Trinity Term
[2019] UKSC 30
On appeal from: [2017] EWCA Civ 956

JUDGMENT

OWD Ltd trading as Birmingham Cash and Carry (In Liquidation) and another (Appellants) *v* Commissioners for Her Majesty's Revenue and Customs (Respondent)
OWD Ltd trading as Birmingham Cash and Carry (In Liquidation) and another (Respondents) *v* Commissioners for Her Majesty's Revenue and Customs (Appellant)

before

Lord Reed, Deputy President
Lord Sumption
Lord Hughes
Lady Black
Lord Briggs

JUDGMENT GIVEN ON

19 June 2019

Heard on 12 July 2018

HMRC
James Eadie QC
Amy Mannion
(Instructed by HMRC Solicitor's Office)

OWD and another
Philip Coppel QC
David Bedenham
(Instructed by Rainer Hughes Solicitors)

LADY BLACK: (with whom Lord Reed, Lord Sumption and Lord Briggs agree)

1. The Finance Act 2015 introduced a regulatory scheme requiring wholesalers supplying duty-paid alcohol to be approved by Her Majesty's Revenue and Customs Commissioners ("HMRC" or "the Commissioners") under section 88C of the Alcoholic Liquor Duties Act 1979 ("ALDA"). Approval may only be given if HMRC are satisfied that the person seeking to carry on the activity is a fit and proper person to do so.

2. OWD, Hollandwest and Budge Brands ("the wholesalers") were already involved in the wholesale supply of duty-paid alcohol when the scheme was introduced. They needed HMRC approval to continue to trade. Approval was refused because HMRC were not satisfied that they were fit and proper. Each wholesaler appealed to the First-tier Tribunal ("FTT") against the decision, inviting HMRC to permit them to continue trading whilst the appeals were pending. When HMRC refused to permit this, the wholesalers brought judicial review proceedings in the High Court challenging that refusal, and seeking orders that would permit them to carry on trading until after the determination of the FTT appeal. Having failed in the High Court, they obtained a measure of relief in the Court of Appeal, but on terms that they did not find satisfactory. Both they and HMRC appeal to this court against aspects of the Court of Appeal's decision.

The principal questions for determination in this court

3. Two principal questions arise for determination on the appeal. The first, in broad outline, is this: when HMRC have refused a person's application for approval under section 88C of ALDA, what, if any, power do they have to permit that person to carry on trading pending the determination of an appeal to the FTT?

4. HMRC's case is that they have no power to grant temporary approval pending the determination of a wholesaler's appeal. The wholesalers argue that section 88C of ALDA enables HMRC to grant such approval or, failing that, HMRC can do so under section 9 of the Commissioners for Revenue and Customs Act 2005 ("the 2005 Act"). The Court of Appeal held that temporary approval can be granted to a person under section 88C of ALDA, but not under section 9 of the 2005 Act. However, contrary to the wholesalers' argument, it held that considerations of hardship and the impact on the person's appeal rights were irrelevant to the decision whether to grant temporary approval to cover the appeal period, and that HMRC's focus must be purely on whether the person was fit and proper for that limited

purpose. The issues that require attention in relation to this first question are, therefore, whether HMRC have any power at all, and if so, on what basis it is to be exercised.

5. The second question concerns the position if HMRC either do not have power to permit trading pending the determination of an appeal to the FTT, or have power but decline to exercise it. In those circumstances, what interim relief, if any, can the High Court grant to ensure that the appeal to the FTT is not thwarted by the wholesaler going out of business whilst awaiting its determination?

6. The Court of Appeal held that the High Court was able to grant injunctive relief under section 37 of the Senior Courts Act 1981. Drawing on *CC & C Ltd v Revenue and Customs Comrs* [2014] EWCA Civ 1653; [2015] 1 WLR 4043 ("*CC & C Ltd*"), it held that relief would only be granted in rare circumstances, but that this could include where there was a clear and properly evidenced claim that a failure to grant interim relief would render the appeal to the FTT illusory. This accorded with the position of HMRC. The wholesalers disagreed with the narrow limits imposed by the Court of Appeal on the scope for relief, but were refused permission to appeal to this court on that ground. Accordingly, the hearing before us began on the basis that the High Court had power to grant injunctive relief, exercisable in exceptional circumstances.

7. As a result of questions which arose in the course of oral argument about the High Court's power, we received further written submissions on the point, after the hearing. Although both parties continued to support the existence of a power in the High Court, the issue needs attention in this judgment.

The regulatory scheme: background

8. The regulatory scheme introduced by the Finance Act 2015 was designed to combat fraud in relation to tax due on alcohol. Alcoholic liquors are subject to excise duty. Generally the charge to duty arises at the moment of importation into the United Kingdom, or at the moment of production here. The charge normally falls exclusively on the distiller/manufacturer/importer of alcohol. The duty paid is then reflected in the price of the alcohol as it passes down the supply chain. Alcohol was, however, entering the supply chain without the requisite duty being paid, resulting in a significant loss of tax revenue. There had long been a requirement for those dealing in duty-suspended alcohol to be approved by HMRC, but there was no equivalent requirement for those dealing in duty-paid alcohol. The introduction of the present scheme, known as the Alcohol Wholesaler Registration Scheme ("AWRS"), closed that gap.

The statutory provisions

9. Section 54 of the Finance Act 2015 inserted Part 6A and Schedule 2B into ALDA. Much of the fine detail of the statutory provisions is not necessary for present purposes and what follows is, at times, a broad summary only.

10. A central concept is "controlled activity". By virtue of section 88A(8), "controlled activity" means selling controlled liquor wholesale, offering it for sale wholesale, or arranging in the course of a trade or business for it to be sold or offered for sale wholesale. By section 88A(2), a sale is of "controlled liquor" if it is a sale of dutiable alcoholic liquor on which duty is charged under the Act at a rate greater than nil, with the excise duty point for the liquor falling at or before the time of the sale. By section 88A(3), subject to some exceptions, the sale is "wholesale" if the seller makes the sale, in the course of his trade or business, to a trade or business buyer, for the buyer to sell or supply in the course of his trade or business. It must be noted that one of the exceptions is, by section 88A(3)(d), "an excluded sale". Section 88A(7) defines a sale as an "excluded sale" if it is "of a description prescribed by or under regulations made by the Commissioners".

11. Section 88B gives the Commissioners power to make provision, by regulations, for certain matters, including as to the cases in which sales are, or are not, to be treated for the purposes of Part 6A as (amongst other things) wholesale sales, and sales of controlled liquor.

12. Section 88C deals with approval to carry on controlled activity. It provides:

> "**88C.** ***Approval to carry on controlled activity***
>
> (1) A UK person may not carry on a controlled activity otherwise than in accordance with an approval given by the Commissioners under this section.
>
> (2) The Commissioners may approve a person under this section to carry on a controlled activity only if they are satisfied that the person is a fit and proper person to carry on the activity.
>
> (3) The Commissioners may approve a person under this section to carry on a controlled activity for such periods and subject to such conditions or restrictions as

they may think fit or as they may by or under regulations made by them prescribe.

(4) The conditions or restrictions may include conditions or restrictions requiring the controlled activity to be carried on only at or from premises specified or approved by the Commissioners.

(5) The Commissioners may at any time for reasonable cause revoke or vary the terms of an approval under this section.

(6) In this Part 'approved person' means a person approved under this section to carry on a controlled activity."

13. Section 88D obliges HMRC to maintain a register of approved persons. It is to contain "such information relating to approved persons as the Commissioners consider appropriate" (section 88D(2)). HMRC may make publicly available "such information contained in the register as they consider necessary to enable those who deal with a person who carries on a controlled activity to determine whether the person in question is an approved person in relation to that activity" (section 88D(3)). This publicly available information is important as section 88F provides that "[a] person may not buy controlled liquor wholesale from a UK person unless the UK person is an approved person in relation to the sale."

14. Section 88G supports the statutory scheme by establishing various criminal offences. For example, section 88G(1) makes it an offence to contravene section 88C(1) by selling liquor wholesale knowing, or having reasonable grounds to suspect, that the buyer is carrying on a trade or business and the liquor is for sale or supply in the course of that trade or business. Buying controlled liquor from an unapproved person, contrary to section 88F, is also an offence, if the person knows or has reasonable grounds to suspect the unapproved status of the supplier.

The Wholesaling of Controlled Liquor Regulations 2015

15. The Wholesaling of Controlled Liquor Regulations 2015 (SI 2015/1516) ("the 2015 Regulations") were made under Part 6A of ALDA. They provide for the manner in which an application for approval is to be made and processed.

16. In the present context, the following provisions of the Regulations are of note:

i) The application must be on a prescribed form, regulation 3(1).

ii) If HMRC refuse an application, they must notify the applicant of that and give reasons, regulation 4(4).

iii) In addition to any conditions or restrictions imposed by HMRC under section 88C(3) of ALDA, "the approval of a person is subject to such conditions and restrictions as the Commissioners may prescribe", regulation 7.

iv) HMRC may prescribe descriptions of sales that are excluded sales for the purposes of Part 6A of ALDA, regulation 10.

v) Part 6 of the Regulations provides for dutiable alcoholic liquor to be subject to forfeiture where a person contravenes section 88C or section 88F or any condition or restriction imposed under Part 6A of ALDA or under the Regulations.

vi) By regulation 2, "prescribed" means "prescribed by the Commissioners in a published notice".

Excise Notice 2002: Alcohol Wholesaler Registration Scheme

17. *Excise Notice 2002: Alcohol Wholesaler Registration Scheme* ("EN2002") was made under ALDA and the 2015 Regulations. It explains what the AWRS is about and addresses various particular aspects of it. It has been amended many times since its first publication in November 2015. The version which is relevant to the decisions of HMRC in this case is that in force between 21 June 2016 and 26 March 2017; unless otherwise specified, references are to that version.

18. Existing wholesalers who sought approval after the introduction of the scheme were informed, by the relevant version of EN2002, that they could continue to trade as normal until receipt of HMRC's decision (para 6.5).

19. Para 6.10 set out how HMRC would assess whether an applicant was fit and proper to carry on a controlled activity. It contains a list of relevant points, and a general statement that:

> "HMRC must be satisfied the business is genuine and that all persons with an important role or interest in it are law abiding, responsible, and don't pose any significant threat in terms of potential revenue non-compliance or fraud."

20. Para 10 dealt with conditions and restrictions. It said that HMRC may decide to apply specific conditions or restrictions where they consider that a wholesaler "is fit and proper to be approved but some additional controls are still needed", which would be used to address specific concerns HMRC had about the business. In contrast, if HMRC considered a wholesaler was not fit and proper to be approved, approval would be refused or revoked rather than allowing the wholesaler to trade subject to added conditions.

21. In para 15(4), which dealt with revocation by HMRC of an existing approval, circumstances were identified in which approval was likely to be revoked, and it was pointed out that the controlled activity could not be carried on after revocation. However, the paragraph ended with a passage to which it will be necessary to return:

> "Where HMRC think the circumstances merit, they may allow a reasonable period of time to wind down the business, for example, to dispose of any legitimate stock."

22. Doubts have been expressed about HMRC's power to allow a period of grace in this way. The version of EN2002 published on 27 March 2017 put the position in relation to disposal of stock on winding down on a rather firmer footing by providing, under regulation 10 of the 2015 Regulations, for such sales to be excluded sales.

Challenging a refusal of approval

23. A wholesaler can challenge HMRC's refusal of approval by seeking a review of it by HMRC and/or appealing to the FTT. Sections 13A-16 of the Finance Act 1994 ("FA 1994") (as amended by article 1(2) of and Schedule 1 to the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56) govern the review and appeal process.

24. Reviews are covered by section 15A-F. By section 15F, the nature and extent of the review are such as appear appropriate to HMRC in the circumstances, but account must be taken of representations made. The review may conclude that the decision is to be upheld, varied, or cancelled.

25. An appeal to the FTT can be brought either as an alternative to seeking a review or, where there has been a review, against the review decision. The provisions as to appeals are set out in section 16. A central concept is that of a "relevant decision". This is defined in section 13A which, in subsection (2)(a)-(j), lists the decisions which are relevant decisions. A decision for the purposes of Part 6A of ALDA as to whether or not a person is to be approved and registered, or as to the conditions or restrictions on approval and registration, features in subsection (2)(j). By section 16(8) of FA 1994, such a decision is classed as an "ancillary matter". Section 16(4) sets out the FTT's powers on an appeal in relation to any decision as to an ancillary matter, or any decision on the review of such a decision. It provides that the tribunal's powers

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

26. These limited powers contrast with the wider powers available to the FTT, under section 16(5), when dealing with other relevant decisions which are not classed as decisions as to "ancillary matters". In those appeals, the FTT can also vary the decision or quash it and substitute its own decision.

27. It is to be noted that, in ALDA appeals such as the present ones, FA 1994 gives the FTT no power to suspend the effect of a challenged decision pending an

appeal, nor is any such power contained in the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273). This contrasts with the position in appeals relating to relevant decisions which come within section 13A(2)(a)-(h) of FA 1994, which include a variety of decisions as to payment of duties, levies, assessments, security and penalties. Normally, by section 16(3) of FA 1994, an appeal in such a case will not be entertained unless the amount of duty which HMRC have determined, by the challenged decision, is payable has been paid or deposited with them. However, the appeal can proceed without full payment if HMRC issue a certificate stating that they have accepted such security as appears to them to be adequate, or that, on the grounds of the hardship that would otherwise be suffered by the appellant, they do not require security or have accepted such lesser security as they consider appropriate. If no certificate is issued, the appellant will be able to bring the appeal nonetheless, if the FTT decides that the certificate should not have been refused, and are satisfied that HMRC have been given such security (if any) as it would have been reasonable for them to accept. The Court of Appeal in the present case said (para 29) that this amounts to the FTT having "a circumscribed power to provide interim relief".

The Commissioners of Revenue and Customs Act 2005, section 9

28. Section 9(1) of the 2005 Act confers "ancillary powers" on HMRC in the following terms:

> "The Commissioners may do anything which they think -
>
> (a) necessary or expedient in connection with the exercise of their functions, or
>
> (b) incidental or conducive to the exercise of their functions."

29. Section 51(2) of the 2005 Act provides the following assistance in interpreting the meaning of "functions":

> "(2) In this Act -
>
> (a) '*function*' means any power or duty (including a power or duty that is ancillary to another power or duty), and

> (b) a reference to the functions of the Commissioners or of officers of Revenue and Customs is a reference to the functions conferred -
>
> (i) by or by virtue of this Act, or
>
> (ii) by or by virtue of any enactment passed or made after the commencement of this Act."

Issue 1A: what powers do HMRC have under section 88C ALDA to permit trading pending the determination of an appeal to the FTT?

30. When HMRC refuse approval under section 88C, do they nevertheless have power under that section to grant temporary approval pending a wholesaler's appeal to the FTT? To recap, HMRC deny that they have any such power under section 88C, whereas the wholesalers support the conclusion of the Court of Appeal that there is power, but challenge the Court of Appeal's conclusion that hardship and the impact on a wholesaler's appeal rights are irrelevant to the exercise of the power.

31. The Court of Appeal's reasoning for its conclusion about section 88C is to be found in paras 52 to 54 of the judgment of Burnett LJ, with whom the other members of the court agreed. Para 52 deals with HMRC's submissions. As Burnett LJ explained, it had been "readily accepted" on behalf of HMRC through their counsel (then, as now, Sir James Eadie QC) that "subsections (2) and (3) [of section 88C] 'hang together'". It was not a question simply of whether, in the abstract, a person was fit and proper, HMRC accepting that it was "feasible for persons to fail to satisfy HMRC that they are fit and proper to conduct a wholesale alcohol business without conditions, but to satisfy them that they are fit and proper subject to conditions". Nevertheless, HMRC submitted that "a temporary approval lasting a finite period could not be a proper basis to use the combined operation of the two subsections". It is important to identify the precise reason for this submission, which is reflected in HMRC's submissions to this court as well. It was, as summarised in the concluding lines of para 52:

> "because there would have been no relevant change of circumstance relating to fitness since the general decision was made. Mr Eadie QC accepted that the statute envisaged an approval being given for a limited time but only, as he put it, if HMRC were satisfied on day one that the person concerned was fit and proper."

32. Para 53 set out the following examples of situations in which approval might properly be limited in some way:

> "53. … It is possible to envisage that HMRC might have well founded concerns about the operation of a business at one of is locations, but not others. A condition limiting trading to specified sites might follow. They might consider the involvement of a particular proprietor, director or senior employee as critical to the grant of approval. By contrast, they might consider the involvement of a particular person to be inimical to the grant of approval. They might limit the period of approval to coincide with the known plans for retirement of an individual of significance in the business. They might limit the period to enable systems to be improved about which there is some concern. They might insist on the production of regular information to meet underlying concerns about record keeping and the like."

33. In the following two paragraphs, Burnett LJ set out his conclusion in these terms:

> "54. A conclusion that a person is not fit and proper for unconditional approval does not preclude conditional approval of that person. In my view HMRC have power under section 88C(3) to grant a temporary approval pending appeal if they conclude that a person is fit and proper for that limited period, perhaps with additional conditions. That is a possible conclusion that might be reached even if a general approval is being denied. In substance, if not in form, that is what HMRC were doing before 27 March when they purported to grant 30 days or more grace. The focus of a decision would remain whether the person was fit and proper but for the more limited purpose. Hardship and the impact on appeal rights would be extraneous considerations. Section 88C does not confer upon HMRC a broad discretionary power of approval but it is possible that they could conclude that a person is fit and proper for a limited time to continue trading. To the extent that HMRC apprehended that they had no power to do what was asked of them by the claimant, in my view they erred.
>
> 55. … there is nothing in the statutory scheme relied upon by HMRC which excludes the possibility of what amounts to

> an ancillary application for temporary approval in the face of a refusal of the general application."

34. In the light of these conclusions, Burnett LJ determined (para 87) that HMRC's decisions that they had no power to grant temporary approval to the wholesalers to trade pending appeal should be quashed, and the question returned to them for reconsideration.

35. HMRC submit that the Court of Appeal was wrong to conclude that they had power to grant temporary approval to the wholesalers under section 88C. However, if it is found that section 88C does confer such power then, in HMRC's submission, the Court of Appeal was correct as to the criteria for the exercise of the power.

36. It is necessary to appreciate exactly how HMRC put their criticism of the Court of Appeal. The following passage from their written case goes to the heart of the argument:

> "It is therefore submitted that HMRC could not properly conclude someone was not fit and proper '*to carry on the controlled activity*' (even on conditions which include the power to approve for a limited time only); yet *then separately* conclude in response to a request that the same business and leadership might be fit and proper to carry on the controlled activity pending appeal to the FTT against the first finding …" (Emphasis in the original)

From this, it is clear that HMRC's argument is addressed to a situation in which they have already concluded that someone is not fit and proper even for a limited period, and whatever conditions might be imposed. In their submission, the introduction of an extraneous factor which has nothing to do with fitness and propriety (ie the fact that an appeal is pending) cannot alter this assessment of fitness.

37. The wholesalers appear to interpret HMRC's argument rather differently. They have taken HMRC to be contending that whether a person is fit and proper is an absolute question, that must be determined without considering whether the imposition of a time limit or other conditions might make it possible to approve someone as fit and proper. For example, they refer, in their written case, to

> "HMRC's thesis that unless it is satisfied that a person is fit and proper to carry on a controlled activity (ie without consideration of whether that person might be fit and proper for

> a period, with conditions, with restrictions or any combination of these) it cannot approve a person under section 88C …"

38. If HMRC *were* advancing the "thesis" there set out, it would be an untenable one, in my view. But as I have said, they are not doing so. They are not insisting that absolute fitness and propriety is required in all cases, but addressing the situation where, as here, they have concluded that no conditions or limitations will enable them to be satisfied that the person is fit and proper. The power to incorporate such conditions/limitations is always present, and the relevant technical guidance given to HMRC officers making AWRS decisions specifically drew attention to the option of approval with conditions, including an example of imposing a time limit on the approval. On the facts of these appeals, HMRC had nevertheless concluded that the wholesalers were not fit and proper. I would accept their argument that in those circumstances there is no power to grant temporary approval pending appeal. If the person is not fit and proper for even a limited period of time, that holds good whatever purpose the time limited approval would be designed to achieve. If considerations of hardship and the impact that maintaining the decision would have on the efficacy of the appeal were relevant to HMRC's decision, it might be different. But I am satisfied that the Court of Appeal was right to conclude that such considerations are not to the point. Section 88C operates through the medium of HMRC being "satisfied that the person is a fit and proper person to carry on the activity", and the impact upon the person, or his business, of a refusal of approval is not material to that evaluation.

39. The wholesalers invite attention to HMRC's practice, prior to the 27 March 2017 version of EN2002, of allowing a winding down period to a business whose approval was revoked, where they thought the circumstances merited it (see para 21 above). They submit that such temporary approval was granted under section 88C, noting that the Court of Appeal saw it that way (para 54), and submitting that it demonstrates the existence of the power that HMRC now deny. HMRC respond that the provision of a winding down period is different in character from temporary approval pending appeal, being closed-ended, and presuming the rationality of the refusal.

40. In my view, the practice (now, of course, ceased) of continuing approval during a winding down period cannot prove the existence of the power for which the wholesalers contend. It may serve to provoke a closer look at the scope of section 88C, but if, after that exacting inspection, the conclusion is reached that it does not encompass the power to grant temporary approval pending appeal, the fact that HMRC may have proceeded, in the past, on the basis of a looser construction of the section, does not alter that conclusion. It may not be irrelevant that HMRC took the opportunity in the 27 March 2017 EN2002 to regularise the position through the route of excluded sales (see para 22 above).

41. Notwithstanding the earlier practice relating to a winding down period, I remain of the view that section 88C does not permit the temporary approval for which the wholesalers argue.

Issue 1B: can HMRC give temporary approval pending appeal under section 9 of the 2005 Act?

42. The wholesalers' primary argument in the Court of Appeal, renewed as part of their case before this court, was that HMRC have power to grant approval pending appeal under section 9 of the 2005 Act. Section 9, which is set out in full at para 28 above, permits the Commissioners to do anything which they think necessary or expedient in connection with, or incidental or conducive to, the exercise of their functions. The Court of Appeal was not prepared to accept that this permitted the temporary approval sought. Burnett LJ gave this summary of his reasons for rejecting that construction:

> "35. In my judgment section 9 of the 2005 Act does not provide HMRC with power to approve persons as fit and proper to trade in wholesale alcohol pending appeal to the FTT, when they have concluded they are not fit and proper persons. Such an action could not be either necessary or expedient in connection with the exercise of their functions; nor would it be incidental or conducive to the exercise of their functions. It would be inconsistent with the statutory scheme."

43. The wholesalers argue that there is nothing inconsistent with the statutory scheme in section 9 being interpreted as enabling HMRC to approve them to trade pending appeal. HMRC say, first, that the only route by which permission can be granted is the section 88C route, and secondly that to use section 9 for temporary approvals would run counter to the statutory scheme as a whole. Their first point is shortly stated: section 88C(1) provides that a person "may not carry on a controlled activity otherwise than in accordance with an approval given by the Commissioners *under this section*" (my italics). The wholesalers reply that there is nothing in section 88C(1) that prohibits HMRC from granting permission by a different route, and complain that if the provision were to be interpreted in this way, there would be no scope for the use of the powers set out in section 9. It is put this way in their written case:

> "Allowing a decision-maker to do something that that decision-maker could otherwise not do in the performance of a function is precisely what ancillary and incidental powers do. If an ancillary power never enables the decision-maker to do

> something that the decision-maker otherwise lacks the power to do, then the ancillary power is left with nothing to do."

44. I have no doubt that there are situations in which the sort of considerations identified by the wholesalers in this passage would lead the court to accept that the Commissioners have indeed got ancillary powers of one sort or another. But it all depends upon the general attributes, and detailed provisions, of the particular statutory scheme in relation to which the question arises, and the nature of the ancillary powers being considered. There are, in the authorities, plentiful statements to this effect, made in various contexts, see for example the following, from *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1 at p 31D-E:

> "The authorities deal with widely different statutory functions but establish the general proposition that when a power is claimed to be incidental, the provisions of the statute which confer and limit functions must be considered and construed."

45. Section 9 concerns ancillary powers which are necessary or expedient in connection with the Commissioners' exercise of their functions, or incidental or conducive to that exercise, not ancillary powers which undermine or contradict those functions. I do not accept that recourse can be had to it to provide an alternative route to time limited approval, supplementing section 88C in the way that the wholesalers suggest. I say that not only because of the terms of section 88C itself, which permit authorisation only under that section ("approval given by the Commissioners under this section"), but also because of the attributes of the whole scheme of which section 88C forms part. Rather than assisting the Commissioners' exercise of their functions under the scheme, such a use would, in my view, undermine the scheme.

46. To start with section 88C itself, it is important to take sections 88C(1) and (2) together. By subsection (1), a person may not carry on a controlled activity otherwise than in accordance with an approval given by the Commissioners under section 88C. By subsection (2), the Commissioners may only give the required approval if they are satisfied that the person is a fit and proper person to carry on the activity. So where, as here, they are *not* so satisfied, they may not give approval under section 88C, and without approval under section 88C, the person may not carry on the controlled activity. Amongst the consequences that follow if he does act without approval, the person will be guilty of an offence (section 88G). It can hardly be said to be necessary or expedient to the exercise of the functions under that tightly drafted scheme, which has at its heart that the Commissioners will only approve people to sell controlled liquor wholesale if satisfied that they are fit and proper to do so, for the Commissioners to be able to draw upon the ancillary powers in section 9 to grant approval to someone in relation to whom they are not satisfied,

nor yet can that be said to be incidental or conducive to the exercise of their functions under the scheme. Furthermore, approval granted under section 9 would not be of any practical assistance to the wholesaler unless he were also put on the register of approved persons under section 88D. By sections 88F and 88G, a person may commit a criminal offence by buying from a person who is not approved, and would need to have recourse to the register to confirm the status of the wholesaler before buying. By using section 9 powers to enter the wholesaler on the register, HMRC would appear to be holding out as fit and proper a person in relation to whom they have formed the opposite view. It is unreal to suggest, as the wholesalers do, that this could be satisfactorily addressed by HMRC including information about the wholesaler under section 88D(2), to the effect that the approval is only temporary pending the outcome of the wholesaler's appeal to the FTT and that actually HMRC do not consider the person fit and proper.

47. But, says Mr Coppel QC for the wholesalers, it is necessary to look at HMRC's functions as a whole, not just their functions under section 88C, or under Part 6A of ALDA. I readily accept that as a general proposition, but I do not think that it justifies HMRC using section 9 to grant temporary approval. Mr Coppel relies on the fact that HMRC's section 88C decisions are attended by a review and appeal process, in which HMRC have a role, including a duty to give effect to whatever decision the FTT reaches. He argues that, as part and parcel of their functions in the appeal process, HMRC must be able to take steps to ensure the effectiveness of the wholesaler's right to have his appeal heard, especially bearing in mind that, even if it ultimately turns out that approval was wrongly refused, the wholesaler will receive no compensation for the damage suffered whilst awaiting the appeal, including potentially the final closure of the business. So, where implementation of the challenged decision pending appeal is likely to result in the wholesaler suffering substantial, and irreversible, harm, he submits that HMRC must take as their starting point that temporary approval should be granted so as to keep the appeal right alive, although he would concede that the starting point could be displaced if the likelihood and scale of harm to the revenue would be greater, if temporary approval were to be granted, than the likelihood and scale of the harm to the wholesaler from a refusal.

48. I am not persuaded by this argument. I do not accept that the fact that HMRC's decision is subject to an appeal, to which they are a party, is a proper foundation upon which to conclude that it is necessary or expedient, incidental or conducive, to the exercise of their functions to assume a power to grant temporary approval so as to preserve the wholesaler's position pending that appeal. With certain other types of relevant decision, HMRC do have a role in facilitating an appeal to the FTT, by relaxing the normal requirement for duty to be paid prior to an appeal. As can be seen from para 27 above, they can effectively waive the standard security required under section 16(3) of FA 1994 on the grounds of hardship, and, if they are not prepared to do so, the FTT can intervene to allow the appeal to proceed nevertheless, if it decides that HMRC should not have refused to provide the required certificate. It cannot be said, therefore, that the review and

appeal provisions were drafted without heed to the possibility that HMRC/the FTT might need powers to allow relief pending appeal, but when it comes to ancillary decisions such as the decisions in question here, there is nothing in sections 13A-16 of FA 1994 (see above at para 23 et seq), or in the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, conferring any power on either HMRC or the FTT to suspend, or circumvent, the consequences of the decision that is being challenged pending determination of the appeal.

49. *R (Wilkinson) v Inland Revenue Comrs* [2005] 1 WLR 1718 offers some insight as to how this absence of express power might bear upon the operation of a general provision such as section 9 of the 2005 Act. It concerned bereavement allowance, which at that time was payable only to widows and not to widowers. The House of Lords rejected the argument that section 1 of the Taxes Management Act 1970, which said that income tax "shall be under the care and management of the Commissioners of Inland Revenue", could be construed as giving the revenue a discretionary power to grant an extra-statutory concession allowing a widower to claim the equivalent to a widow's bereavement allowance. Lord Hoffmann observed at para 21, with the agreement of the rest of the House, that the power could not be construed "so widely as to enable the commissioners to concede, by extra-statutory concession, an allowance which Parliament could have granted but did not grant". Although the context was not the same as in the present case, section 1 of the Taxes Management Act 1970 not being concerned with ancillary powers in quite the same way as section 9 of the 2005 Act, it can similarly be said here that section 9 should not be construed as conferring on HMRC a power to grant temporary approval pending appeal which Parliament could have conferred through Part 6A or the FA 1994, but did not. That temporary approval pending appeal is not part of the scheme is perhaps underlined also by the fact that express provision was made in section 54(12) of the Finance Act 2015 for the time from which the prohibition on trading in section 88C was to apply, namely when the wholesaler's application to HMRC was "disposed of" (ie by section 54(13), has been determined by HMRC, withdrawn, abandoned, or otherwise ceases to have effect), rather than from the conclusion of any appeal against the decision on the application.

Issue 2: High Court powers

(1) The approach of the Court of Appeal in CC & C Ltd and in the present case

50. In the Court of Appeal, it was common ground that the High Court has power to grant injunctive relief to assist a wholesaler pending his appeal to the FTT, but there was a dispute between the parties as to the basis on which relief could be granted. In determining this issue, the Court of Appeal drew heavily upon its earlier decision in *CC & C Ltd* and it will be necessary to look, therefore, at that decision.

51. There are considerable similarities between *CC & C Ltd* and the present case, although *CC & C Ltd* concerned wholesale trade in duty-suspended goods, not duty-paid goods. Those trading wholesale in duty-suspended goods were required to be approved and registered by HMRC. The claimant company had been approved and registered for some years, when HMRC revoked the registration on the basis that it was no longer fit and proper. Like HMRC's decisions in the present case, the decision in *CC & C Ltd* was classed, for the purposes of sections 13A-16 of the FA 1994, as a decision relating to an ancillary matter. The company appealed to the FTT against the decision and also commenced proceedings in the Administrative Court to obtain interim relief pending the determination of the appeal, claiming that there was a risk that it would be irreparably damaged meanwhile.

52. Underhill LJ, with whom the other members of the court agreed, had "no doubt that the court has jurisdiction, in the formal sense, under section 37(1) of the [Senior Courts Act 1981] to make an order of the kind sought" (para 38, and see also Lewison LJ's short judgment commencing at para 48). The court was concerned with the approach that should be taken to the exercise of that jurisdiction. At para 39, Underhill LJ said that it was trite law that where Parliament has enacted a self-contained scheme for challenging decisions, it would normally be wrong for the High Court to permit such decisions to be challenged by way of judicial review. He cited a passage from a judgment of the Privy Council, in *Harley Development Inc v Comr of Inland Revenue* [1996] 1 WLR 727, 735-736, culminating in the following:

> "Their Lordships consider that, where a statute lays down a comprehensive system of appeals procedure against administrative decisions, it will only be in exceptional circumstances, typically an abuse of power, that the courts will entertain an application for judicial review of a decision which has not been appealed."

53. Underhill LJ set out in paras 41 and 42 why, where Parliament could have made provision for suspensory orders to be made pending appeal to the FTT but had not done so, the court was not entitled to intervene to grant a trader interim relief simply on the basis that there is a pending appeal with a realistic chance of success. But, he said, it did not follow that there were no circumstances in which the court may grant such relief, and he noted that HMRC did not so contend. He went on, in paras 43 and 44, to set out when relief may be granted. He said that:

> "where the challenge to the decision is not simply that it is unreasonable but that it is unlawful on some other ground, then the case falls outside the statutory regime and there is nothing objectionable in the court entertaining a claim for judicial review or, where appropriate, granting interim relief in

> connection with that claim. A precise definition of that additional element may be elusive and is unnecessary for present purposes. The authorities cited in the *Harley Development* case refer to 'abuse of power', 'impropriety' and 'unfairness'. [Counsel for HMRC] referred to cases where HMRC had behaved 'capriciously' or 'outrageously' or in bad faith. Those terms sufficiently indicate the territory that we are in, but I would sound a note of caution about 'capricious' and 'unfair'. A decision is sometimes referred to rhetorically as 'capricious' where all that is meant is that it is one which could not reasonably have been reached; but in this context that is not enough, since a challenge on that basis falls within the statutory regime. As for 'unfair', I am not convinced that any allegation of procedural unfairness, however closely connected with the substantive unreasonableness alleged, will always be sufficient to justify the intervention of the court: [counsel for HMRC] submitted that cases of unfairness would fall within the statutory regime to the extent that the unfairness impugned the reasonableness of the decision. As I have noted above, the types of unfairness contemplated in [*R v Inland Revenue Comrs, Ex p Preston* [1985] AC 835] -which is the source of the use of the term in the *Harley Development* case - were of a fairly fundamental character. But since procedural unfairness is not relied on in this case I need not consider the point further."

54. Summarising his conclusion at para 44, he said that the court may entertain a claim "where it is arguable that the decision was not simply unreasonable but was unlawful on one of the more fundamental bases identified above". He said that such cases "will, of their nature, be exceptional". The *CC & C* case was not one of them, and relief was not available.

55. In the present case, Burnett LJ analysed the ratio of *CC & C* as having the following components:

> "61. … (i) The High Court has jurisdiction to grant an injunction maintaining registration pending appeal to the FTT, which has been revoked by HMRC, when a parallel challenge to that decision is made in judicial review proceedings.

(ii) The jurisdiction should not be exercised simply on the basis that the person concerned has a pending appeal with a realistic chance of success.

(iii) If the decision is challenged only on the basis that HMRC could not reasonably have come to it, the case falls within section 16 of the Finance Act 1994 and the court should not intervene.

(iv) If the challenge to the decision is on some other ground outside the statutory regime the court may entertain judicial review or grant interim relief.

(v) A definition of the additional element needed is elusive but would include 'abuse of power', 'impropriety' and 'unfairness' as envisaged in *Harley Development Inc v Comr of Inland Revenue* [1996] 1 WLR 727."

56. Having lost their argument that *CC & C Ltd* had been decided per incuriam or should be distinguished, the wholesalers accepted that their cases did not fall within any of what Burnett LJ described (para 73) as the "exceptions identified as examples" in *CC & C Ltd* but submitted that interim relief should be granted because otherwise there was a risk that their rights under article 6 and article 1 protocol 1 ("A1P1") of the European Convention on Human Rights ("ECHR") would be violated. The argument, both in relation to article 6 and A1P1, was put on the basis that by the time the appeal is heard, the wholesalers would have ceased to be viable and their appeals to the FTT would be ineffective. The Court of Appeal found it sufficient to deal with the argument by focussing on article 6 alone, finding it unnecessary to explore "the altogether more complicated route of A1P1", para 82, and in due course I will take the same approach.

57. Burnett LJ's conclusion was as follows:

"81. In my opinion, a statutory appeal against a refusal of approval which is unable to provide a remedy before an appellant has been forced out of business, rendering the appeal entirely academic (or theoretical or illusory in the language of the Strasbourg Court) is capable of giving rise to a violation of article 6 which the High Court would be entitled to prevent by the grant of appropriate injunctive relief under section 37 of the 1981 Act. To that extent, the exceptions enumerated by

> Underhill LJ in the *CC & C Ltd* case [2015] 1 WLR 4043 can be expanded to include cases in which a claimant can demonstrate, to a high degree of probability, that the absence of interim relief would violate its ECHR rights. Moreover, such an injunction need not be ancillary to a claim for judicial review of any decision of HMRC, although it might be."

58. Burnett LJ's reasoning for his conclusion (see paras 77 to 81) involved the following steps:

i) The dispute concerns "civil rights and obligations" for the purposes of article 6, see *Tre Traktörer AB v Sweden* (1989) 13 EHRR 309, in which the Strasbourg court concluded that there was a violation of article 6 where a company had its licence to sell alcohol revoked by two administrative bodies, neither of which was a court or tribunal.

ii) Unlike in *Tre Traktörer AB*, the wholesalers have appeals to the FTT which satisfy the requirement for a hearing by a tribunal.

iii) However, the ECHR is intended to guarantee rights that are "practical and effective", not "theoretical or illusory", see *Airey v Ireland* (1979) 2 EHRR 305 and other authorities set out at para 80 of Burnett LJ's judgment.

iv) If an appellant is forced out of business before the statutory appeal concludes, the appeal is rendered theoretical or illusory.

59. It is important to recognise the lack of debate that there was in the Court of Appeal about this element of the case. At para 76, Burnett LJ recorded that Sir James Eadie accepted on behalf of HMRC that the High Court may grant an interim injunction to vindicate the Convention rights of the wholesalers, though emphasising (1) that (as Burnett LJ himself expressly accepted) the first port of call must be the FTT itself, which could be expected to expedite the appeal to avoid the problem, and (2) that proper evidential support would be required for an argument based on the ECHR. It was not argued on behalf of the wholesalers that interim relief should issue automatically, without it being demonstrated that the wholesaler could not survive until the appeal was heard. As Burnett LJ set out at para 83, Mr Coppel recognised that factors such as the strength of the appeal and the nature of the concern that led to the refusal to approve would be factors to be weighed when considering whether to grant an injunction, reflecting the fact that the scheme exists to protect the public purse and legitimate traders. Burnett LJ set out the sort of compelling evidence that would be required before relief would be granted:

> "85. A claimant seeking an injunction would need compelling evidence that the appeal would be ineffective. It would call for more than a narrative statement from a director of the business speaking of the dire consequences of delay. The statements should be supported by documentary financial evidence and a statement from an independent professional doing more than reformulating his client's stated opinion. Otherwise, a judge may be cautious about taking prognostications of disaster at face value. It should not be forgotten that a trader who sees ultimate failure in the appeal would have every incentive to talk up the prospects of imminent demise of the business, in an attempt to keep going pending appeal. Equally, material would have to be deployed which provided a proper insight into the prospects of success in an appeal. There is no permission filter for an appeal to the FTT. The High Court would not intervene in the absence of a detailed explanation of why the decision of HMRC was unreasonable. It must not be overlooked that the FTT is not exercising its usual appellate jurisdiction in these types of case where it makes its own decision. Finally, there would have to be detailed evidence of the attempts made to secure expedition in the FTT and the reasons why those attempts failed."

60. Burnett LJ anticipated that the circumstances in which it was appropriate for injunctive relief of this kind to issue would be rare, as practical relief would be achievable by obtaining temporary approval from HMRC under section 88C (not a route that I consider available for the reasons set out earlier) or, failing that, by seeking expedition from the FTT.

61. The evidence in support of injunctive relief in the present cases had not been sufficient to satisfy either of the two judges who entertained the proceedings at first instance that the appeals would be rendered nugatory without interim relief, as Burnett LJ set out:

> "86. In the *ABC Ltd* case William Davies J considered himself bound by the *CC & C Ltd* case to refuse injunctive relief even if the claimants could show that the appeal would be rendered 'nugatory'. However, at para 48 he concluded that the evidence did not suggest that was inevitable. The evidence demonstrated that there was a prospect that the appeal would be rendered nugatory, no more. In the *X Ltd and Y Ltd* case, Andrew Baker J dealt with the strength of the evidence relating to the business prospects of the claimants in paras 39 and 40. He was unpersuaded by the assertions that they would not

> survive the appeal process. In those circumstances, even if either judge had considered a free-standing injunction by reference to rights guaranteed by article 6 of the ECHR, it would have been refused."

(2) The limited scope of Issue 2

62. This court's engagement in the issue as to the High Court's powers is narrowly confined for procedural reasons. Only the wholesalers sought to appeal against the Court of Appeal's determination on this aspect of the case. Their notice of appeal sought permission to appeal on three grounds. The first ground challenged the Court of Appeal's decision that section 9 of the 2005 Act did not give HMRC any power to permit temporary trading pending the outcome of an appeal to the FTT. Permission was given for this ground to be pursued and I have addressed it above. Ground 2 was that the Court of Appeal were wrong to conclude that it was only in exceptional circumstances that the High Court could grant interim relief pending an appeal to the FTT. Ground 3 was that the Court of Appeal were wrong to conclude that even where implementation of HMRC's decision prior to the outcome of an appeal to the FTT would violate a wholesaler's ECHR rights, the High Court should not grant interim relief as the first port of call must be to the FTT to expedite the appeal. Permission to appeal was not granted in relation to either of these grounds.

63. In these circumstances, both parties understandably approached the appeal to this court on the basis that the High Court *has* power to grant injunctive relief where the wholesaler's article 6 rights would otherwise be infringed by the business ceasing to be viable before the FTT could consider the matter, rendering the appeal provided by statute entirely academic, and that the circumstances in which that power would be exercised were as set out in *CC & C Ltd*, as interpreted by the Court of Appeal in the present case. This court's refusal of permission to appeal in relation to the High Court's injunctive powers immunises that position from challenge in the present proceedings. Furthermore, it has not been the role of this court to review the established finding that the evidence produced by the wholesalers in support of their application for injunctive relief on an article 6 basis failed to meet the required standard (see para 86 of Burnett LJ's judgment, set out above).

64. The question that arose during the course of the hearing before us was the discrete question of what form the High Court's order could legitimately take, where a case for injunctive relief *was* made out. If minded to make an order, what, if anything, could the High Court order HMRC to do to protect the position of a wholesaler pending appeal? Supplementary written submissions were provided following the hearing directed to this point.

(3) The parties' supplementary submissions

65. In their supplementary submissions, both sides adhere to the position that the Court of Appeal was correct to conclude that the power in section 37 of the Senior Courts Act 1981 *could* be exercised in the AWRS context, in exceptional cases.

66. HMRC emphasise the breadth of the High Court's power under section 37, being a power to make orders and grant interim relief whenever it considers it just and convenient to do so, including when necessary to protect effective rights of access to court, whether derived from article 6 of the ECHR or the common law. This enables it, they say, to make an order which will have the effect of holding the ring pending the appeal, unconstrained by the limitations and conditions imposed upon HMRC by the legislation and public law principles. They also submit that Parliament can be taken to have enacted the AWRS on the basis that the High Court's powers to grant interim relief remain intact.

67. In their submission, an order can be made requiring them to give the wholesaler provisional approval, under section 88C, to sell controlled liquor, and also to add the wholesaler to the section 88D register. They support this on the basis that, although they could not act in this way of their own initiative, they could do so pursuant to a court order because the court's role is part of the statutory scheme. In the alternative, HMRC propose that an order could be made requiring them to exercise their power, under regulation 10 of the 2015 Regulations (see para 16 above), to exclude certain descriptions of sales from ALDA. As with temporary approval, HMRC would not, they stress, independently use this power to exclude sales in circumstances like the present, but they would do so if ordered by the court to do that. If this route were to be taken, the wholesaler would be outside the ALDA regime whilst the appeal to the FTT was pending. It would be necessary, therefore, for the court to impose conditions that would need to be met by the wholesaler for the exclusion to continue, for example as to record keeping and due diligence.

68. HMRC seek to explain why their own exclusion of sales to allow a winding down period (see above) should not be taken to indicate that they have power, without court intervention, to grant a wholesaler relief pending an appeal. They draw a distinction between their limited exercise of power, which is consistent with the statutory scheme, and an open-ended exclusion pending appeal. The latter would, in their view, be a stretch too far for them, but not for the High Court when intervening on the basis that the case was exceptional and that there was a need to protect effective access to justice.

69. Like HMRC, the wholesalers also submit that the High Court can order HMRC to approve and register a wholesaler temporarily under section 88C and section 88D. They say this on the basis that unless HMRC has decided that the

wholesaler is not fit and proper to carry on any controlled activity for any period of time, regardless of all conditions and restrictions HMRC might impose, there is a residual power in the High Court to order HMRC to act under section 88C and D. Failing that, they propose that the order could focus upon section 9 of the 2005 Act. If neither of those routes is available, they rely upon section 8(1) of the Human Rights Act 1998, which they say gives the court power to act to ensure the efficacy of the appeal to the FTT, as required by article 6 ECHR (and, they say, A1P1).

(4) Discussion

70. It will be apparent, from what I have set out of their submissions, that the parties do not share the court's anxieties as to what, if any, form of order the High Court could make to safeguard the position of a wholesaler, without requiring HMRC to trespass impermissibly outside the statutory provisions relevant to the AWRS. As a result of this, the court has not had the benefit of any testing analysis, in the written or oral argument, of the parties' essentially agreed position. This is not intended as a criticism (the parties were entitled to make the legal submissions they considered appropriate) but the result is that the process has not entirely dispelled the court's unease about the form that the High Court's order might legitimately take. To illustrate the point, let me take the suggestion that the High Court could order HMRC to grant temporary approval under section 88C to a wholesaler whose application they have rejected, but who has appealed to the FTT and has established an article 6 case for relief pending the appeal. Section 88C approval, whether indefinite or limited in time, depends on HMRC being satisfied that the wholesaler is fit and proper to carry on the controlled activity; that is an essential condition for approval under the section. For matters to have reached this point, however, HMRC must necessarily have concluded that they are *not* satisfied that the wholesaler is fit and proper, even for a limited period of trading. If the High Court orders HMRC to grant temporary approval to the wholesaler in these circumstances, it is necessarily requiring HMRC to be satisfied when they are not satisfied, and I question how that can properly be done.

71. That example points to a more fundamental concern. Generally the High Court's power to order a person to do something by mandatory injunction is exercisable for the purpose of making that person do something that he has it within his powers to do and should have done, but has failed to do. Here, the court has concluded, and HMRC agree, that there is in fact nothing which HMRC can properly do in the exercise of their statutory functions. They may fairly be said to have no relevant power which they could legitimately exercise in this context without straying outside the purpose for which the power was given. In such circumstances, a conclusion that the High Court could nonetheless solve the problem by granting an injunction looks worryingly like endorsing the exercise of some sort of inherent authority to override an Act of Parliament, on the basis that the end justifies the means. It would take a lot of persuading for me to conclude that this would be a

proper exercise of the High Court's undoubtedly wide power to grant injunctive relief, but the parties' agreement that it is permissible has closed off adversarial submissions on the point.

72. The absence of debate between the parties makes it undesirable to make any definitive pronouncement as to whether an appropriate form of order might be found as a vehicle for the exercise, by the High Court, of its power to grant relief to a wholesaler pending an appeal to the FTT. Since the case for relief was not, in fact, made out on the evidence in the present case (see para 86 of the Court of Appeal judgment, set out at para 61 above), it is unnecessary to do so, and I will say no more on the subject.

73. It should be noted that Mr Coppel invites the court to broaden its interpretation of section 88C of ALDA and section 9 of the 2005 Act by viewing them with ECHR considerations in mind, and/or bearing in mind article 47 of the Charter of Fundamental Rights and Freedoms of the European Union. Just as I am uneasy about accepting that the statutory scheme can be interpreted in such a way as to enable the High Court to come to the assistance of a wholesaler whose ECHR rights are in issue, so I do not readily see how section 88C and section 9 could be more broadly interpreted to the same end. I need not say more on the subject, however, as Mr Coppel's argument would not, in any event, assist the wholesalers in this case, given that their evidence did not establish that their ECHR rights are endangered.

Conclusions

74. I would allow HMRC's appeal against the Court of Appeal's order remitting to HMRC the question of whether the wholesalers should be given temporary approval under section 88C. HMRC do not, in my view, have power, in circumstances such as the present ones, to grant such temporary approval under that section.

75. I would dismiss the wholesalers' appeal against the Court of Appeal's determination that HMRC do not have power to grant temporary approval under section 9 because, in my view, the Court of Appeal were right.

LORD HUGHES: (with whom Lord Sumption agrees)

76. For the reasons so clearly set out by Lady Black, I agree that:

(i) HMRC has no power under section 88C of the Alcoholic Liquor Duties Act 1979 ("ALDA") to approve temporarily an existing trader whom it has determined not to be a fit and proper person even for a short period and even subject to conditions; and

(ii) nor has HMRC any power to do this under section 9 of the Commissioners for Revenue and Customs Act 2005; moreover

(iii) although this is not for decision in the present case, it is also difficult to see, where a trader has been refused registration, on the grounds that HMRC is not satisfied that it is a fit and proper person, even for a limited period or on conditions, that a power to preserve its ability to trade pending appeal to the FTT can be found in the High Court.

77. As to (iii), it is highly significant that HMRC, which sponsored the legislation in question, thought it right to contend in these proceedings that the High Court does have the third-mentioned kind of power pending appeal, albeit only in cases where it is clearly established that otherwise good grounds of appeal would be rendered nugatory if the power did not exist. The principle underlying that approach is correct, and responsible. Neither in English law nor under the ECHR is there any general right to an appeal against an adverse decision, such as the one here under consideration, *viz* a determination that a trader is not a fit and proper person to be approved under ALDA. But in this instance a right of appeal has been conferred by section 16 of the Finance Act 1994, albeit the grounds upon which it can succeed are limited: see para 25 of Lady Black's judgment. Where such a right exists in law it would potentially be a breach of article 6 ECHR (right to a fair trial), read with article 13 (right to an effective remedy) if it were rendered illusory or nugatory by the absence of any power to suspend or stay the adverse decision of HMRC until the appeal can be determined. In the particular case of a trader who had an existing business at the time when the registration scheme introduced by section 88C of ALDA, his right of appeal to the FTT might be rendered illusory or nugatory if he would be forced out of business before a good case on appeal could be determined. There may be few who are genuinely in this position, and with the passage of time those thus affected must be a reducing number. But some are enough to result in potential incompatibility of the legislation with the ECHR.

78. It is not possible for courts to invent a remedial legislative provision where, as seems here to be the case, the language of the self-executing scheme adopted by ALDA and of the appellate structure adopted by the Finance Act 1994 do not admit of a construction which allows for a power to stay a decision of HMRC pending appeal. Nor, if the court's reading of the legislation is correct, can there be a remedy under section 8 of the Human Rights Act, since there is no unlawfulness if no other course is possible - see section 6(2). But if potential incompatibility is to be avoided,

those responsible for legislation in this field may wish urgently to address amendment, for example to give either the FTT or the High Court a limited power to impose a stay pending appeal in defined circumstances.