the basis of abuse of process - failure to allege dishonesty in an earlier appeal by a connected party – no abuse of process – application dismissed – whether the appellant's conduct was dishonest – yes – appeal dismissed

Heard on: 8-14 March 2024
Judgment date: 6 June 2024

Before

TRIBUNAL JUDGE RICHARD CHAPMAN KC
MISS SUSAN STOTT

Between

ASHLEY CHARLES TREES

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr James Pickup KC, leading counsel, instructed by Keystone Law, Solicitors

For the Respondents: Mr Ben Hayhurst, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal against a director's liability notice issued to Mr Ashley Trees on 7 July 2021 ("the DLN") pursuant to section 61(1) of the Value Added Tax Act 1994 ("VATA 1994") in the sum of £1,974,850. The DLN notified Mr Trees that HMRC intended to recover the full amount of a civil evasion penalty which had been issued to CCA Distribution Ltd ("CCA") on the same day ("the Penalty") in the same amount pursuant to section 60(1) of VATA 1994. HMRC's basis for the DLN was an allegation that (on HMRC's case) dishonest conduct of CCA was wholly attributable to dishonesty of Mr Trees when a director of CCA.

2. An application was made on behalf of Mr Trees for a stay or alternatively for a direction barring HMRC from taking further part in these proceedings upon the basis of abuse of process ("the Application"). The central issue in respect of the Application is as to whether HMRC should have pleaded and pursued allegations of dishonesty in a previous appeal brought by a connected party, with the effect that it is an abuse of process for HMRC now to do so within this appeal.

3. With the agreement of the parties, we heard the Application at the start of the appeal and gave our determination orally at that stage rather than hearing the whole appeal first. This is because the granting of the Application would effectively dispose of the appeal whereas the dismissal of the Application would nevertheless resolve issues which would otherwise have to be dealt with as part of the substantive appeal. In the event, we dismissed the Application. With the further agreement of the parties, we treated the oral determination as a summary decision in order to deliver a full written decision at the same time (and in the same document) as our decision in the substantive appeal. We note that the section of this decision which deals with the Application is in substantially similar terms to our oral summary decision.

4. We have been greatly assisted throughout by the clear and careful submissions of both Mr Pickup KC for Mr Trees and Mr Hayhurst for HMRC, for which we are grateful. We are also grateful to Mr Christopher Kerr, counsel, for his role as a co-author with Mr Hayhurst of HMRC's written opening submissions but who did not attend the hearing.

FACTUAL BACKGROUND

5. The context for the DLN and the Penalty is a lengthy and involved one. We summarise the most significant elements of the background as follows, which are either non-contentious or have already been dealt with in previous decisions either in this appeal or in CCA's appeal as referred to below.

6. CCA was incorporated in November 2001 and went into administration on 21 August 2009. It was dissolved on 16 November 2022. Throughout its trading activities, Mr Trees was CCA's sole director and sole shareholder. The parties agree that CCA is to be treated as Mr Trees' *alter ego*.

7. CCA was initially intended to operate a joint venture between Mr Trees and another party, but this was unsuccessful and so CCA quickly became dormant. In 2003, CCA began trading in the grey market for mobile phones. Mr Trees had previous experience of mobile phone trading through another company, Appleco Ltd ("Appleco"), which had also been involved in the purchase and sale of new and used computers. Mr Trees himself undertook all CCA's transactions during the relevant periods, being April 2006, May 2006, and June 2006 ("the VAT Periods").

8. On 13 July 2007 and 13 August 2007, HMRC notified CCA of their decisions that they would not pay the input tax claimed during the VAT Periods ("the Denial Decisions"). Their reason for this refusal was that HMRC considered that CCA's transactions were connected to fraud and that CCA, through Mr Trees, knew this or ought to have known this. The input tax in issue was in the sum of £9,874,254.54.

9. CCA appealed against the Denial Decisions to the First-tier Tribunal ("the CCA Appeal"). The First-tier Tribunal (Judge Cornwell-Kelly and Mr Agboola) allowed the appeal in a decision released on 22 April 2013 with the neutral citation [2013] UKFTT 253 (TC). This decision included a dissenting statement from Mr Agboola. HMRC appealed to the Upper Tribunal, who allowed the appeal, set aside the First-tier Tribunal decision, and remitted the appeal to a differently constituted First-tier Tribunal. The Upper Tribunal's decision was released on 24 September 2015 with the neutral citation [2015] UKUT 513 (TCC). CCA appealed against the Upper Tribunal's decision to the Court of Appeal, which was dismissed by a judgment dated 23 November 2017 with the neutral citation [2017] EWCA Civ 1899.

10. The First-tier Tribunal (Judge Mosedale and Mrs Hunter) subsequently reheard the CCA Appeal and dismissed it in a decision released on 14 May 2020 with the neutral citation [2020] UKFTT 222 (TC) ("the 2020 Decision"). CCA did not appeal the 2020 Decision.

11. In essence, Judge Mosedale and Mrs Hunter decided that all of CCA's transactions during the VAT Periods were connected to fraud, that Mr Trees (acting on behalf of CCA) knew that all of the transactions were connected to fraud and, in the alternative, Mr Trees (acting on behalf of CCA) ought to have known that CCA's transactions were connected to fraud.

12. It is significant that HMRC did not allege dishonesty in the CCA Appeal. Indeed, HMRC made this clear in a response to an application for disclosure brought by CCA on 30 November 2018. By a letter dated 11 January 2019, HMRC stated that:

> "2. For the avoidance of doubt, we confirm that HMRC do not seek to allege dishonesty or fraud against CCA or Mr Trees. HMRC's case is based on the *Kittel* test of knew or should have known."

13. Further, Judge Mosedale and Mrs Hunter included in the 2020 Decision their reasons for dismissing an application by CCA to strike out what were said by CCA to be allegations of fraud. The 2020 Decision includes the following at [107] to [114]:

> "[107] The Court of Appeal in the joined cases of *E-buyer* and *Citibank* [2017] EWCA Civ 1416 ruled at [97] that it was not necessary for HMRC to plead, particularise or prove dishonesty or fraud where the allegation was actual knowledge by the trader that its transactions were connected to fraud. The appellant's position was that, subsequent to this, it had asked for CPR style disclosure from HMRC and HMRC had refused on the grounds that they made no allegations of fraud or dishonesty against CCA or Mr Trees. The appellant had chosen not to pursue the disclosure any further on the basis of this concession.
>
> [108] However, shortly before the hearing, it took the position that HMRC was putting a case to the tribunal that was inconsistent with their assurance that they made no allegations of fraud or dishonesty against the appellant. The appellant's position was that allegations that were only consistent with fraud or dishonesty should be removed from HMRC's statement of case, could not be made in submissions at the hearing, should not be put to any of the appellant's witnesses, and that the Tribunal could not reach findings of fact on them.

[109] The appellant identified the particular allegations to which it referred: there were about 10 of them. We do not need to set them all out in full; they can be summarised as either allegations that the appellant, acting by its director, was a participant in an overall scheme of fraud or allegations that the appellant was not a free agent. We understood that the implication of not being a free agent was that the appellant knew it was being directed in its trading so that it had to know that it was a participant in overall scheme of fraud. We set out examples of the allegations complained about:

> It is highly improbable that such a high proportion of the appellant's deals would have led back to these defaulting entities if it were free to select its suppliers.
>
> It is implausible that the appellant was duped by all 15 counterparties in respect of the 156 deals.

We note in passing that one of the allegations complained about (concerning IP addresses) was later withdrawn during the hearing for a different reason.

[110] The appellant's point was that *Kittel* deemed a person who had knowledge or means of knowledge of connection to fraud to be a participant in the fraud, but HMRC were going further and alleging that CCA was actually a knowing participant in the fraud. That, said the appellant, amounted to an allegation of fraud or dishonesty on the part of CCA which was inconsistent with HMRC's statement that they made no such allegation.

[111] HMRC's point was, they said, that they did not allege that CCA was conspiring with the fraudsters, but they did say that CCA (by its director) was being manipulated by his suppliers and customers and instructed on what to do in its dealing such that it was obvious to Mr Trees and CCA that its deals had nothing to do with commercial activity. HMRC relied on what the Court of Appeal said in *Citibank* and *E-buyer* that it was possible to allege knowledge of connection to fraud without making an allegation of dishonesty.

[112] Our ruling was given orally and recorded in the transcript; we only summarise it here. Firstly, we agreed that the effect of the Court of Appeal's ruling was that it was possible to enter into a transaction knowing that it was connected to fraud without being dishonest – [78], [86] [107] and [120]. It followed that a pleading of knowledge of connection to fraud was not a pleading of dishonesty.

[113] However, the appellant was wrong to say that that meant HMRC could not plead factors which supported the allegation of knowledge if they also supported an allegation of dishonesty or indeed necessarily were pleadings of dishonest behaviour. For this, we relied on statements by the judges of the Court of Appeal as follows:

> [85] ... It might be, of course, that if some or all of the allegations made in the Statement of Case were proved, that might (in theory, though not, of course, in practice) have allowed a tribunal to go on to make a finding that the taxpayer had been dishonest. But if HMRC does not seek such a finding, and if such a finding is not needed to support the conclusion that the taxpayer cannot recover its input tax, there is neither any need nor any utility in asking the FTT to undertake that exercise.
>
> *Sir Geoffrey Vos*
>
> [109] In summary, in my view, if HMRC do not wish and do not need to plead dishonesty, the concept of dishonesty should not be raising its

> head. As the Chancellor has observed, an analysis of whether the allegations amounted to dishonesty was unnecessary and inappropriate in litigation of this kind. Traders should not have to face a plea of dishonesty, HMRC should not be obliged to take on the burden of proving dishonesty, and judges should not have to address the added unnecessary complication of dishonesty simply on the basis HMRC seeks to prove actual knowledge of a fraud, in accordance with the *Kittel* test, and relies on facts and or inferences from facts that could support a finding of dishonesty. (our emphasis)
>
> *Lady Justice Hallett*
>
> [120] … Unless dishonesty is expressly alleged, the only question is whether the pleaded allegations are relevant to the issue of actual or constructive knowledge for the purposes of the *Kittel* test: …. For that reason, it is entirely irrelevant whether dishonesty is implicitly alleged in HMRC's statements of case. (our emphasis)
>
> *Sir Terence Etherton*
>
> [114] In conclusion, the allegations complained about were allegations which supported HMRC's case that the appellant had actual or constructive knowledge of the (alleged) connection to fraud; even if the allegations were consistent with a state of dishonesty on the part of the appellant and/or its director, the allegations were not allegations of dishonesty. The Tribunal would not strike out the allegations and would reach a conclusion on the allegations, but, as HMRC accepted, the Tribunal would reach no conclusion about whether the appellant's and/or its director's behaviour was dishonest or fraudulent: nor would The Tribunal undertake the exercise of deciding whether the allegations were only consistent with a dishonest state of mind; we would only make a finding on whether or not HMRC had proved actual or constructive knowledge of connection to fraud. The Tribunal noted that it would not be open to HMRC's counsel to suggest to the appellant's witnesses that they were dishonest."

14. As set out above, the Penalty and the DLN were issued on 7 July 2021. Mr Trees requested a review, which upheld the decision on 17 November 2021. Mr Trees issued a notice of appeal in respect of the DLN received by the Tribunal on 15 December 2021, being the present appeal.

15. Directions were released on 22 June 2022 and varied by Judge Bowler in a letter dated 9 August 2022. On 20 February 2023, Judge Redston heard three applications by HMRC; first to strike out the parts of Mr Trees' grounds of appeal which sought to relitigate the findings in the 2020 Decision that Mr Trees did not know that the transactions were connected to fraud, secondly for the 2020 Decision to stand as evidence in the present appeal, and, thirdly, for case management directions. By a decision released on 23 March 2023 ("the 2023 Decision") Judge Redston granted all three of HMRC's applications. The 2023 Decision included the following:

> "[73] It is true, as Mr Trees says, that the issue to be decided in his appeal is different: the FTT hearing his appeal will have to decide whether he was dishonest, not whether he knew the transactions were connected with fraud. But that does not give him an unfettered right to put forward any grounds of appeal. In *Gore Wood*, Lord Bingham approved the dictum that it would be an abuse of process to allow a person "to litigate a second time what has already been decided between himself and the other party to the litigation". Litigation between HMRC and CCA, of which Mr Trees was the controlling mind, has already been concluded on the basis that Mr Trees knew the

> transactions were connected to fraud. Allowing him to reargue that point would be to permit him to litigate it a second time.
>
> [74] That does not mean that Mr Trees cannot argue, at the hearing of his appeal, that he was not dishonest: that is a new point and the burden of proving it will rest with HMRC. But in deciding whether or not he was dishonest, the parties and the FTT hearing his appeal must start from the position that he knew the transactions were connected with fraud."

16. As a result of the 2023 Decision, Mr Trees' grounds of appeal (as set out in a letter dated 13 December 2021 accompanying his notice of appeal) were substantially amended and were essentially restricted to a plea that he was not dishonest. The grounds of appeal now include some background and then the following:

> "HMRC raising a penalty assessment on me for dishonesty came right out of the blue. You can see from some of the comments made on page 18 of the decision that when my legal team asked for a CPR style disclosure from HMRC it refused on the grounds that they made no allegations of fraud or dishonesty against CCA or myself!!!
>
> On page 19 there are several references to "a connection to fraud without being dishonest" and dishonesty was not pleaded. If it had been it could have been dealt with by my legal team but HMRC have now gone back on what they said, waited until I no longer have legal representation and then come up with a penalty charge.
>
> The decision emphasises that HMRC accepted that the Tribunal would reach no conclusion about whether my behaviour was dishonest as this was not a requirement to determine if the company was trading in a fraudulent chain. There is even a reference to the Tribunal noting that it would not be open to HMRC's counsel to suggest to the company's witnesses that they were dishonest.
>
> I don't believe HMRC have produced any conclusive evidence at all to demonstrate dishonesty, they can't because there was no dishonesty on my part.
>
> This isn't fair and I am appealing to the Tribunal to make things right."

17. Judge Redston made further case management directions released on 24 March 2023 and 28 July 2023. By a decision released on 25 August 2023 ("the 2023 Disclosure Decision"), Judge Redston refused an application by Mr Trees for specific disclosure of any documents relating to fraudulent traders which mentioned his name or CCA's name. This refusal was upon the basis that disclosure equivalent to CPR standard disclosure had already been given. Judge Redston stated as follows at [17], [18], [26] and [27] as regards the appropriate scope of disclosure in this appeal:

> "[17] My notes of the Hearing record HMRC's Counsel as saying that HMRC accepted they "have to prove dishonesty – will have to make CPR compliant disclosure – have to see if anything else to be served – will be served in evidence as exhibits".
>
> [18] I therefore agree with HMRC that there was no agreement at the Hearing that HMRC would disclose "any documentation relating to the fraudsters which mentioned [Mr Trees'] name or that of CCA". Instead, HMRC accepted at the Hearing that they would "be faced with a more onerous disclosure obligation" than had applied in CCA 2020, and that this disclosure would be "CPR compliant". To use Mr Adamson's phrase, the disclosure HMRC have made is "a more demanding disclosure in order to prove dishonesty".

...

[26] I agree with HMRC that directing that they disclose every document which names Mr Trees and/or CCA would be disproportionate. The exercise already carried out meets the standard disclosure obligations at 36.6 as modified by Namli, and it also meets the "reasonableness" requirements in CPR 36.7.

[27] Mr Trees will not suffer any disadvantage as a result of my refusal of his application to widen the disclosure requirements, because he has already been served with all documents which are adverse to HMRC's case."

THE APPLICATION

18. The appeal was listed to be heard for five days commencing 11 March 2024 (with an additional reading day on 8 March 2024). The written opening submissions on behalf of Mr Trees dated 27 February 2024 included the Application. HMRC responded to the Application in a written response dated 1 March 2024. HMRC took no issue with timing of the Application and, as set out above, agreed that it should be heard prior to the substantive appeal.

The Legal Framework

19. The following legal framework was not in dispute.

The Penalty and the DLN

20. The applicable penalty regime at the time of the issue of the Penalty and DLN was that of sections 60 and 61 of VATA 1994, the relevant subsections of which are in the following form:

"60 VAT evasion: conduct involving dishonesty

(1) In any case where –

(a) for the purpose of evading VAT, a person does any act or omits to take any action, and

(b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),

he shall be liable, subject to subsection (6) below, to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct.

...

(7) On an appeal against an assessment to a penalty under this section, the burden of proof as to the matters specified in subsection (1)(a) and (b) above shall lie upon the Commissioners.

61 VAT evasion: liability of directors etc

(1) Where it appears to the Commissioners

(a) that a body corporate is liable to a penalty under section 60, and

(b) that the conduct giving rise to that penalty is, in whole or in part, attributable to the dishonesty of a person who is, or at the material time was, a director or managing officer of the body corporate (a "named officer"),

the Commissioners may serve a notice under this section on the body corporate and on the named officer.

(2) A notice under this section shall state –

(a) the amount of the penalty referred to in subsection (1)(a) above ("the basic penalty"), and

(b) that the Commissioners propose, in accordance with this section, to recover from the named officer such portion (which may be the whole) of the basic penalty as is specified in the notice.

(3) Where a notice is served under this section, the portion of the basic penalty specified in the notice shall be recoverable from the named officer as if he were personally liable under section 60 to a penalty which corresponds to that portion; and the amount of that penalty may be assessed and notified to him accordingly under section 76.

(4) Where a notice is served under this section –

(a) the amount which, under section 76, may be assessed as the amount due by way of penalty from the body corporate shall be only so much (if any) of the basic penalty as is not assessed on and notified to a named officer by virtue of subsection (3) above; and

(b) the body corporate shall be treated as discharged from liability for so much of the basic penalty as is so assessed and notified.

(5) No appeal shall lie against a notice under this section as such but –

(a) where a body corporate is assessed as mentioned in subsection (4)(a) above, the body corporate may appeal against the Commissioners' decision as to its liability to a penalty and against the amount of the basic penalty as if it were specified in the assessment; and

(b) where an assessment is made on a named officer by virtue of subsection (3) above, the named officer may appeal against the Commissioners' decision that the conduct of the body corporate referred to in subsection (1)(b) above is, in whole or part, attributable to his dishonesty and against their decision as to the portion of the penalty which the Commissioners propose to recover from him.

(6) In this section a "managing officer", in relation to a body corporate, means any manager, secretary or other similar officer of the body corporate or any person purporting to act in any such capacity or as a director; and where the affairs of a body corporate are managed by its members, this section shall apply in relation to the conduct of a member in connection with his functions of management as if he were a director of the body corporate."

21. Section 76 provides for, *inter alia*, assessments of amounts due by way of penalty under sections 60 and 61. In turn, section 77 includes a time limit for an assessment under section 76 of (in the case of, *inter alia*, a penalty under section 60) two years beginning with the time when the amount of VAT has been finally determined. Section 77(2) states as follows:

"77 Assessments: time limits and supplementary assessments.

...

(2) Subject to subsection (5) below. an assessment under section 76 of an amount due by way of any penalty, interest or surcharge referred to in subsection (3) of that section may be made at any time before the expiry of the period of 2 years beginning –

(a) in the case of a penalty under section 65 or 66, with the time when facts sufficient in the opinion of the Commissioners to indicate, as the case may be

(i) that the statement in question contained a material inaccuracy; or

(ii) that there had been a default within the meaning of section 66(1),

came to the Commissioners' knowledge; and

(b) in any other case, with the time when the amount of VAT due for the prescribed accounting period concerned has been finally determined."

2009 Rules

22. The Application is made pursuant to Rules 5(3)(j), 8(3)(c) and 8(7)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

23. The Tribunal's jurisdiction to strike out or debar can include doing so for abuse of process. This is clear from *Shiner v HMRC* [2018] EWCA Civ 31 *per* Patten LJ at [19] and *CF Booth v HMRC* [2020] UKFTT 0035 (TC) *per* Judge McNall at [63] and [64].

Abuse of Process

24. The abuse of process relied upon by Mr Trees stems from the judgment of Sir James Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100 at 115 as follows:

> ""In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time... Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and prima facie, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule."

25. In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, Lord Sumption stated at [17] that the rule in *Henderson v Henderson* applies where a party seeks to raise, "in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones,". He contrasted this with cause of action estoppel and issue estoppel as follows:

> "[17] Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336. Third, there

> is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see *King v Hoare* (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see Civil Jurisdiction and Judgments Act 1982, section 34. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197-198. Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

26. In *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 ("*Gore Wood*"), Lord Bingham noted that the very fact that a matter could have been raised in previous proceedings does not necessarily make the later proceedings abusive. Instead, a broad, merits-based judgment is required. Lord Bingham stated as follows at 31B to 31F:

> "But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds

> would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

27. In *Gore Wood,* Lord Bingham also rejected the argument that the rule in *Henderson v Henderson* could not apply where the parties in the two sets of proceedings were different where the parties are sufficiently connected (albeit that he was dealing with claims brought by closely connected claimants). Lord Bingham stated as follows at 32C to 32G:

> "Two subsidiary arguments were advanced by Mr ter Haar in the courts below and rejected by each. The first was that the rule in *Henderson v Henderson* 3 Hare 100 did not apply to Mr Johnson since he had not been the plaintiff in the first action against GW. In my judgment this argument was rightly rejected. A formulaic approach to application of the rule would be mistaken. WWH was the corporate embodiment of Mr Johnson. He made decisions and gave instructions on its behalf. If he had wished to include his personal claim in the company's action, or to issue proceedings in tandem with those of the company, he had power to do so. The correct approach is that formulated by Sir Robert Megarry V-C in *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510 where he said, at p 515:
>
> > "Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest.'"..."

28. The justification for the rule in *Henderson v Henderson* is to achieve finality. In *Barrow v Bankside* [1996] 1 WLR 257, Sir Thomas Bingham MR (as he then was) stated as follows at 260:

> "... The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

29. We note that we were also referred to, and we considered, the following authorities in respect of abuse of process and the rule in *Henderson v Henderson*: *Greenhalgh v Mallard* [1947] 2 All ER 255, *Brisbane City Council v Attorney-General for Queensland* [1979] AC

411, *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, *Ashmore v British Coal Corporation* [1990] 2 QB 338, and *Manson v Vooght* [1999] BPIR 376.

Dishonesty

30. As set out above with reference to the applicable legislation, it is for HMRC to establish dishonesty. The applicable test for dishonesty is now well settled and is set out by Lord Hughes as follows in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67 ("*Ivey*") at [74]:

> "[74] These several considerations provide convincing grounds for holding that the second leg of the test propounded in *Ghosh* does not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* and by Lord Hoffmann in *Barlow Clowes*: see para 62 above. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

Knowledge and Means of Knowledge

31. The Denial Decisions and the CCA Appeal were based upon the principle that input VAT recovery could be denied where a taxable person knew or should have known that he was participating in a transaction connected with the fraudulent evasion of VAT. The Court of Justice of the European Union held as follows in *Kittel* (C-439/04) at [59]:

> "[59] Therefore, it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity'."

32. Moses LJ made it clear in *Mobilx Ltd v HMRC* [2010] EWCA Civ 517 that a person who knew or should have known that his transaction was connected with the fraudulent evasion of VAT is not entitled to deduct input tax because he is to be regarded as a participant in the fraud. He stated as follows at [42] and [43]:

> "[42] By the concluding words of § 59 the Court must be taken to mean that even where the transaction in question would otherwise meet the objective criteria which the Court identified, it will not do so in a case where a person is to be regarded, by reason of his state of knowledge, as a participant.
>
> [43] A person who has no intention of undertaking an economic activity but pretends to do so in order to make off with the tax he has received on making a supply, either by disappearing or hijacking a taxable person's VAT identity, does not meet the objective criteria which form the basis of those concepts which limit the scope of VAT and the right to deduct (see Halifax § 59 and Kittel § 53). A taxable person who knows or should have known that the transaction which he is undertaking is connected with fraudulent evasion

> of VAT is to be regarded as a participant and, equally, fails to meet the objective criteria which determine the scope of the right to deduct."

33. It was held in *E Buyer UK Ltd v HMRC* [2018] 1 WLR 1524 ("*E Buyer*") that knowledge of fraud does not require a plea of dishonesty. The Chancellor stated as follows at [85] (part of which was cited in the 2020 Decision):

> "[85] The key point, in my judgment, is that, whilst HMRC can, of course, allege that a taxpayer has acted dishonestly and fraudulently in relation to the transactions to which it was a party, they do not need to do so in order to deny that taxpayer the right to reclaim input tax under the test. The exercise upon which Judge Mosedale was engaged was, therefore, inappropriate. It was simply irrelevant for the F-tT to ask whether the allegations in the statement of case, if all proved, would necessarily lead to the conclusion that the taxpayer had been dishonest or fraudulent. It was even more inappropriate for Judge Mosedale to direct HMRC to plead dishonesty when it had expressly informed her that it did not wish to make any such allegation. It might be, of course, that if some or all of the allegations made in the statement of case were proved, that might (in theory, though not, of course, in practice) have allowed a tribunal to go on to make a finding that the taxpayer had been dishonest. But if HMRC does not seek such a finding, and if such a finding is not needed to support the conclusion that the taxpayer cannot recover its input tax, there is neither any need nor any utility in asking the F-tT to undertake that exercise."

Submissions

Mr Trees

34. Mr Pickup's submissions on behalf of Mr Trees can be summarised as follows:

(1) Mr Pickup's written submissions treat the abuse of process as being both the issue of the DLN and the defence of the appeal. He states at paragraph 1 that the Application is, "on the ground that the issue to the Appellant of a Director's Liability Notice ... and these proceedings are an abuse of the process of the Court." In the course of oral submissions, however, Mr Pickup was clear in saying that he accepted that HMRC had the power to issue the DLN but that what was abusive was HMRC's reliance within this appeal upon dishonesty that should have been raised in the CCA Appeal. If a section 60 or section 61 penalty is in prospect, then HMRC should deal with dishonesty at the same time as the *Kittel* denial. He submitted that no public law issues arise as it was not Mr Trees' case that HMRC were not entitled to issue the DLN itself.

(2) The case of *HMRC v Kishore* [2021] EWCA Civ 1565 ("*Kishore*") relied upon by HMRC is not binding and is to be distinguished from the present case. It did not involve a dishonesty penalty, the previous appeal in that case had been struck out, and the issue was as to whether HMRC were entitled to issue the penalty.

(3) HMRC could have pleaded and pursued dishonesty in the CCA Appeal. They were repeatedly invited to do so by CCA and yet were steadfast in confirming that they were not relying upon fraud or dishonesty. Mr Pickup relied upon the case of *Butt v HMRC* [2019] EWCA Civ 554 ("*Butt*") as an illustration of *Kittel* and dishonesty being dealt with at the same time.

(4) HMRC should have brought their whole case within the CCA Appeal. Mr Pickup submitted in his written opening that HMRC, "cannot hold back part of its case, to then be deployed in duplicative litigation, some years later, in which this Tribunal cannot properly examine the underlying factual background, which has been determined by the earlier Tribunal." HMRC's allegation in the CCA Appeal was in reality an allegation of

dishonesty. However, Mr Trees has been prejudiced as a result of HMRC holding back a formal plea of dishonesty until this appeal. This prejudice includes Mr Trees being denied CPR disclosure in the CCA Appeal, being denied the ability to cross-examine witnesses or present his own evidence as to the surrounding circumstances of the transactions in the context of a plea of dishonesty. Mr Pickup rhetorically asks, "What more can he do?"

(5) Paragraph 114 of the 2020 Decision is effectively a finding of dishonesty which Mr Trees cannot now go behind.

(6) Mr Trees had been denied the finality of the CCA Appeal. The present appeal arises out of exactly the same facts as the CCA Appeal, which is precisely the abuse which the rule in *Henderson v Henderson* contemplates. This is reinforced by the fact that the only evidence relied upon by HMRC is the 2020 Decision.

(7) The present Tribunal is unable to carry out the exercise required to consider the test for dishonesty in *Ivey* because at least stage one has already been carried out by Judge Mosedale and Mrs Hunter in the 2020 Decision. In this regard, Mr Pickup submits that the "fact-finding tribunal" referred to at paragraph 74 of *Ivey* must be the *same* fact-finding tribunal for both limbs.

(8) The DLN is a criminal charge and so engages Article 6 of the ECHR ("Article 6"). The present appeal is not consistent with Article 6 as there has been an unreasonable delay and, for the reasons set out above, Mr Trees will be denied the ability to cross-examine or present evidence in respect of matters contained within the 2020 Decision despite the fact that at the time of the CCA Appeal dishonesty was expressly not being pursued.

HMRC

35. Mr Hayhurst's submissions on behalf of HMRC can be summarised as follows:

(1) Whilst HMRC could have raised dishonesty within the CCA Appeal, it did not need to and was not required to do so. Importantly, the Penalty and the DLN had not yet been issued.

(2) *Kishore* is binding upon this Tribunal and is a complete answer to the Application in respect of whether dishonesty should have been raised in the CCA Appeal. In the alternative, even if *Kishore* can be distinguished, the reasoning in *Kishore* is equally applicable to the present case.

(3) The legislation anticipates HMRC waiting until the determination of VAT liability before issuing a penalty. This is reinforced by the later iterations of the legislation.

(4) There is no prejudice to Mr Trees. HMRC was not seeking to avoid disclosure in the CCA Appeal. Full disclosure was given in the CCA Appeal notwithstanding the absence of obligation to do so, full disclosure has been given in the present appeal, and Mr Trees can still challenge the evidence on dishonesty. The prejudice which Mr Trees complains of is conflating the arguments in respect of the rule in *Henderson v Henderson* with the consequences of the 2023 Decision precluding Mr Trees from relitigating findings in the 2020 Decision.

(5) Paragraph 114 of the 2020 Decision expressly does not make any findings as to dishonesty.

(6) *Butt* is not a helpful illustration as it is in the context of all matters being dealt with in a penalty appeal rather than all matters being dealt with in a *Kittel* appeal.

(7) This Tribunal is capable of considering and applying the *Ivey* test for dishonesty.

(8) HMRC does not just rely upon the 2020 Decision, as the underlying evidence is available within the bundles.

(9) The Article 6 arguments fail for the same reasons as for abuse of process.

Discussion and decision

"Could Have"

36. HMRC could have raised the issue of dishonesty within the CCA Appeal. This was confirmed by the Chancellor in *E Buyer* at [85] as quoted above, in which he says that, "... whilst HMRC can, of course, allege that a taxpayer has acted dishonestly and fraudulently in relation to the transactions to which it was a party, they do not need to do so in order to deny that taxpayer the right to reclaim input tax under the test." In short, HMRC can allege dishonesty but does not need to in order to fulfil the test for the denial of input tax on a *Kittel* basis.

"Should Have"

Kishore

37. In *Kishore,* the Court of Appeal was dealing with a misdeclaration penalty under section 63 of VATA 1994, which did not require a finding of dishonesty. HMRC had previously denied Mr Kishore's input tax upon the basis of *Kittel,* which he then appealed. His appeal was subsequently struck out for a failure to comply with case management directions. HMRC did not impose penalties upon Mr Kishore until after the appeal had been struck out and so, obviously, had not done so in the course of the appeal against the denial of input tax. In the penalty appeal. HMRC sought to prevent Mr Kishore from raising the issues which had arisen in the *Kittel* appeal upon the basis of abuse of process. HMRC's application succeeded before the First-tier Tribunal but the Upper Tribunal allowed in part an appeal against this. HMRC was unsuccessful before the Court of Appeal in an appeal against the Upper Tribunal decision.

38. Importantly for present purposes, the Court of Appeal also dealt with a cross-appeal by Mr Kishore in which Mr Kishore argued that the imposition of the penalties was an abuse of process pursuant to the rule in *Henderson v Henderson* and that HMRC ought to have raised the penalty assessments at the same time as the denial of input tax. The Court of Appeal dismissed this ground of appeal upon the basis that HMRC were entitled to await the outcome of the *Kittel* appeal and so, whilst they could have issued the penalty at the same time, it could not be said that they should have done so. Newey LJ stated as follows at [49] to [51]:

> "[49] Mr McGurk submitted that the imposition of penalties on Mr Kishore amounted to an abuse of process by HMRC. He argued that the penalties depended on the same facts as the refusal of Mr Kishore's input tax claims and that HMRC ought to have raised the penalty assessments at the same time as they denied the right to deduct input tax. Invoking the rule in Henderson v Henderson, Mr McGurk maintained that HMRC should have sought to impose the penalties earlier if they wished to impose them at all.
>
> [50] I have not been persuaded. *Johnson v Gore Wood & Co* confirms that the "bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all". In the present case, however, Mr Kishore is complaining of HMRC's failure to do something other than make a claim or advance a defence in proceedings, viz. issue penalty

assessments. Any proceedings were always going to be initiated by Mr Kishore; HMRC could never have invoked the penalties by way of defence to the Kittel appeals; and the penalties could not have been put in issue before the FTT, whether in conjunction with the Kittel appeals or otherwise, until after they had been raised. In any event, it is "wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive", as Lord Bingham explained in *Johnson v Gore Wood & Co*. For a party to be held to be acting abusively, it must be the case that he should have raised a claim or defence in previous proceedings, not just that he could have done so. In this context, paragraph 91 of the UT's decision is in point. The UT there said this:

> "s77 [of the VATA] clearly permits HMRC a two-year period after the conclusion of the underlying tax appeal within which to issue a penalty assessment. The section is unambiguous and there is no basis for reading it down in reliance on Article 6. We consider, in agreement with HMRC, that there is in any event a sound basis for this extended limitation period, given that HMRC has a choice of penalties (a s63 VATA misdeclaration penalty or a s60 dishonest evasion penalty) depending on the degree of culpability of the taxpayer. At least in some cases (the present case being one) that degree of culpability is not established until after the underlying tax appeal has been concluded. Mr McGurk's contention that s60 (dishonest evasion) cannot have been in issue in this case because the penalty notices specifically disavowed dishonesty is beside the point, because this says nothing about whether a dishonest penalty might have been a possibility prior to the conclusion of the Kittel appeals. We note that HMRC's decisions dated 13 July 2007 and 28 March 2008 contended in the alternative that Mr Kishore knew or that he ought to have known of the fraudulent nature of the fraudulent scheme to defraud the revenue. At that stage, therefore, both options in terms of penalty remained open."

> [51] I agree with these comments and, in all the circumstances, do not consider that the rule in *Henderson v Henderson* assists Mr Kishore. For completeness, I should record that section 77(2) of the VATA provides that a penalty assessment "may be made at any time before the expiry of the period of 2 years beginning with the time when the amount of VAT due for the prescribed accounting period concerned has been finally determined".

39. We agree with Mr Pickup that *Kishore* is capable of being distinguished as the Court of Appeal was dealing with a different penalty and the specific point was as to whether it was an abuse of process for a penalty not to be issued at the same time as the denial of input tax. We also note that the *Kittel* appeal did not reach a final hearing. Further, a wide merits-based analysis as required by *Gore Wood* involves us considering all the circumstances.

40. However, we accept Mr Hayhurst's secondary point that the reasoning in *Kishore* is equally applicable to the present case. Once it is accepted that there is no obligation to issue a penalty prior to the two year period in section 77 of VATA 1994 (as we must in the light of *Kishore*) it cannot be said that HMRC has an obligation to treat the *Kittel* proceedings as if a penalty had been issued. To do so would have the same effect as saying that HMRC could issue a penalty but not rely on dishonesty in any appeal, despite that being central to upholding a notice pursuant to section 60 or section 61. Even if that were strictly correct, this is a strong reason for rejecting the submission that dishonesty should have been raised in *Kittel* proceedings. This is because it is artificial to distinguish between attacking the issuing

of the penalty and attacking the reliance upon dishonesty. In reality, they are the same complaint and would amount to saying that whilst HMRC had the power to issue a penalty or director's liability notice, they are under an obligation not to do so if they have not laid the groundwork first by alleging dishonesty in any previous *Kittel* appeal. This would in effect be a fetter on the issue of such a penalty or notice which does not appear in the legislation and would cut down the benefit of the time period (and be wholly inconsistent with) the time limit in section 77.

41. For completeness, we note at this stage that we do not accept Mr Hayhurst's submission that later iterations of the penalty regime should be considered in order to reinforce the proper construction of the legislation in issue within this appeal as enabling HMRC to await the outcome of *Kittel* proceedings before deciding whether to issue a penalty. There is no ambiguity as to the construction of section 77 and the construction of the legislation itself is not in dispute.

42. We also note that whilst *Butt* is an example of *Kittel* issues being dealt with at the same time as dishonesty, that was packaged within a penalty appeal as there had been no previous *Kittel* appeal. This therefore says nothing as to whether dishonesty should be pleaded in a *Kittel* appeal where there is no penalty or director's liability notice yet. At its height, it is an example of how all issues can interact when heard at the same time. Again, this assists with the "could have" element of the rule in *Henderson v Henderson* but not the "should have" element.

Prejudice

43. The focus of Mr Pickup's submission upon the "should have" element is that Mr Trees has suffered prejudice as a result of HMRC deciding not to plead dishonesty in the CCA Appeal but to separate it off and bring it later within this appeal. Mr Pickup submitted that the reason for doing so does not matter (the context for such submission being a dispute as to whether HMRC did so in order to avoid CPR disclosure).

44. We agree with Mr Pickup that the reason for not pleading dishonesty earlier does not matter. However, we do not accept that Mr Trees is prejudiced such that it is an abuse for HMRC to rely upon dishonesty in this appeal. This is for the following reasons.

45. First, we agree with Mr Hayhurst that Mr Trees' complaint about his inability to explore all facts at the same time as a consideration of dishonesty is really a complaint about his inability to relitigate the matters in the 2020 Decision as a result of the 2023 Decision. Given that it has already been held to be an abuse of process for him to reopen the 2020 Decision, it follows that it is not an abuse of process for him not to be able to do so.

46. Secondly, we do not accept that Mr Trees has been denied the ability to challenge or examine the evidence. He (through the CCA Appeal) had the ability to do this in the CCA Appeal in respect of knowledge and means of knowledge and is able to do so within this appeal as regards dishonesty. As noted by Judge Redston in the 2023 Decision, CCA was expertly represented in the CCA Appeal and it took place before a very experienced tribunal. Judge Redston found at [76] that, "It would thus be extremely surprising if there had been any unfairness in the cross-examination process, and I do not accept that this was the case."

47. Thirdly, we do not accept that paragraph 114 of the 2020 Decision disposes of issues of dishonesty. Indeed, the combination of the 2020 Decision and the 2023 Decision expressly leaves open the question of dishonesty. Mr Pickup particularly relies upon the words in paragraph 114 "even if the allegations were consistent with a state of dishonesty on the part of the appellant and/or its director, the allegations were not allegations of dishonesty." This is not saying (or at least does not have the effect) that Judge Mosedale and Mrs Hunter were

making findings of or equivalent to dishonesty. Indeed, they expressly say that they would, "reach no conclusion about whether the appellant's and/or its director's behaviour was dishonest or fraudulent." We also have in mind paragraph 74 of the 2023 Decision, which we quoted earlier and which again marks the dividing line between Mr Trees' knowledge that the transactions were connected to fraud (which was decided in the 2023 Decision and cannot be relitigated) and whether or not he was dishonest, which is a matter for this appeal.

48. Fourthly, the whole context of the present appeal is that the CCA Appeal did not deal with dishonesty and that HMRC must now establish dishonesty in the present appeal. Mr Trees is entitled to submit that he was not dishonest (and expressly does so). This is the answer to Mr Pickup's question as to what more Mr Trees can do. He can present evidence that he was not dishonest insofar as doing so does not reopen matters decided in the 2020 Decision, he can challenge HMRC's position that he was dishonest, and he can submit that HMRC have not proved their case. The extent to which the evidence is available to do this and the extent to which such challenge or submission is possible or successful are matters for the substantive appeal rather than the Application.

49. Fifthly, Mr Trees has had CPR disclosure on matters relating to dishonesty. Whilst it is common ground that HMRC was not required to give CPR disclosure in the CCA Appeal, there may well be a dispute as to whether it was given anyway. We do not descend into that dispute and, for the purposes of this Application, assume that it was not upon the basis that there was no order for HMRC to do so. Importantly, however, Judge Redston has already made a determination in the 2023 Disclosure Decision that Mr Trees has had within this appeal all the disclosure to which he is entitled in respect of dishonesty. The failure to plead dishonesty in the CCA Appeal, therefore, has not deprived Mr Trees of CPR standard disclosure relating to dishonesty in this appeal.

Ivey

50. We do not accept that we, as the fact-finding tribunal, are unable to consider and apply the *Ivey* test for dishonesty. It is correct that Lord Hughes refers to "***a*** fact-finding tribunal" (our emphasis) in *Ivey* at [74]. However, it is reading too much into that wording to say that this precludes the present situation. *Ivey* was not a tax case and circumstances such as the present were not under consideration.

51. Crucially, this tribunal will still undertake a fact-finding role in respect of both elements of the *Ivey* test. The difference between this appeal and a case where dishonesty is to be considered in circumstances where knowledge has not already been the subject of a concluded *Kittel* appeal is that the 2020 Decision will provide evidence (which cannot be relitigated) that Mr Trees knew that the transactions were connected with fraud. Indeed, the 2020 Decision has been admitted into evidence by virtue of the 2023 Decision for precisely that purpose.

52. Further, we do not accept that Mr Trees is hampered by the failure to plead dishonesty in the CCA Appeal when challenging HMRC's position in respect of the *Ivey* test within this appeal. This is for the same reasons that we have already set out when considering prejudice.

Finality

53. It is not clear to us that pleading dishonesty would have achieved finality. Particularly given that (as in *Kishore*) there was no obligation to issue the Penalty and the DLN at the same time as the Denial Decisions or in the course of the CCA Appeal, the Penalty and the DLN could still have been issued after the CCA Appeal. It would then be a matter for Mr Trees to decide if he wished to appeal the DLN and, if he did so, the present appeal would still be required.

54. Again, this shows the artificiality in separating out the power to issue the Penalty and the DLN and the reliance upon dishonesty; once it is understood that HMRC remained entitled to issue the Penalty and the DLN, finality would not have been achieved by the CCA Appeal even if dishonesty had been pleaded provided HMRC decided to go on to issue the Penalty and the DLN afterwards.

Article 6

55. There was no dispute that Article 6 is engaged by the DLN, although there is a dispute as to whether this was from the date of the Denial Decisions or from the date of the DLN. Even if, for the purposes of this Application, we assume in Mr Trees' favour that the operative date is the earlier one of the Denial Decisions, we find that consideration of Article 6 does not change our decision as to abuse of process.

56. As regards unreasonable delay, Mr Trees has not suffered sufficient (or any) prejudice for the purposes of this appeal as regards his ability to challenge the DLN or to have a fair trial. There was no suggestion that CCA did not have a fair trial in the course of the CCA Appeal (which, again, has already been dealt with by Judge Redston in the 2023 Decision). Given Mr Pickup's rhetorical question as to what more Mr Trees can do in this appeal, no category of evidence has been identified that is not available to Mr Trees now that would have been available at an earlier stage.

57. As regards Mr Trees' ability to cross-examine, to challenge evidence, and to present evidence, we repeat our findings above in respect of our consideration of prejudice with the effect that Mr Trees' ability to have a fair trial is not hampered.

Broad Merits-Based Judgment

58. For all the reasons set out above, we consider that, applying a broad merits-based judgment, the failure to rely upon dishonesty at the CCA Appeal does not cause HMRC's defence of the present appeal to be an abuse of process pursuant to the rule in *Henderson v Henderson.* Whilst dishonesty could have been raised in the CCA Appeal, it cannot be said that it should have been raised.

Disposition of the application

59. It follows that we dismiss the Application.

THE SUBSTANTIVE APPEAL

The issues

60. There was no dispute about the legal framework. The Penalty and the DLN were issued pursuant to sections 60 and 61 of VAT 1994, the relevant sections of which we have already set out above. The burden of proof is upon HMRC.

61. It follows that HMRC must establish that the conduct giving rise to the Penalty against CCA was, in whole or in part, attributable to the dishonesty of Mr Trees, who was at the material time a director or managing officer of CCA.

62. There was no dispute between the parties that that Mr Trees was the sole director of CCA at the relevant time, that CCA's conduct is to be attributed to Mr Trees, and that the relevant conduct was CCA's involvement in the evasion of VAT. We note that if these matters had been in dispute, we would have made findings to the same effect as there were findings of fact at paragraph 134 of the 2020 Decision that Mr Trees was at all material times the sole director of CCA and that all CCA's relevant trading was undertaken by Mr Trees. The DLN refers to the relevant conduct as follows:

> "During our checks into the tax affairs of CCA Distribution Limited (in Administration), we found that the company had not declared the right

> amount of tax. We consider that the actions that led to this happening were dishonest. Because of this we are going to charge the company a civil evasion penalty. We are charging this penalty under Section 60(1) of the VAT Act 1994.
>
> We also consider that you were wholly responsible for the dishonest actions. This is because you, as the director and controlling mind of the Appellant, entered into transactions and sought to deduct £9,874,254 in input tax in relation to deals in April, May and June 2006 for the purpose of evading VAT.
>
> We will therefore recover some of the penalty from you. We are doing this under Section 61 of the VAT Act 1994."

63. The evasion of VAT involved for the purposes of sections 60 and 61 is therefore the entry into the transactions which were the subject of the Denial Decisions and CCA's conduct in seeking to deduct £9,874,254 in input tax for the VAT Periods. This is therefore the conduct which was considered in the CCA Appeal.

64. The only issue between the parties was as to whether Mr Trees' conduct was dishonest. The test for dishonesty as provided for in *Ivey* at [74] *per* Lord Hughes is set out in full above and comprises two stages. The first stage ("Stage One") is the subjective test; as Lord Hughes put it, "the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts." The second stage ("Stage Two") is the objective test; as Lord Hughes put it, "When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people."

The evidence

65. The 2020 Decision has already been admitted into evidence by virtue of the 2023 Decision.

66. We also had before us the bundle of documents used in the CCA Appeal. However, we were not asked by either counsel to consider or to take into account any particular document in that bundle. In any event, as the 2020 Decision is conclusive of the matters before the tribunal in the CCA Appeal, it would not be appropriate for us to reach any contrary conclusions by reference to such documents.

67. We have read and considered a witness statement from Mr Vincent D'Rozario on behalf of HMRC, who is employed by HMRC as a Higher Officer and who issued the Penalty and the DLN. Mr Pickup did not cross-examine Mr D'Rozario.

68. The appeal bundle included two witness statements from Mr Trees and one from Mrs Patricia Ryan (Appleco and CCA's bookkeeper) on behalf of Mr Trees. However, at the opening of Mr Trees' substantive case, Mr Pickup withdrew these statements and offered no evidence on behalf of Mr Trees. As such, although we read these witness statements as part of our pre-hearing reading, we do not take them into account within this decision.

69. The parties agreed that the evidence of Stage One of the *Ivey* test for dishonesty was to be found in the 2020 Decision. They also agreed that it was then a matter for this tribunal as to whether such conduct was objectively dishonest when considered in accordance with Stage Two of the *Ivey* test.

Submissions

HMRC

70. In the course of oral submissions, Mr Hayhurst highlighted twelve findings in the 2020 Decision which, when taken individually and together, he said established dishonesty pursuant to the *Ivey* test. At this stage, we set only the headlines of each finding, as we set out the detail of those findings below.

(1) The repeated nature of the deals.

(2) The patterns of the deals, which required some degree of active involvement.

(3) The pricing being dictated to CCA involved active rather than just passive involvement.

(4) The banking evidence establishes that Mr Trees' active involvement facilitated the fraud.

(5) Opening the FCIB account again required active involvement.

(6) The turnover and profit meant that Mr Trees was knowingly involved and took a profit from it.

(7) CCA's due diligence was not to protect CCA but was window dressing and so involved active deception.

(8) The absence or inadequacy of insurance again involved actively facilitating refund claims and putting in train mechanisms to do so.

(9) The failure to provide the IMEI numbers again established active concealment.

(10) CCA's disinterest in the goods reveals that CCA's trading was orchestrated and actively facilitated fraud.

(11) Mr Trees' untruthfulness when giving evidence reinforces the point that Mr Trees was actively pursuing a fraudulent claim for input tax on behalf of CCA.

(12) The risk free, benign trading environment meant that Mr Trees knew the role CCA was playing in the fraud.

71. Mr Hayhurst also said that HMRC relied upon the 2020 Decision as a whole. His and Mr Kerr's written opening submissions included a list of 22 findings of fact all of which overlap with the 12 headlines set out above or the wider point that CCA (and specifically Mr Trees) knew that CCA's transactions were connected to fraud but entered into them and sought to reclaim VAT regardless.

Mr Trees

72. Mr Pickup said on behalf of Mr Trees that there are many references to "we think" in the 2020 Decision, which were seen through the prism of *Kittel* rather than *Ivey*. It is of note that Judge Cornwell-Kelly had found the exact opposite. Mr Pickup also responded to each of the twelve features relied upon by HMRC, submitting that they do not establish dishonesty, whether individually or together. In particular, he submitted as follows.

(1) It is CCA's misfortune that it found itself repeatedly involved in fraudulent chains.

(2) It is in the nature of the conduct of sophisticated fraudsters that there was orchestration in the background. The dishonesty of others does not cause Mr Trees to be dishonest.

(3) The finding in the 2020 Decision as to pricing being dictated to CCA was that Mr Trees' evidence was unreliable. This was conjecture by the tribunal given the references to "we think". This is different to a finding of dishonesty.

(4) The banking evidence did not show dishonesty by Mr Trees.

(5) The FCIB evidence caused the tribunal to find that there was knowledge of fraud but the findings do not go as far as dishonesty.

(6) The existence of high turnover and profits is not itself dishonest.

(7) Mr Trees was open and frank about his due diligence. This is not dishonest.

(8) CCA did have insurance, but just not appropriate insurance. It is not dishonest to have inadequate insurance.

(9) Mr Trees gave his explanation to Mr D'Razario throughout about the IMEI numbers. Although the tribunal did not accept this evidence, this is not enough for it to give rise to dishonesty.

(10) The disinterest in the goods does point to orchestration by the fraudsters but not evidence that Mr Trees' involvement was dishonest.

(11) The assessment of Mr Trees' evidence was in the context of his knowledge, not dishonesty.

(12) The benign trading environment was simply saying that those who were proficient and have good systems in place will make significant profits. This is not dishonest.

Discussion and decision

73. We find the conduct giving rise to the penalty against CCA was, in whole or in part, attributable to the dishonesty of Mr Trees, who was at the material time a director of CCA. As set out above, the only issue in dispute in this regard was whether Mr Trees was acting dishonestly in such conduct. We set out our reasoning for our finding that Mr Trees was acting dishonestly below by dealing with some overview points, by setting out the relevant findings in the 2020 Decision for the purposes of Stage One for each relevant feature, and by making our own findings for the purposes of Stage Two for each such feature. Save for dealing with knowledge at the outset, we follow the order taken by Mr Hayhurst and Mr Pickup; we do this for consistency rather than to suggest any hierarchy of factors.

Overview points

74. We note Mr Pickup's emphasis upon Judge Mosedale and Mrs Hunter setting out in the 2020 Decision what they thought to be the case (as Mr Pickup notes, the various references to "we think"). However, we find that, read in the context of the decision as a whole, this simply denotes what they treat as their findings. Insofar as Mr Pickup meant by this that their findings were tentative or not conclusive, we disagree. As set out below, their findings were emphatic.

75. We find that the decision of Judge Cornwell-Kelly is not relevant as it was overturned by the Upper Tribunal and CCA's appeal to the Court of Appeal was dismissed. Further, it has been superseded by the 2020 Decision. Insofar as Mr Pickup was simply saying that different people (and, indeed, different Judges) can have different views of the same evidence, we agree. However, the definitive view of the evidence at Stage One is to be taken from the findings in the 2020 Decision. Insofar as alternative views can be taken as to objective dishonesty, then this is catered for at Stage Two when considering whether Mr Trees' conduct was dishonest by the objective standards of ordinary decent people.

76. The themes which emerge are: first, that Mr Trees was knowingly involved in facilitating the fraud; secondly, that he took part in orchestrated transactions that he knew were connected to fraud; and, thirdly, that he took steps to conceal the fraud. We find that each of these themes are dishonest by the objective standards of ordinary decent people. This is because each of these themes go beyond knowledge in that they involve active participation in the fraud. This is furthered by the fact that Mr Trees necessarily took the extra step of declaring the transactions and claiming input tax in respect of them, notwithstanding his knowledge about the connection to fraud.

Knowledge

Stage One

77. An important element of the consideration of the twelve factors set out above, both individually and together, is the finding of fact that Mr Trees conducted himself knowing that CCA was participating in transactions orchestrated for the purpose of VAT fraud.

78. We adopt the following findings from the 2020 Decision (the start of which referred to the FTT not deciding the case upon the basis that CCA should have known of its participation in fraud) in respect of Mr Trees' actual state of mind as to knowledge or belief as to facts:

> "[474] But we do not decide it on that basis. Putting all of that out of our mind, we look at the facts. We have found that CCA did know that its deals were dictated to it (§§304-309) and that its banking was dictated to it (see §299-303 and §§310-324): knowing any one of these matters meant Mr Trees could not have been in any doubt that CCA was participating in transactions orchestrated for the purpose of VAT fraud. He knew CCA was not trading as a free agent in any grey market.
>
> [475] But even if we were to put those findings of fact aside, we would still conclude that Mr Trees knew that CCA's transactions were connected to fraud. CCA was offered deals far too good to be true: it was offered the opportunity to make phenomenal profits over a short space of time for doing virtually nothing; the deals required no special skill nor utilisation of any carefully cultivated contacts, they involved few costs and no commercial risk. CCA knew that its customers had little interest in the product traded, it knew about the patterns in the trading that had no rational explanation, it knew that its trading environment was uncommercially benign (see §§269-298). The only explanation for all of this was clearly that the transactions were orchestrated for the purpose of fraud; that conclusion is all the more obvious when Mr Trees was well aware that there was VAT fraud taking place in mobile phone trading. From this we would conclude that it was very clear that Mr Trees knew that CCA's transactions were connected to fraud.
>
> [476] But it is even more certain that he did: he acted as a person who did know of the connection; CCA's deal documentation was inadequate reflecting that Mr Trees knew that it did not really matter; similarly CCA did not inspect the goods; CCA's due diligence was inadequate and undertaken to satisfy HMRC; negative indicators were ignored; CCA held inadequate insurance against some risks and none against others despite the high value of the goods; CCA was not willing to cooperate with HMRC over IMEI numbers where such cooperation might have helped reveal circulation of the phones and thus the fraud. Mr Trees had a relationship of trust with Future which was clearly involved in the fraud and this relationship continued long after the suspicions of an innocent trader would have been raised.
>
> [477] None of factors put forward by appellant as indicating Mr Trees did not know actually countered or explained away any of these findings. CCA's cooperation with HMRC was limited and self-interested; Mr Trees did not

> rely on Mr D'Rozario's opinions; HMRC was definitely not better placed to spot the fraud than Mr Trees; while Mr Trees did choose to put his own money at risk, this was at least as consistent with confidence that HMRC would not discover any fraud, as with any innocence; CCA's prior trading could only have given CCA confidence that HMRC would continue to repay it its input tax claims; its employees were not aware of anything untoward but there was no reason why they would know as it was Mr Trees who exclusively conducted the deals and in any event their evidence was so general it does not exonerate Mr Trees.
>
> [478] We are in no doubt that Mr Trees knew that all of CCA's transactions in the period in question were connected to fraud. As we have found that they were so connected, CCA's claim for input tax on the transactions was correctly denied by HMRC on the basis of Kittel. The appeal is DISMISSED."

Stage Two

79. We find that Mr Trees' conduct in this regard was dishonest by the objective standards of ordinary decent people. In particular, it is objectively dishonest to know that CCA's transactions were connected to fraud, to enter into those transactions regardless, and to seek to reclaim input tax on them. Knowingly acting in this way means that Mr Trees was actively involved in facilitating the fraud and then seeking to obtain a repayment of input tax from HMRC.

The nature of the deals

Stage One

80. We adopt the following findings from the 2020 Decision in respect of Mr Trees' actual state of mind as to knowledge or belief as to facts.

> "[208] In conclusion there is overwhelming evidence that CCA's supply chains, both buffer and broker, were contrived. There is no reason to contrive transactions other than fraud and in any event as we have already found all of them did trace back to a fraudulent default, albeit in the case of CCA's broker transactions, the connection to the fraudulent default was via a contra-trade. The overwhelming likelihood is that all of these transactions were contrived for the purpose of MTIC fraud and so we find.
>
> [209] We find for the reasons given above that all of CCA's transactions in the period in question, broker and buffer, were contrived by fraudsters; that its broker transactions were with alleged contra-traders, Future, Soul and Infinity, all of whose broker transactions could be traced back to fraudulent default; we also find CCA's buffer transactions all traced back directly to a fraudulent default."

Stage Two

81. We find that Mr Trees' conduct in this regard was dishonest by the objective standards of ordinary decent people. In particular, it is objectively dishonest to be involved in contrived transactions in the knowledge at the time of the transactions that those transactions were fraudulent (when taken together with the findings in the 2020 Decision as to knowledge).

Irrational trading

Stage One

82. We adopt the following findings from the 2020 Decision in respect of Mr Trees' actual state of mind as to knowledge or belief as to facts.

> "[294] Mr Trees accepted that he knew that the phones CCA traded in were recently imported into UK and he knew CCA was re-exporting them back to the continent; he also accepted he knew the phones would need adapters if they were sold retail in the UK as (mostly) they had 2 pin plugs.
>
> [295] His answer was that traders would buy what was available; in effect he was saying it was rational for a trader to participate in a deal in which it could make a profit, and up to a point we agree. But this was his opportunity to explain why he thought the market CCA was trading in existed; it was his opportunity to explain its commercial rationale. He had been able to explain the rationale for deals made by Appleco (see §§130-132): but he gave no real explanation for the trading CCA took part in. We think this indicates that at the time he knew the deals were connected to fraud.
>
> [296] Similarly, Mr Trees gave no convincing explanation for why it so happened that if CCA bought from Future, Soul or Infinity, it always sold the goods to an EU customer, but if it bought from its 8 other suppliers, it always sold the goods to a UK registered company. Again this is just another indicator of knowledge because such patterns in trading appear commercially irrational and Mr Trees, who must have known of it, had no explanation for it."

Stage Two

83. We find that Mr Trees' conduct in this regard was dishonest by the objective standards of ordinary decent people. In particular, it is objectively dishonest to know that CCA's deals were connected with fraud and yet to enter into them regardless and also to claim the repayment of input tax upon them.

Pricing:

Stage One

84. We adopt the following findings from the 2020 Decision in respect of Mr Trees' actual state of mind as to knowledge or belief as to facts.

> "[304] We move on to consider the margins. We are not dealing with matters in the same order as HMRC as this matter was the one with which Mr Kerr commenced his cross examination. Mr Trees stood by his 2012 evidence that every deal was negotiated individually and appeared to him to be just like any other commercial deal in a highly competitive market. He said he was a keen negotiator and implied that he was out to get the best deal.
>
> [305] Nevertheless, a short time later, when asked to explain why it so happened that CCA got a margin of exactly £1 per phone in 115 out of its 117 buffer deals in the period in question, his answer was that he wasn't trying to maximise profit but realise a pound per phone. That evidence was not only inconsistent with what he had first said but also with the broker deals, where the profits made per phone were much higher. His explanation for that was that his costs in broker deals were higher (transportation, insurance and being out of the money pending the VAT reclaim). But we find his profit was much more than £1 per phone even once these costs were considered.
>
> [306] We concluded that he was trying to explain what could not really be explained, other than by knowledge of the fraud, which was the consistency in margin on the buffer deals, and the consistently much higher profits on broker deals.
>
> [307] The question of the alleged negotiations was very important because it was CCA's case that the fraudsters wanted CCA to remain ignorant of the

> fraud and so would have undertaken negotiations with Mr Trees to make it appear like genuine trading. Yet we found his evidence on negotiations quite unconvincing: it was internally inconsistent for the reasons given above and inconsistent with the documentary evidence which showed that buffer deals always had consistent, round figure margins of nearly always £1, and broker deals had much higher margins. All this suggested Mr Trees did not undertake individual negotiations for each deal.
>
> [308] We take account of Mrs Ryan's and Mr Gordon's evidence referred to above. In so far as they heard Mr Trees on the phone during the day, negotiating deals, this tells us nothing. We have no evidence at all about what was actually said and to whom and even how many calls were in respect of Appleco's or CCA's business. Therefore, in so far as their evidence is relied upon as showing real negotiations took place on behalf of CCA, it is very weak evidence compared to the evidence which we have seen which indicates that negotiations in any real sense cannot have taken place.
>
> [309] In conclusion, we find Mr Trees' evidence that there was a rigorous negotiation unreliable. Mr Trees denied he was rung up, like Sander Pielkenrood, and told from whom to buy, to whom to sell, what to buy and sell and at what price. But Mr Trees' denial is not reliable: we think the evidence shows that that is what happened. As we have said at §194 above we have excluded reliance on Sander's evidence: but our finding is consistent with that evidence which indicates, that, had we put weight on it, it was reliable evidence."

Stage Two

85. We find that Mr Trees' conduct in this regard was dishonest by the objective standards of ordinary decent people. In particular, it is objectively dishonest knowingly to facilitate a fraud and to take active steps to conceal it by making it appear that there were negotiations when in fact negotiations did not in any real sense take place.

Banking evidence

Stage One

86. We adopt the following findings from the 2020 Decision in respect of Mr Trees' actual state of mind as to knowledge or belief as to facts.

> "[199] We find that the banking evidence gave a very clear indication that a sophisticated, complicated and very lucrative fraud on the British public was at the root of all the transactions at issue in this appeal. That is the only logical explanation for money circulating in loops. The loops are only consistent with a fraud which involved money being moved between entities to give the appearance of commercial transactions; it was entirely inconsistent with genuine commercial transactions where the ultimate seller would not be the ultimate purchaser.
>
> [200] Moreover, Mr Birchfield was only able to identify these loops because all the entities in the chain banked with FCIB. It would be extremely unlikely that a chain of commercial, independent traders would all choose to bank with the same bank.
>
> [201] The appellant suggested this was not unlikely because UK banks (possibly at the instigation of HMRC) closed accounts for mobile phone traders while FCIB, an off-shore bank, offered modern banking facilities. We do not accept that explanation: it was clear that both CCA and Future were able to hold and use other bank accounts as they did so: Future had a

Barclays account and CCA had a Bank of Ireland account. Moreover, the chains involved nonUK companies who would not be affected by the closure of UK bank accounts and so that could not be the explanation as to why they held FCIB accounts. We consider it more likely than not that the reason all the entities banked with FCIB is that it suited the fraudsters that they did so as it enabled the money to move swiftly and that is what they wanted.

[202] We say that it was clear that the fraudsters wanted the money to move swiftly because, firstly, that is what it did, and secondly, it is a logical inference. Some of the loops, involving many entities, took less than 2 hours. It is also clear the same funds were used to circulate many times within the same period of 24 hours.

[203] Mr Birchfield's evidence which we accept and which was not in any event challenged, was that FCIB only executed transfer instructions in 3 minute batches; it was therefore impossible for any person to transfer money they received in less than 3 minutes. We find that in many instances the recipient of funds must have given instructions to the bank to transfer the funds onwards in three minutes or less of its receipt because there was only 3 minutes between the receipt and the transfer. Such swift receipt and transfer of funds enabled large loops to be completed very quickly, as we have said.

[204] Moreover, when Mr Birchfield looked beyond the loops involving CCA and just followed the money, the evidence showed that the same sum of money might circulate in a loop 10 times within 24 hours: it looked like the money was circulating in loops as many times as possible in as short a time as possible.

[205] The money movements on their face had little to do with commercial transactions as the entities were in most cases passing on very quickly exactly the amount they received. It was like a game of pass the parcel. It did not look commercial: an entity being paid for a commercial transaction might choose to keep the money: it would expect to retain its profit margin in any event and wouldn't expect its supplier to know that it had been paid so its supplier wouldn't be looking for payment the moment its customer paid.

[206] The banking evidence did not look consistent with commerce. It was consistent with fraudsters trying to give credence to the orchestrated chain of transactions by setting up chains of payments to show HMRC that money had actually changed hands, while, at the same time being careful not to have their money out of their control for any length of time. It looked like the fraudsters were maximising the use of the money by ensuring as many loops took place within 24 hours as possible.

[207] Only a highly sophisticated and organised MTIC fraud makes sense of the banking evidence and the appellant did not suggest a realistic alternative explanation. We agree with HMRC that this demonstrated very clearly that at the root of the circulation of funds was a fraud as it was entirely inconsistent with a commercial transaction where individuals were free to pay their suppliers at a time of their choosing."

Stage Two

87. We find that the evidence in respect of the movement of funds is not on its own sufficient to establish objective dishonesty. The findings of fact set out above did not establish that Mr Trees knew about the movement of funds by other traders (as now revealed by the banking evidence). As such, Mr Trees was not objectively dishonest in respect of the movement of funds amongst other traders. We note, however, that this is to be distinguished

from the matters set out below under the heading "FCIB" which involves CCA's own involvement in the banking transactions.

FCIB

Stage One

88. We adopt the following findings from the 2020 Decision in respect of Mr Trees' actual state of mind as to knowledge or belief as to facts.

> "[299] Moving on from the uncommercial trading environment, we consider CCA's use of an FCIB bank account. We found Mr Trees' evidence about why CCA had an FCIB account unreliable. His answers went round in circles; with an explanation given at one time inconsistent with another explanation he gave earlier or later.
>
> [300] His evidence was that FCIB offered a very flexible, online account and CCA chose to use it as it was quick and convenient. CCA also had a Bank of Ireland account which in the 2012 hearing Mr Trees said was opened because it offered a good rate of interest. Nevertheless, when asked in the same hearing why CCA kept a large balance in its FCIB account, Mr Trees said it was because the interest from the Bank of Ireland account was low. It was also his evidence that he chose not to use the Bank of Ireland account for trading.
>
> [301] Yet when asked in this hearing why he paid its suppliers within minutes of receiving money from his customer he said it was in part because FCIB, every 4 to 6 weeks, locked accounts down for 1 to 2 weeks such that no money could be moved. This evidence had never been given before and was inconsistent with his suggestion that FCIB was a convenient business account.
>
> [302] It seemed to us that Mr Trees gave whatever explanation he thought of at the time in answer to any particular question but was unable to give answers that were, when viewed in the round, consistent. So FCIB was a convenient bank for a business to use when the question was why he happened to have an FCIB bank just the same as all other traders in the MTIC supply chain; but when the question was why he moved the money so swiftly, it was because FCIB might out of the blue lock his account down. There were many other examples of answers which were inconsistent.
>
> [303] We do not accept any of the answers he gave as to why CCA held an FCIB account: his evidence was inconsistent and unreliable. Taking into account that it was clearly convenient, even essential, to the fraudsters that the money circulated within the same bank so that it could move as fast as possible, we think the reason CCA held an FCIB account was because it was told to do so. It was put to Mr Trees that he was told to open an FCIB account but he denied this. We don't accept the denial as reliable: we think more likely than not that CCA held an FCIB account because he had been told that in order to participate in the transactions CCA needed an FCIB account. And that means Mr Trees knew that the transactions were connected to fraud."

Stage Two

89. We find that Mr Trees' conduct in this regard was dishonest by the objective standards of ordinary decent people. In particular, it is objectively dishonest to open and use an FCIB account that he had been told to open in order to participate in transactions that he knew were connected to fraud. This is because such knowledge and conduct denotes actual involvement and active facilitation of the fraud.

Turnover and profit

Stage One

90. We adopt the following findings from the 2020 Decision in respect of Mr Trees' actual state of mind as to knowledge or belief as to facts.

> "[269] One such factor was that CCA had, we find, what appeared to be an extraordinarily successful business, with profits increasing exponentially over time. CCA turned over £9.7m in 03/04, £65m next year and £402 million in the following year to April 2006. Its gross profits in the last 7 months of trading were £1.35 million and its costs were not high (just freight forwarding fees and insurance in the main).
>
> [270] It was put to Mr Trees that this was phenomenal success; he did not accept this. He pointed out that his background in Appleco meant that, on occasion, particularly in the earlier years, he had had some very profitable deals. It was suggested to him that the situations were not comparable as Appleco traded with a large staff whereas CCA's profits were entirely down to trades negotiated by him alone. His answer was that he was a workaholic.
>
> [271] As HMRC pointed out, after a few years of trading, CCA had a turnover approaching half a billion pounds. At the same time, Appleco, with a large staff with infrastructure, stock and business premises had a turnover some 250 times smaller. It was pointed out to Mr Trees that in 3 months, CCA sold 330,000 mobile phones which amounted to about 10% of the grey market at the time. Mr Trees' answer was that he was not aware of that and would have been more concerned with his position in the European market.
>
> [272] It was pointed out to him that he made no losses on any deals; he said he had made a loss in 2003 (which was accepted) and that he was not in the market to make a loss.
>
> [273] We found Mr Trees' evidence on his knowledge that the deals were too good to be true unconvincing. It was obvious that CCA's success, if this was genuine trading, was staggering. Mr Trees gave no convincing explanation for why at the time he thought this phenomenal success arose from genuine trading. It was ridiculous to suggest, as he did, that one person's hard work could be a rational explanation for such success: many people are workaholics without realising any profit at all.
>
> *Easy deals*
>
> [274] All the broker and buffer deals of CCA were 'back to back' which meant that the appellant simultaneously bought and sold goods; moreover, it appeared and we find that the deal documentation was all raised in a single day. In other words, what the appellant had to sell was always exactly what his customer wished to purchase. It never had to split up a purchase between a number of customers, nor did it have to purchase from more than one supplier in order to meet a customer's requirement.
>
> [275] Mr Trees' answer was that in order to ensure that he met a customer's demand, sometimes he had to buy less than was on offer. We don't find this answer reliable as we find other evidence from Mr Trees unreliable. In any event, it was put to him that it was all too easy and we think that it was.
>
> *No need to advertise*
>
> [276] Another factor is that CCA did not have any difficulty in locating persons from whom to buy stock and to whom to sell stock. Mr Trees accepted that CCA received many uninvited offers from persons wanting to buy and sell to CCA. He accepted that CCA did not need to advertise; while

it had a webpage with its contact details, it did not need to advertise any stock for sale. It seems willing suppliers and customers simply materialised.

[277] This was in stark contrast to Appleco which advertised very widely in order to trade.

Very few costs

[278] As we have said, CCA's business had very few costs. Its turnover increased to an enormous amount in a short space of time without requiring much in the way of effort or costs. Mr Trees' response, when this was put to him, was to play it down. He did not choose to recognise what was plain to us.

[279] The only staff required by CCA to turnover millions of pounds was Mr Trees, who put together all the deals, with a little part-time help from Appleco's bookkeeper (Mrs Ryan) on the accounts and another Appleco staff member (Mr Gordon) who did some due diligence paperwork. Mr Trees suggested an 'enormous' amount of work was put in on CCA's behalf, but all it seemed to amount to was the willingness of Appleco staff to pass on messages to Mr Trees, for paperwork to be faxed, and VAT numbers verified.

[280] We agree with HMRC that the ease with which CCA made huge profits should have been obvious to Mr Trees; Appleco employed about 25-30 staff in the labour intensive business of reconditioning and building computers and in 18 months 2004/5 had sales of less than £1million and gross profits of less than £130,000. Mr Trees denied that it was obvious that the comparison with Appleco must have made it clear that CCA's profits were the result of fraud: Mr Trees denied he knew that but we cannot accept his denial when all the evidence is taken into account.

Very few risks

[281] Mr Trees' evidence was that his suppliers would take stock back if his customer reneged on a deal. This had in fact happened he said with one deal with Infinity some time earlier in their trading relationship. It was put to him that this was all too good to be true. He denied this: he said that it was normal to be able to go back on a contract if payment had not been made.

[282] We do not agree that it is normal, but it is clear that Mr Trees knew that he was not at risk if a customer let him down. It was put to him that the deals were too easy and stress-free as he described them: his only, and unconvincing, answer was that CCA had made a loss on a deal in 2003.

[283] We consider it was just one more factor which meant that Mr Trees knew at the time that the deals were too good to be true and that the only possible explanation for CCA's trading was that fraud was at the root of it."

Stage Two

91. We find that Mr Trees' conduct in this regard was dishonest by the objective standards of ordinary decent people. In particular, again, it is objectively dishonest to know that CCA's deals were not genuine trading deals and were connected with fraud and yet to enter into them regardless, to obtain large profits, and also to claim the repayment of input tax upon them.

Due Diligence

Stage One

92. We adopt the following findings from the 2020 Decision in respect of Mr Trees' actual state of mind as to knowledge or belief as to facts.

> "[383] Mr Trees' position seemed to be that the due diligence was undertaken primarily for VAT risks; so, for instance, he accepted that his due diligence on his suppliers was better than on his customers. It seems he did not see due diligence as protecting CCA from commercial risks such as customers who reneged on deals; that is perhaps not surprising bearing in mind, as we have already said, CCA had an uncommercially benign trading environment and Mr Trees knew that.
>
> [384] Moreover, although Mr Trees reverted to saying that he thought the risk of fraud was in the supply chain and not connected to his customers, we have found (see §§346-7 and 350) he was aware that the risk of fraud applied as much to customers as to suppliers. Indeed, in some cases he did carry out a little due diligence on customers.
>
> [385] So the patchiness of the due diligence, the fact that most of it was carried out after many of the deals in this appeal, its lack of thoroughness, and the fact negative indicators were routinely ignored, means we find it was more likely than not that its purpose was not to protect CCA from being involved in MTIC fraud but as window dressing to be shown to HMRC, to bolster CCA's claim to refund of the input tax.
>
> ...
>
> [389] We don't accept Mr Trees' evidence that much due diligence was carried out before May/June 2006; apart from visits, there is little evidence of this and we do not consider him a reliable witness. We also think that the due diligence that was actually carried out was carried out to satisfy HMRC: it was clear that CCA was happy to trade before May/June 2006 with the same companies without much due diligence so the purpose of the due diligence was clearly not to protect CCA against trading risks. We do not think Mr Trees really suggested that it was.
>
> [390] Mr Trees implied that CCA did not need due diligence as it traded with companies with which it had an established trading history and it trusted: but it appears CCA was also content to trade with new companies as well with little in the way of due diligence.
>
> [391] And when due diligence was undertaken, negative indicators were ignored. The due diligence was of little real value in any event as Mr Trees did not look at his trading partners' accounts or obtain professional or banking references; the few trade references obtained appeared to raise questions rather than provide reassurance.
>
> [392] The appellant's case was that thorough due diligence would not have discovered the fraud and we agree with that. Thorough due diligence might well have made CCA suspicious (eg it should have revealed the connection between Future and Soul) it would not by itself have shown a definite connection to fraud.
>
> [393] But the evidence on due diligence is relevant as it shows, we find, that Mr Trees understood CCA was trading without taking any real commercial risks from which it needed due diligence to protect it. This is yet more evidence that Mr Trees was not worried about the deals going wrong, or being left holding goods and liable to pay for them without having a

> customer. It also shows that Mr Trees was not looking at the evidence with a view to avoiding a connection to fraud: he was not concerned by the patterns in the due diligence, of odd connections between companies and of consistently poor credit ratings. The purpose of CCA's due diligence was to satisfy HMRC.
>
> [394] The only explanation for all of this which makes sense is that at the time of the deals CCA knew that they were connected to fraud. It was put to Mr Trees that his due diligence was not consistent with wanting to check the legitimacy of his customers; he denied that but we do not accept his denial as reliable for the reasons given above. It was put to him that his due diligence was ineffective because he didn't want to find out anything because he knew his deals were connected to fraud; he denied this as well but we do not accept his denial as reliable for the above reasons."

Stage Two

93. We find that Mr Trees' conduct in this regard was dishonest by the objective standards of ordinary decent people. In particular, the use of due diligence as, to use Judge Mosedale and Mrs Hunter's words, "window dressing" and in order to satisfy HMRC denotes an attempt to conceal the fraud and also active involvement in facilitating the fraud.

Insurance

Stage One

94. We adopt the following findings from the 2020 Decision in respect of Mr Trees' actual state of mind as to knowledge or belief as to facts.

> "[395] CCA was buying and selling what appeared to be very valuable mobile phones. It was responsible for shipping them to its buyers. CCA's position was that up to the end of 2005 it relied on the insurance held by the freight forwarder to cover them in transit; HMRC did not challenge this. From January 2006, the law changed and it had to carry its own insurance in order to be covered. Mr Trees arrange a marine freight insurance policy through an agent, Mr Tidey. The policy cost CCA £19,200.
>
> [396] HMRC's case was the policy was ineffective to cover CCA and that it was just window dressing as CCA was not really concerned about the risk of loss in transit.
>
> [397] We consider the policy was inadequate for a number of reasons. Firstly, it listed the countries to which deliveries were covered. They did not include Belgium, when all of CCA's deliveries were made to Belgium. Mr Trees accepted that this was true: his point was that adding Belgium to the policy would not have increased its price and so it was simply an oversight on his part.
>
> [398] We agree that whether or not the policy was intended as window dressing or genuine insurance, it was clearly an error that Belgium was not specified. Nevertheless, such carelessness indicated a lack of interest in the details on Mr Trees' part.
>
> [399] The policy covered transit of goods worth £20 million per year. This was clearly inadequate: CCA sent goods worth £18 million in April 2006 alone. Mr Trees' explanation was that he understood that that was just an estimate which could be revised upwards. Mr Tidey's evidence was rather different: he considered the estimate had to be a genuine estimate. We find it was not. Even though Mr Trees denied this, we do not accept his evidence as reliable: the insurance was obviously inadequate.

[400] We think it was obvious to Mr Trees that the insurance was inadequate; £20 million a year was clearly a massive underestimate. CCA's previous year's carryings were £79 million. There was no suggestion CCA had even attempted to revise the estimate when (by June 2006) they had exceeded it several times over. Mr Trees said he did not think it necessary to do so; he suggested he could pay an additional premium at the end of the year.

[401] We find this was not consistent with Mr Tidey's evidence nor with good sense if Mr Trees wished to have insurance that was effective.

[402] We also note that the policy had a limit of £750,000 per ship yet the evidence shows that CCA's shipments exceeded this by many multiples meaning in the event of loss CCA was, for this reason as well, uninsured. Mr Trees accepted he became aware of this but stated it was the fault of Aquarius the freight forwarder and against his instructions; he suggested that he refused to pay them because of this.

[403] CCA's insurance was inadequate in other ways; the marine cargo policy only covered goods in transit abroad, it did not cover goods in transit or in storage in the UK. Yet CCA owned the goods and was at risk while they were stored and they were stored for days or weeks as CCA did not ship them until the earliest when it was paid. Mr Trees' explanation was that he relied on insurance held by the freight forwarder (Aquarius); he said he had fallen out with his previous freight forwarder (A1) for not providing a copy of the insurance. He did not agree with Mr Kerr that the freight forwarder made it clear that it was for owners to hold insurance.

[404] The policy also only covered mobile phones; whereas some of the deals included DVD payers, GPS and laptops. Their value was £4 million. Mr Trees' reply was that CCA selfinsured them although he accepted that meant CCA was uninsured. He said he was happy to take the risk. We note that in the context of his willingness to take risk, it was his unchallenged evidence that he did not insure his home and, having spent a lot of money on securing Appleco's premises, did not insure them either.

[405] HMRC's case, which Mr Trees denied, was that he bought the marine cargo policy in order to assist his repayment claims rather than because he wanted any insurance. We note that at this point it was Mr Trees' evidence that he did not know that HMRC would check CCA held insurance when considering whether to release an input tax reclaim; it was pointed out to him this was inconsistent with what he had said earlier; he then accepted that he had known at the time that Mr D'Rozario was interested in CCA's insurance position.

[406] We consider that Mr Trees' evidence was clearly unreliable in some areas (such as his knowledge of HMRC's interest in insurance policies) and we had to be careful of all he said. We consider that in other spheres (such as Appleco and his home) he was prepared to take the risk of no insurance, but at least in respect of Appleco, it was a calculated risk as he spent significant sums on security. With CCA, we think he was also prepared to trade without insurance; it is more likely than not on the evidence we have that the reason CCA bought the inadequate marine insurance policy which it did was to assist with its VAT refund claims and not because it genuinely wanted insurance to protect itself from risk. This explains the policy's inadequacy and the error over Belgium.

[407] The question is why it did not want protection from the risk: with Appleco, Mr Trees took a calculated risk as he was able to diminish the risk

> of theft: CCA's stock appeared to be many multiples more valuable and yet no steps were taken to diminish CCA's risk of damage or theft of them, other than the purchase of this obviously inadequate insurance policy. It suggests to us that Mr Trees was not concerned with the risk, which strongly suggests he knew that there was no real risk because he knew the trading was orchestrated and his trading partners not really interested in the goods supposedly the object of it."

Stage Two

95. We find that Mr Trees' conduct in this regard was dishonest by the objective standards of ordinary decent people. In particular, again, it is objectively dishonest to know that CCA's deals were orchestrated and connected with fraud and yet to enter into them regardless and also to claim the repayment of input tax upon them.

IMEI numbers

Stage One

96. We adopt the following findings from the 2020 Decision in respect of Mr Trees' actual state of mind as to knowledge or belief as to facts.

> "[408] Mr D'Rozario kept a log of his contact with Mr Trees; he also produced the correspondence between the parties. It was clear from this that starting in 2003, Mr D'Rozario asked Mr Trees to keep records of the IMEI numbers of the phones which he was trading. It was also clear that Mr D'Rozario explained to Mr Trees why it would help HMRC identify fraud: it would help them identify phones which were being repeatedly sold (in other words, the 'carousel' element of MTIC fraud). Mr Trees accepted he knew that IMEI numbers would identify circularity.
>
> [409] We find that, from 2003, Mr Trees' normal reply to Mr D'Rozario was that he would consider providing the numbers to HMRC. It was HMRC's case that nevertheless he never provided any IMEI numbers to HMRC.
>
> [410] At the start of the hearing before us, it was the appellant's case that Mr Trees had provided a list of IMEI numbers to HMRC in January 2006. The list was produced: it had not been before the previous hearing as it had only been found more recently. Mr D'Rozario's logs did not record any receipt of IMEI numbers and Mr D'Rozario himself had no recollection of receiving any.
>
> [411] On closer investigation, as the hearing progressed, it became apparent that the list could not have been sent to HMRC in January 2006. There was a record that the appellant's freight forwarders had told Mr Trees none could be provided for any period before April 2006; moreover, the list of phones, while it appeared to Mr D'Rozario to contain genuine IMEI numbers, did not clearly relate to any of CCA's deals because of the mixture of model numbers.
>
> [412] We accept that at some point in early to mid-2006, CCA did obtain a list of some IMEI numbers; we do not accept that they were ever provided to HMRC. We prefer Mr D'Rozario's evidence; it is consistent with the documents and he was a reliable witness. Mr Trees was not.
>
> [413] The significance of the IMEI numbers is the reason why CCA failed to provide them to HMRC while at the same time kept promising HMRC that it would consider doing so. It was put to Mr Trees that he was stringing HMRC along, and we think that he was.
>
> [414] In the hearing, he gave a number of reasons for not providing the numbers to HMRC. He said it was too expensive (50p per phone he

suggested); he also said he believed HMRC would not tell him the results of the check if he provided the numbers to them.

[415] He was also insistent in the hearing, repeating something he said first in his 2018 witness statement, that a computer could not, in a reasonable time, carry out a check as each IMEI number was 15 digits long and there were about 2 million IMEI numbers in HMRC's Nemesis database. He suggested it would take weeks for any computer to work out if one 15 digit number matched any of the 2 million IMEI numbers held by the computer. We had no expert evidence on this, but we agree with HMRC that we could take judicial notice of the powers of computers in 2006 and this evidence was not credible. In any event, it made no sense: if computers were incapable of making this match, why would HMRC have had the Nemesis database? Moreover, it was clear that Mr Trees knew that the Nemesis database was used by HMRC. We thought this evidence about computer processing inadequacy was a poor attempt by Mr Trees to explain his reluctance to assist HMRC by providing IMEI numbers.

[416] We do not accept that obtaining lists of IMEI numbers was too expensive: it was clear that at some point CCA did obtain some IMEI numbers. We do accept the appellant's point that HMRC would not necessarily have informed CCA of the outcome of any IMEI number check but we comment that this would not have concerned Mr Trees if, as Mr Trees, said, CCA genuinely wanted to assist HMRC in its fight against MTIC fraud.

[417] We also accept Mr Pickup's point that there is no allegation or attempt to prove that CCA actually dealt in phones that were being carouselled, any more than HMRC attempted to prove (other than in respect of the Samsung Serenes and P990s) that CCA was dealing in phones that did not exist or did not meet the specification in the invoices. We agree that (other than in respect of the Samsung Serenes and P990s) it is not proved the phones did not exist or did not meet specification or were being carouselled; but the contrary is also not proved.

[418] It seems to us that, as Mr Trees did not obtain the IMEI numbers and did not inspect the goods himself, he could not know that the phones existed, met specification and had not been carouselled. If he was ignorant of connection to fraud, he would have nothing to fear from providing the IMEI numbers to HMRC; but if he did know of the connection, or suspected it, sensibly he would have to be concerned about the risk to CCA if HMRC saw the IMEI numbers of the phones it traded.

[419] We think that Mr Trees did not want to give HMRC IMEI numbers because he was aware that the check might reveal that CCA was dealing in phones that either it or someone else had dealt in before and that the phones were circulating between wholesalers rather than reaching a retailer. If Mr Trees had truly believed that CCA's transactions were not connected with fraud, he would, we think, have been happy to provide what Mr D'Rozario wanted to satisfy him of CCA's bona fides.

[420] Having said that, we accept that Mr Trees' failure to provide the IMEI numbers by itself might indicate nothing more than that he suspected his transactions were connected to fraud: suspicion is not enough to deny input tax. However, when this factor is considered with all the other factors which we have discussed, we think it is just one more element that shows Mr Trees knew CCA's transactions were connected with fraud."

Stage Two

97. We find that Mr Trees' conduct in this regard was dishonest by the objective standards of ordinary decent people. In particular, "stringing HMRC along" denotes an attempt to conceal the fraud and also active involvement in facilitating the fraud.

Disinterest in the goods

Stage One

98. We adopt the following findings from the 2020 Decision in respect of Mr Trees' actual state of mind as to knowledge or belief as to facts.

> "[297] We found Mr Trees reluctant to admit that he knew that his customers did not inspect the goods that they were purchasing and had to pay for before they were transported to them. He did accept, when questioned, that not only was there no evidence that CCA's customers ever inspected the goods, but that (as they were held to CCA's order) he would have had to give permission to enable his customers to inspect them. His answer seemed to be that there was some level of trust between the parties and the freight forwarder and that his customers did not need to inspect the goods.
>
> [298] We did not find his evidence on this convincing: he was describing an uncommercially benign trading environment and he must have known that at the time. His customers gave little specificity as to what they wanted and did not inspect the goods before or after they purchased them, and never rejected them after they received them. He knew about this lack of interest in the goods and was not concerned. Again, we think this indicates he had actual knowledge of the connection to fraud.
>
> ...
>
> [356] CCA's deal documentation, such as its invoices and purchase orders, did not contain terms: they did not specify time of payment nor contain any clauses about when title would pass. As the goods changed hands at a time other than the time of payment, we think the question of title would have been quite important, particularly for valuable goods.
>
> [357] Mr Trees' explanation for this was not particularly convincing: he said terms couldn't be put down in writing as they would be too long. This was clearly not correct: important terms could be set down quite shortly. It was pointed out to him that some of CCA's counterparties did specify terms (eg Pielkenrood's paperwork specified the type of phones it wanted and required despatch within 3 days of payment). He also said that it was unnecessary to specify anything in writing as it was all agreed orally: again this was not a convincing answer as the whole point of writing things down is to record what was verbally agreed.
>
> [358] We consider that he failed to give a sensible reason as to why basic contract terms for contracts involving very large sums of money and what appeared to be very valuable goods were not reduced to writing. At best his answer amounted to saying that everyone trusted each other so terms did not need to be put in writing.
>
> [359] The evidence, however, is that the deals were orchestrated and whether or not Mr Trees knew that, it is clear that every other participant in the supply chains must have known that. They were therefore not interested in the goods or the contractual terms but simply in playing their part in the charade: this is reflected in the lack of contractual terms and specification of the goods. The fact that CCA's own contracts also lacked such specification

> and terms suggests that Mr Trees similarly was not interested and for the same reason."

Stage Two

99. We find that Mr Trees' conduct in this regard was dishonest by the objective standards of ordinary decent people. In particular, again, it is objectively dishonest to know that CCA's deals were, to use Judge Mosedale and Mrs Hunter's words a, "charade" and were connected with fraud and yet to enter into them regardless and also to claim the repayment of input tax upon them.

Mr Trees untruthfulness

Stage One

100. We adopt the following findings from the 2020 Decision in respect of Mr Trees' actual state of mind as to knowledge or belief as to facts.

> "[255] We deal with Mr Trees' evidence as we go through our findings of fact. For the reasons we explain in detail below, we did not find his evidence about what he knew, and why he acted as he did, at the relevant time, to be credible. It was inconsistent and implausible. We also found that he played down certain matters in an attempt to present them as something other than they were.
>
> [256] For instance, in his witness statement he said CCA only occasionally got credit from his suppliers. When it was pointed out to him that CCA did not pay its suppliers until it was in funds from its customers, he said this happened 'some of the time'. He was challenged and went on to accept it happened in every deal. Mr Trees' unconvincing explanation was that he thought 'credit' meant agreed credit for a set number of days; he also said it was not real credit as the goods were held at all times by the freight forwarder; when challenged, he accepted that the freight forwarder held the goods to CCA's order. Another instance of this was that his witness statement said his suppliers would take back goods if CCA's customers reneged on the deal; in evidence, he appeared to retract that to an extent by saying his customers would 'listen' if CCA wanted to renege. It seemed to us that Mr Trees was playing down his original evidence on just how benign CCA's trading environment actually was.
>
> [257] We also found that he avoided giving straight answers. For instance, when it was put to him that CCA's was a seamless and risk-free business, his answer was that CCA didn't need staff because it was selling mobile phones and not assembling computers. When asked if was important to CCA if it could return purchased goods to its suppliers if its customer let it down, he talked around the question without giving an answer. These were just examples: it seemed to us that he avoided answering questions to which he had no good answer.
>
> [258] In the main, we deal with why we found his evidence unreliable as we go through our findings of fact so we can deal with them in context. But we mention two further instances of unreliable evidence here because their only relevance is to the reliability of Mr Trees, rather than to our other findings of fact.
>
> [259] The first was in respect of Mr Trees' evidence with respect to Pielkenrood and in particular that he only dealt with Simon Pielkenrood, the director of the company. He said he never dealt with Sander.
>
> [260] There was some documentary evidence which suggested otherwise: there was a fax from Sander to 'Dear Ashley'; CCA's due diligence showed

> Sander as the contact; Pielkenrood's trade application form showed Sander as the contact; CCA's database had Sander down as a contact.
>
> [261] HMRC suggested Mr Trees was trying to distance himself from Sander's evidence (discussed above at §§189-194). Mr Trees denied this and pointed out that he had always accepted he dealt directly with Raj Gathani at Future even though Mr Gathani had pleaded guilty to fraud. We don't see the situations as similar; it was always clear that Mr Trees dealt directly with Mr Gathani and in any event there was no suggestion that Mr Gathani's evidence implicated CCA (indeed he pleaded guilty so presumably gave no evidence). Sander's evidence, however, directly contradicted a key part of Mr Trees' evidence.
>
> [262] We agree with HMRC that the documentary evidence does show that it was more likely than not that it was Sander and not Simon who was CCA's main contact at Pielkenrood. We consider this yet one more reason why we do not consider Mr Trees' evidence as reliable.
>
> [263] The second instance was that Mr Trees also gave evidence we could not rely on in respect of Soul. There were documents from Soul, stamped with what purported to be CCA's stamp, which indicated delivery of goods to CCA's premises. Mr Trees was adamant that goods were not delivered; he was also quite adamant that the stamp was not CCA's and that CCA did not have a stamp. This was odd because in the previous hearing he had accepted it was CCA's stamp and then later in this hearing, when confronted with a different stamped document in a different context, did accept that CCA had a stamp.
>
> [264] We consider Mr Trees' evidence on this unreliable. We consider it more likely than not that CCA did have a stamp and it was used on the Soul documents in question. We think Mr Trees gave unreliable evidence as he had no reasonable explanation for why CCA would have stamped a document to say goods were delivered to CCA when they had not been."

Stage Two

101. We find that Mr Trees' conduct in this regard was dishonest by the objective standards of ordinary decent people. In saying that Mr Trees' evidence was "implausible", Judge Mosedale and Mrs Hunter went beyond simply saying that his evidence was unreliable or not accepted. Giving implausible evidence in a witness statement and in oral evidence is dishonest by the objective standards of ordinary decent people as it is an attempt to deceive the tribunal. This is perpetuated by it being inherent in the finding that Mr Trees knew that CCA's transactions were connected to fraud that he also knew that CCA was not entitled to reclaim the input tax. We note that although this was necessarily after the transactions, it is to be seen objectively as an attempt within the CCA Appeal to conceal the fraud.

Benign trading environment

Stage One

102. We adopt the following findings from the 2020 Decision in respect of Mr Trees' actual state of mind as to knowledge or belief as to facts.

> "*Customers and suppliers willing to accept uncommercial terms*
>
> [284] Linked with the fact that the deals were too good to be true, there were reasons for finding that the trading environment described by Mr Trees was uncommercially benign and he must have known this. Mr Trees accepted that CCA's suppliers sold what appeared to be very high value goods to CCA without requiring immediate payment; moreover, even though some

had terms which retained title, in practice CCA's suppliers always released control of the goods to CCA long before CCA paid.

[285] Mr Trees' evidence was that the terms of credit was that CCA would pay its supplier when it was paid by its customer. He could not give a rational explanation for why his suppliers were so generous. We also note that CCA was not even required to stick to these terms: Mr Trees' evidence elsewhere was that CCA, when it received funds, used the money to pay its most pressing supplier which would not necessarily be the supplier of the goods for which it had just received the payment. It all goes to show that CCA's suppliers extended credit to CCA with no set date for repayment and no requirement for interest. This was obviously not commercial behaviour.

[286] Mr Trees also accepted that CCA's customers were in most cases (35 out of 39) willing to pay for the goods before CCA shipped them. It was put to Mr Trees that its customers were not acting in a commercial fashion: his reply was that they could have checked that the goods existed before paying for them had they wanted to. That was no answer : we find he was unable to give a rational explanation for why a third party customer would pay for goods before receiving them and without checking on their existence and quality. The fact that they did so was a clear indicator to Mr Trees at the time of fraud being at the root of the transactions.

[287] We note that in most cases the delay between payment to CCA and shipment by CCA was normally only a few days, in some cases it was a matter of weeks and in one case a matter of 42 days. Mr Trees said he could not remember why this delay occurred and after 12 years we are not surprised; nevertheless, the impression we had is that CCA's customers were not clamouring for their goods to be shipped even once they had paid. Mr Trees knew that at the time.

[288] So, CCA never had to pay for the goods before CCA was paid by its customers. CCA's customers normally paid CCA before CCA shipped the goods, and sometimes a long time before they were shipped. Mr Trees told the Tribunal that he was not concerned that his suppliers extended credit to him on such generous terms with no interest liability and no set date for payment. In so far as his customer's willingness to pay in advance, he said that this was the way the business operated: the customers would not get the goods until they paid.

[289] But this was clearly not true for CCA which was able to take control of the goods without payment. He was given the chance to explain this but gave no real explanation other than to suggest that it was different when the supply was UK to UK rather than UK to EU because (he said) it was easier for the supplier to get the goods back if the supply was UK to UK. This clearly made no sense whatsoever as a UK supplier giving control of the goods to a UK company had no way of preventing them being exported, and indeed that is exactly what happened. CCA did export them.

[290] Mr Trees appeared to be a rational person and was unable to give to us a rational explanation for why at the time he thought that CCA was able to operate with such very accommodating suppliers and customers. We conclude his evidence was not reliable and that he knew at the time that the reason for this benign trading environment was that it was connected to fraud.

Customers and suppliers materialised without any effort

[291] We have already mentioned that CCA's customers and suppliers materialised without any effort on CCA's part: it was put to him that he must

> have asked himself why he was not being cut out of market: why didn't his suppliers supply direct to his customers and cut out CCA? His answer was that he had not thought about it at the time and it wasn't something a businessman would think about.
>
> [292] It was put to him that he knew Future, Soul and Infinity were very large businesses; he accepted he knew that; he was asked why he had not questioned why they sold to CCA rather than directly to customers in the EU? Again his answer was that he had not thought about it, although he did suggest CCA had contacts that they might not have had.
>
> [293] We think, particularly taking into account Mr Trees' knowledge of how easy CCA's trading environment was, and how customers materialised with no effort on CCA's part, and knowledge that there was fraud in the market, he would have considered CCA's role very odd if he was concerned to avoid deals connected to fraud. It was obviously very strange that CCA was in a position to make very large profits for doing very little, when there was no obvious commercial reason why CCA's suppliers couldn't have cut out CCA and realised CCA's profits for themselves. We do not consider Mr Trees' answer that he did not think about it reliable. We think he knew why CCA was in the supply chain: he knew CCA was a broker in transactions orchestrated for the purposes of fraud."

Stage Two

103. We find that Mr Trees' conduct in this regard was dishonest by the objective standards of ordinary decent people. In particular, again, it is objectively dishonest to know that CCA's deals were orchestrated and connected with fraud and yet to enter into them regardless and also to claim the repayment of input tax upon them.

Conclusions

104. It follows that we find that Mr Trees was dishonest in accordance with the *Ivey* test. We note that (with the exception of the banking evidence relating to traders other than CCA) this is the case for each of the above factors individually. This is, however, reinforced when all of those factors (again with the exception of the banking evidence relating to traders other than CCA) are taken together.

Disposition of the substantive appeal

105. It follows that we dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

106. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RICHARD CHAPMAN KC
TRIBUNAL JUDGE

Release date: 06th JUNE 2024