Neutral Citation Number: [2021] EWHC 3174 (Admin)

Case No: CO/3123/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/11/2021

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

THE QUEEN ON THE APPLICATION OF S&S CONSULTING SERVICES (UK) LIMITED	**Claimant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Defendant**

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- -

Aparna Nathan QC and Joshua Carey (instructed by **Frisby and Small LLP Solicitors**) for the **Claimant**
Jonathan Kinnear QC (instructed by **The Commissioners for HM Revenue & Customs**) for the **Defendant**

Hearing date: **28 October 2021**

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Approved Judgment

Mr Justice Julian Knowles:

Introduction

1. This is a renewed application for injunctive relief by the Claimant, S&S Consulting Services (UK) Limited (S&S), following refusal on the papers by the single judge.

2. S&S seeks a mandatory injunction under s 37 of the Senior Courts Act 1981 (SCA 1981) requiring the Defendant, the Commissioners for Her Majesty's Revenue and Customs (HMRC), to re-register it for VAT pending either: (a) the outcome of its application for judicial review of HMRC's decision of 27 August 2021 to de-register it for the purposes of VAT (the Decision); and/or (b) pending the outcome of its appeal to the First-tier Tribunal (Tax) (the FtT) against the Decision and a related VAT assessment.

3. HMRC cancelled S&S's registration because, following an investigation, they concluded that S&S was principally or solely registered to abuse the VAT system by facilitating VAT fraud.

4. It is right to make clear at the outset that S&S strongly denies that allegation and any wrongdoing.

5. It is common ground that the Decision has serious potential consequences for S&S's ability to carry on in business. It is now unable to issue VAT invoices for taxable supplies. S&S says it may even become insolvent as a result. For example, the Decision has the effect of limiting S&S's lawful turnover to the VAT threshold of £85 000; if S&S were to trade in excess of that figure then it might be acting unlawfully. It is also common ground that although S&S has lodged an appeal to the FtT against the Decision, the Tribunal has no power to require HMRC to re-register S&S by way of interim relief pending the outcome of the appeal.

6. S&S's application for permission to seek judicial review is outstanding and has not yet been considered on the papers. The parties were agreed that the only matter before me is the renewed application for injunctive relief.

Legislative framework: VAT registration and de-registration

7. VAT is a tax levied on goods and services provided in the UK in the course of business. It is charged on a percentage basis of the price of the goods and services provided. There are different percentage rates for different categories. The standard rate is currently 20%.

8. The principal domestic legislation concerning VAT is the Value Added Tax Act 1994 (VATA), which gives effect to EU VAT law. The principal piece of EU legislation is the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006) (the Directive).

9. Section 3(1) of VATA provides that a person is a taxable person for the purposes of VATA while he is, or is required to be, registered under the Act. Section 3(2) provides that Schs 1 to 3A shall have effect with respect to registration. Schedule 1 is the principal one for the purposes of this case.

10. Section 4(1) provides that VAT must be charged on any supply of goods or services made in the UK, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him. By s 4(2), a taxable supply is a supply of goods or services made in the UK other than an exempt supply (a term defined in s 31 and Sch 9).

11. In summary terms, [1] of Sch 1 provides that a person who makes taxable supplies in excess of the prescribed levels in the prescribed circumstances, is liable to be registered if not registered. For example, [1(1)(a)] of Sch 1 provides that a person who makes taxable supplies but is not registered under the Act becomes liable to be registered under Sch 1 if at the end of any month, the person is UK-established and the value of his taxable supplies in the period of one year then ending has exceeded £85 000 (that figure being provided for in the Value Added Tax (Increase of Registration Limits) Order 2017 (SI 2017/290)).

12. A taxable person is required to account to HMRC for the VAT they charge on their taxable supplies in the manner specified in VATA and the regulations made under it. In very simple terms, at the end of each relevant period, the taxable person must: calculate the VAT he has charged his customers during that period on his taxable supplies (the output tax); calculate the VAT he has paid out on supplies to him during that period (the input tax); deduct the amount of input tax from the amount of output tax, and account to HMRC for the difference (or reclaim VAT if the figure is negative). This is done by the taxable person completing a VAT return for each period. If, on that return, the taxable person under-declares the value of the taxable supplies they have made during that period, and thus the amount of VAT owing, then there is scope to deprive HMRC of the VAT which is properly due to them.

13. By way of hypothetical illustration: suppose during the relevant accounting period the taxable person makes £100 000 of taxable supplies at the standard rate of 20%, with (for simplicity) zero input tax. He will have charged his customers £20 000 VAT, which is the amount owing to HMRC at the end of the period, for which he must account. But if on his VAT return he wrongly declares only having made £50 000 of supplies during that period, and hence having only charged £10 000 in VAT, and only accounts to HMRC for that amount, then HMRC is deprived of £10 000 in VAT which is due to it, and the taxable person stands to benefit in that amount. Obviously, HMRC has systems in place to try and ensure that taxable persons pay the proper amount of VAT owing on their taxable supplies. It has powers to carry out inspections and to require VAT registered traders to produce books and records to evidence what they have declared on their returns.

14. A person registered for VAT may be deregistered. Paragraph 13 of Sch 1 of VATA relevantly states:

> "… (2) Subject to sub-paragraph (5) below, where the Commissioners are satisfied that a registered person has ceased to be registrable, they may cancel his registration with effect from the day on which he so ceased or from such later date as may be agreed between them and him.
>
> …
>
> (5) The Commissioners shall not under sub-paragraph (2) above cancel a person's registration with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement, or entitled, to be 7 registered under this Act."

15. Schedule 1 does not further specify the grounds on which a person's VAT registration may be cancelled on the basis they have 'ceased to be registrable'. However, it is a principle of EU law that Member states have a legitimate interest in taking appropriate steps to protect their financial interests, and the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by the Directive: see, in particular, Case C-255/02, *Halifax and others* [2006] ECR I-1609, [71]; Case C-285/09, *R* [2010] ECR I-12605, [36]; and Case C-525/11 *Mednis* [2012] ECR, [31]. Under well accepted principles, there was no need for national implementing legislation of the principle prohibiting abuse of the VAT system: *Halifax*; Advocate-General Maduro's Opinion, [62]-[82]; *Pendragon Plc v Revenue and Customs Commissioners* [2015] 1 WLR 2838, [27]; *Mobilx Ltd (In Administration) v Revenue and Customs Commissioners* [2010] STC 1436, [49].

16. Brexit has not altered the position. Section 42(4) and 42(4A) of the Taxation (Cross Border Trade) Act 2018 specifically preserves the effect of EU law principles preventing the abuse of the VAT system, following the UK's exit from the EU.

17. Thus, in accordance with these general principles, it was common ground before me that HMRC are entitled to cancel a person's VAT registration where they are satisfied that the registration is being used to facilitate fraud on the VAT system: *Valsts ienemumu dienests v Ablessio SIA* (C-527/11, 14 March 2013) (CJEU), [28]-[30]; *R (Ingenious Construction Ltd) v Commissioners of HM Revenue and Customs* [2020] EWHC 2255 (Admin), [6]. This is sometimes known as the *Ablessio* principle. In its judgment in that case the CJEU said:

> "34. In order to be considered proportionate to the objective of preventing evasion, a refusal to identify a taxable person by an individual number must be based on sound evidence giving objective grounds for considering that it is probable that the VAT identification number assigned to that taxable person will be used fraudulently. Such a decision must be based on an overall assessment of all the circumstances of the case and of the evidence

> gathered when checking the information provided by the undertaking concerned."

18. HMRC's internal manual on VAT Fraud (*VATF44500 - Basic interventions: other interventions: deregistering businesses that misuse their VAT number*) provides:

> "Using the *Ablessio* principle HMRC can, in certain circumstances, either refuse to allow a taxable person to register for VAT or deregister a taxable person from VAT where following an overall assessment of all the facts of the case there is objective evidence to conclude that the taxable person is solely or primarily:
>
> - committing a VAT fraud
> - participating in transactions connected with VAT fraud ie they knew or should have known that their transactions are connected with VAT fraud
> - intending on committing VAT fraud or participating in a fraudulent scheme"

19. Sections 83A – 83C of VATA deal with the requirements for HMRC to offer a review of a decision subject to appeal pursuant to s 83 (for example, deregistration). That review can be accepted by a taxpayer within 30 days and, if accepted, completed by HMRC within 45 days subject to an agreed extension of time pursuant to s 83F.

20. Section 83(1)(a) of VATA provides for a right of appeal to the Tribunal in relation to the registration or cancellation of registration of any person under the Act. The relevant procedural rules are contained in The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273). In relation to such a decision the Tribunal exercises an appellate rather than a supervisory jurisdiction: *Manhattan Systems Ltd v The Commissioners for HM Revenue and Customs* [2017] UKFTT 862 (TC), [42]-[45]; *Millennium Energy Trading Ltd v The Commissioners for HM Revenue and Customs* [2018] UKFTT 633 (TC), [99]-[100]. In other words, the question for the Tribunal on an appeal against de-registration is not whether HMRC's decision was reasonable in light of what was known to them at the time, but whether their decision was right in the light of the entire evidence before the Tribunal. If the decision is held to be wrong, HMRC are required to re-register the taxpayer, as there are no further statutory obligations imposed on HMRC (such as a requirement that they be satisfied as to the taxpayer's fitness).

Factual background

21. S&S was incorporated in 2011. It applied to register for VAT with effect from 1 February 2012. The business of the company is to provide the services of its employees or, in some cases, self-employed persons engaged by it, to third parties in return for a fee. The fee is computed on the basis of hours worked by

the employee/self-employed person at the latter's hourly rate, together with a margin for the company. The company charges output tax on the total fee income.

22. S&S's sole shareholder and director is Mr Spencer Hill. He has made two witness statements for these proceedings, dated 10 September 2021 and 27 October 2021 respectively. I grant permission for S&S to rely on the second witness statement.

23. Beginning in April 2020 and going into 2021, HMRC carried out an investigation into S&S's VAT position. There was much communication between HMRC and S&S and its tax, legal and accountancy advisers. S&S supplied books and records to HMRC. There were also meetings between the parties. The principal officer engaged in the investigation was Stephen Mills of HMRC's VAT Fraud Investigation Service.

24. On 25 January 2021 Mr Mills wrote a pre-assessment letter to S&S asserting the following (*inter alia*):

> "1/. On the invalid invoices I note your recent emails and telephone calls suggesting this needs my immediate attention. I can't assist you drafting the wording of what should be contained within a sales invoice. This is covered by the statutory requirements and must include a description. I note that I raised this with you and the business in my letter of 21st July 2020. I then reminded you of this in the email of 4th December 2020, requested that you stop using invalid sales invoices immediately and requested sight of the revised sales invoice format.
>
> I note that you have only now contacted me because invalid sales invoices received by customers have been queried
>
> 2/. HMRC have compared the records you have supplied with other parties in the supply chain and in a number of cases there are anomalies. To date I can compare your records directly to two of your customers. Of those, in both cases there are differences in the records they show when compared to yours.
>
> In the one instance the sales declared by you fall short with a suppression rate of 178%. Effectively only one third of your sales have actually been declared on these transactions.
>
> 3/. In some instances although you declare sales on an invoice basis a self-billing scheme is in operation with the self-billed sales invoices not having been advised or notified to me at all. I will need to see all such self-billing

> arrangements and the corresponding invoices that have been notified.
>
> 4/. In several instances payments are made to different bank accounts than that declared by you. I note that you stated there was one business bank account with the one named signatory. I am aware that this is not correct and the business receives sales into multiple bank accounts. I will require copies of all the undeclared bank accounts and an explanation.
>
> 5/. Overall on the evidence I presently hold your sales are being under declared by the 178%. I propose to allow the standard 21 days for you to provide the full business records including the undeclared bank statements. Once I have reviewed those I will adjust any under declaration that occurs. If you are unable or unwilling to provide the evidence I will assess using the figure of 178% as an uplift on each period to date."

25. Mr Mills offered S&S the opportunity to comment on his findings and calculations. S&S did so.

26. On 17 May 2021 Mr Mills wrote to S&S informing it that he had concluded that S&S had not declared the correct amount of VAT due for the period beginning on 1 May 2018 and ending on 31 January 2021. He assessed S&S's VAT liability at £23 616 622.

27. HMRC carried out a review of this assessment at S&S's request pursuant to the statutory provisions I referred to earlier. The assessment was upheld in a letter dated 23 August 2021.

28. On 27 August 2021 Mr Mills wrote to S&S informing it that it would be deregistered for VAT forthwith. Apart from a mention of deregistration at the outset of the investigation for a different reason (which I will return to), HMRC had not given any warning they were contemplating such a step. The letter began:

> "As you are aware I have been checking the VAT position of S & S Consulting Services (UK) Ltd. I have obtained information that leads me to believe that S & S Consulting Services (UK) Ltd is using its VAT registration solely or principally for fraudulent purposes.
>
> It is HMRC's position that the right to VAT registration or remain registered for VAT does not arise when the principal aim of that registration is to facilitate a fraud on the VAT system. S & S Consulting Services (UK) Ltd, VAT registration [number provided] will be deregistered with effect from 27' August 2021."

29. Later in his letter, referring to the decision in *Ablessio*, Mr Mills wrote:

> "The CJEU said that VAT registration may be refused where there is 'sound evidence giving objective grounds for considering that it is probable that the VAT identification number assigned to that taxable person will be used fraudulently.' (para 34). The Court further said that this would be the case in Ablessio if the evidence indicated that the registration of Ablessio '..might result in misuse of the identification number or other VAT fraud.' (para 38). Although any decision to refuse a registration 'must be based on an overall assessment of all the circumstances of the case...' (para 34)
>
> Whilst the judgment in Ablessio concerned the refusal to register a person for VAT rather than cancelling an existing registration, it clearly supports HMRC's view that HMRC may cancel a trader's VAT registration where, after conducting an overall assessment of all the circumstances of the case, HMRC have concluded that the trader is using its VAT registration for fraudulent purposes or will do so in the future."

30. Mr Mills then set out thirteen factors which he said indicated that S&S was principally or solely registered to abuse the VAT system by facilitating VAT fraud:

a. the business had failed to provide sufficient evidence to establish the current trading position;

b. sales invoices issued by S&S were invalid for VAT purposes;

c. when notified by HMRC that the invoices were invalid, S&S amended the format to refer to 'timesheets'; the supporting timesheets were not made available to HMRC;

d. from the sales evidence provided it was impossible to ascertain the liability of supplies or whether the business is taxable;

e. sales had been routed through an undisclosed bank account, details of which had not been provided to HMRC even when queried;

f. S&S advised that one bank account was operated by the business, however this was later corrected to disclose two further business bank accounts that had been omitted;

g. records from period 7/20 onwards had not been made available;

h. the majority of contact between HMRC and S&S has been via its agent with little involvement from the named Director;

i. the primary accounting records for S&S held on the Merit system. Requests for access to this system and the data had not produced any of the primary records;

j. S&S operates as a successor to Simplify Contracting Services and SMP Support Services Ltd with the trade being transferred over upon the Deregistration or loss of CIS (Construction Industry Scheme) gross payment status of the predecessor company.

k. The predecessor companies to S&S, SMP Support Services Ltd and Simplify Contracting Service, have operated as defaulting traders, accumulating large debts and failing to provide requested information. The same method of operation had been continued with S & S Consulting Services (UK) Ltd;

l. links between S&S and predecessor companies SMP Support Services Ltd and Simplify Contracting Services have not been notified to HMRC;

m. S&S is under the control of Paul Bell operating as a shadow director. A similar structure was operated by SMP Support Services Ltd and Simplify Contracting Services. Although this had not been disclosed to HMRC, it was clear from the past employment history of Spencer Hill (a director of S&S) that he is closely associated with Paul Bell.

31. In his witness statement of 4 October 2021 Mr Mills provided some additional reasons for deregistering S&S.

32. Accordingly, in his letter, Mr Mills concluded:

> "Whilst S & S Consulting Services (UK) Ltd may satisfy the formal requirements for VAT registration under Schedule 1 of the VAT Act 1994, HMRC considers that the VAT registration is being used to facilitate VAT fraud, and in accordance with the principles recited above, its VAT registration should be cancelled.
>
> Consequences of this decision
>
> S & S Consulting Services (UK) Ltd will be deregistered with effect from 27th August 2021. As of that date S & S Consulting Services (UK) Ltd may not issue tax invoices charging VAT or showing a VAT registration number. S & S Consulting Services (UK) Ltd must not quote the cancelled VAT number for the purposes of new transactions with suppliers or customers."

33. On 8 September 2021 S&S lodged appeals with the FtT against the Decision and the VAT assessment. It issued a claim for judicial review and interim injunctive relief around the same time. HMRC has agreed to the expedition of the appeal and has not required S&S to pay the disputed VAT pending the appeal, which is generally required (see s 84(3) and (3B) of VATA). Whilst writing this judgment I was informed that the FtT has listed the appeal for hearing in early February 2022.

34. In his first witness statement of 10 September 2021, Mr Hill set out the background to the company and his own background and experience. At [30] he said this:

> "30. I was shocked when, on 27th August 2021, the Defendant issued the Notice [of deregistration]. I add that the Company has not received a copy of the Notice in the post, from HMRC, but I was copied into the email. The Notice alleged that the Company was using its VAT registration solely or principally for fraudulent purposes. I was shocked to tears to read that because it is absolutely not true. As a business, we have tried our very best to do everything above board and to be compliant with all the rules. From what I can see, the Notice is based upon several statements and comments that are just wrong. Some of the points are matters that I have asked my advisors to comment upon as they are familiar with the relevant documents …"

35. In the following paragraphs Mr Hill then set out his response to HMRC's reasons for deregistering the company.

36. Also before me are witness statements from Hilary Oldham, a tax adviser with Chartergates Legal Services, who advised S&S on VAT matters and dealt with HMRC during the investigation, and Neil Dyer of Dyer & Co, who are S&S's appointed accountants. Chartergates are also S&S's legal advisers. Ms Oldham and Mr Dyer both assert in their statements that the Decision is based on a number of significant factually incorrect assertions or incorrect assumptions, which they address in detail.

37. On 7 October 2021 Eyre J refused interim relief on the papers. He made the following observations:

> "3. It is accordingly necessary to consider the grant of an interim injunction in the exercise of the court's jurisdiction under s 37 of the Senior Courts Act 1981 whether pending the final determination of the Claimant's appeal by the First Tier Tribunal or to some intermediate date.
>
> 4. The approach to be taken is that set out in *American Cyanamid v Ethico*n albeit having regard when considering the balance of convenience to the importance

> of the public interest in the Defendant being able to enforce the law and to take action to prevent fraud. In that respect I accept the Defendant's submission that the applicable guidance was provided by Underhill LJ in *CC & C Ltd v HMRC* [2015] 1 WLR 4043 namely that it will only be appropriate for an interim injunction to be granted in such cases where it can properly be said that the decision of HMRC is challenged as being unlawful on a basis akin to abuse of power by that body.
>
> 5. Here I accept that the Claimant has shown a serious issue to be tried as to the correctness of the Defendant's decision and that it has surmounted the low hurdle of showing that there is a serious issue to be tried as to the reasonableness of that decision. However, it has not shown a serious issue, let alone demonstrated to any further standard, that the decision was flawed as being an abuse of power or otherwise wholly outside the scope of the Defendant's powers.
>
> 6. I also accept that the Claimant has shown to a sufficient level that damages would not be an adequate remedy and that there is, at the lowest, a real prospect that the deregistration of the Defendant will bring about its financial collapse.
>
> 7. However, I am not satisfied that the grant of an injunction is justified having regard to the balance of convenience. In considering that aspect I take account of the strong public interest set out above and the approach laid down in the guidance recited above. Here the Claimant has an appeal to the First Tier Tribunal which the Defendant is content to see expedited; the statutory appeal does not provide for a suspension of the deregistration; and although the Claimant has shown to the necessary level a challenge to the correctness of the Defendant's decision it has not shown any basis for concluding that there was an abuse of power or unlawfulness of the kind necessary for an interim injunction to be granted.
>
> 8. Accordingly, the application for interim relief falls to be refused."

The parties' cases

38. On behalf of S&S, Ms Nathan QC submitted that the Claimant was in an 'egregious' position and that the Decision was 'catastrophic' for it. It cannot issue VAT receipts. It cannot trade legally above the VAT limit £85 000. It can therefore no longer compete in the market. Unless S&S is able to secure

injunctive relief from this Court, it will not be able to challenge the Decision either before the FtT or on judicial review because it will not survive long enough to do so.

39. Ms Nathan said I could grant an injunction either: (a) pending the judicial review as interim relief in the ordinary way; and/or (b) on a freestanding basis in order to safeguard and protect her client's appeal right to the FtT, and in relation to the latter, she relied on cases such as *Fourie v Le Roux* [2007] 1 WLR 320, [30], and *Convoy Collateral Ltd v Broad Idea International Ltd and another* [2021] UKPC 24, [90]-[92] as establishing such jurisdiction.

40. Ms Nathan made a number of criticisms of how HMRC had behaved during the investigation, including that they had given no warning to S&S that they were considering de-registration. I will return to this point later. She said that whilst her client had engaged and sought to answer HMRC's concerns, a considerable amount of correspondence went entirely unanswered or, when it was answered, there was little in the way of substantive comment by HMRC.

41. She said that HMRC had given differing and inconsistent reasons at various stages for the Decision. Some reasons given by Mr Mills in his letter of 27 August 2021 were no longer being relied upon, whilst new grounds were now advanced. She said the ground had shifted. She said all of this went to show the Decision was flawed. Ms Nathan also attacked some of HMRC's conclusions which had led them to de-register S&S, for example in relation to undisclosed bank accounts, and its alleged connections to earlier companies which were viewed with suspicion. I will come back to this.

42. In relation to the test I should apply, Ms Nathan said that HMRC were wrong to submit, on the basis of cases such as *CC&C v Revenue and Customs Commissioners* [2015] 1 WLR 4043, *R (ABC Ltd) v Revenue and Customs Commissioners* [2018] 1 WLR 125, *R (OWD Ltd (t/a Birmingham Cash and Carry)) v Revenue and Customs Commissioners* [2019] WLR 4020 and *Ingenious* that something in the nature of an abuse of power by HMRC was required before relief can be granted. She sought to distinguish *CC&C*, *ABC* and *OWD* on the basis that the types of decision under challenge in those cases had been taken pursuant to a 'finely calibrated' statutory scheme and that the court in *Ingenious* had gone too far. She relied on the decision of Mostyn J in *R (DEF Ltd) v The Commissioners for HM Revenue and Customs* [2019] EWHC 600 (Admin). She submitted that Parliament has never considered deregistration on the basis of abuse of the VAT system. She said the VAT legislation dealing with registration and deregistration is notable for its limited, if any, prescription of the circumstances in which deregistration is possible, and entirely silent on the issue of whether and, if so, when a person can be deregistered on the basis that it has abused its VAT registration number. Therefore, she said it was inappropriate to import the *CC&C/ABC/OWD* line of authority (which requires an arguable case of serious wrongdoing by HMRC before interim relief should be granted in the present context) when considering whether to grant an injunction in this case.

43. But in any event, if she needed to show it, Ms Nathan said there had been an arguable abuse of power in this case by HMRC when it took the Decision, in particular because HMRC had not sent a 'minded to' de-register letter, which Underhill LJ said in *CC&C* it should do, and so S&S had had no opportunity to comment prior to the Decision being taken. That was because it amounted to a 'bolt out of the blue', a phrase used by Simler J (as she then was) in *R (Tidechain Ltd) v The Commissioners for HM Revenue and Customs* [2015] EWHC 4031; the Decision was irrational; HMRC had failed to take into account relevant considerations and left relevant ones out of account. It had misunderstood the facts. It was disproportionate and therefore in breach of Articles 6 and 8 of the European Convention on Human Rights (the ECHR), and Article 1 of Protocol 1 (A1P1). Ms Nathan said, as Eyre J had found, there was a serious issue to be tried about the lawfulness of the Decision.

44. Further or alternatively, the Claimant contended that this matter must be assessed in the context of the overall balance of convenience and whether the courts are content to permit HMRC to deregister a taxpayer with no safeguards and in the knowledge that its decision will not be capable of effective challenge because S&S will have collapsed by the time the appeal to the FtT comes on for hearing. Ms Nathan said that the way HMRC had conducted themselves struck at the heart of the lawfulness of the exercise of the power such that the Administrative Court should intervene and grant interim injunctive relief pending the outcome of the permission decision and, if permission is granted, the judicial review proceedings.

45. On behalf of HMRC, Mr Kinnear QC did not really dispute that the Decision may have serious consequences for the Claimant, although he did not accept it would become insolvent before the FtT appeal. He submitted that: (a) the Decision to deregister does not amount to an abuse of power and therefore the Claimant cannot benefit from injunctive relief; and (b) without prejudice to his first submission, above, the balance of convenience lies in favour of HMRC in particular given that (it was asserted) S&S has been responsible for the fraudulent suppression of in excess of £23 million of VAT, which was itself a continuation of similar fraudulent activity involving predecessor linked companies, and thus there is an overwhelming public interest in protecting the Revenue.

46. Mr Kinnear disputed the assertion that HMRC had changed their position in the way contended for by S&S. He said the Decision had been fundamentally based on the discrepancies in the material provided (or deliberately not provided) by the Claimant, as compared to the information provided by their customers. He said this core argument had been maintained by HMRC throughout and was set out as early as 25 January 2021.

47. On the test to be applied, Mr Kinnear said that the relevant authorities (some of which I have already referred to, and to which I will return) said it was agreed I had jurisdiction to grant the injunction sought, but that exceptional circumstances were required, those being: (a) where the decision being challenged involved unfairness or serious misconduct by HMRC of a fundamental character; (b) where compelling evidence shows that the right to

an appeal would be illusory (on the basis that the business would fail before the appeal); and (c) where evidence is available that demonstrates a proper insight into the ultimate chances of success.

48. He submitted, contrary to the Claimant's position, that it was necessary to show an arguable case that there has been an abuse of power; and that the deregistration scheme has been designed so as to give HMRC a broad discretion in respect of the deregistration of taxpayers who have utilised their registration to fraudulent and abusive ends. Any suggestion that Parliament has not granted the Defendants power to deregister in such circumstances had no merit. He said the relevant law had been set out, in particular, in *CC&C* which was binding upon me, and he rejected the Claimant's attempt to distinguish it on the basis it was concerned with a different and more 'calibrated' statutory scheme. He said, alternatively, that in any event VAT de-registration was sufficiently calibrated. He said, simply put, the law is clear that injunctive relief is only appropriate in this context if an abuse of power can be identified and it could not. For the same reason, he said that there is no basis on which to grant interim relief solely to aid the FtT proceedings.

49. Mr Kinnear also disputed that the Convention provided any basis for an injunction. Articles 8 and A1P1 were not engaged by S&S's position. In relation to Article 6, Mr Kinnear submitted that Parliament has provided a multi-tiered review and appeal system, that can be subject to judicial oversight in appropriate circumstances. He said that if the Claimant were unable to avail itself of this system for financial reasons, that would not be the fault of HMRC. In any event, he said that the Claimants had not carried the burden of showing to the requisite high degree of probability that its business would fail before its appeal. Also, even if such a risk had been shown, the balance of convenience and the need to protect the Revenue weighed against injunctive relief.

Discussion

The test for injunction relief in the public law context

50. Before turning to the specific VAT de-registration context of this case, I begin with considering the general approach to be applied where an injunction is sought by way of interim relief in a public law challenge.

51. The relevant principles were considered by the Court of Appeal in *R (on the application of the Governing Body of X) v Ofsted* [2020] EWCA Civ 594, [62]-[65]:

> "62. In the context of civil litigation, the well-known principles deriving from Lord Diplock's speech in American Cyanamid *Co. v Ethicon Ltd.* [1975] AC 396 (at p.407) were summarized by Christopher Clarke J., as he then was, in *Sabmiller Africa B.V. v East African Breweries Ltd.* [2009] EWHC 2140 (Comm) (at

paragraphs 47 and 48). As he explained, the ‘general approach’ is for the court to ask itself ‘[whether] there is a serious question to be tried’, and, if there is, ‘whether the claimant would be adequately compensated in damages and whether the defendant would be in a financial position to pay them’. If so, ‘no injunction should normally be granted". If not, the court must then consider "whether the defendant would be adequately compensated under the [claimant's] undertaking as to damages in the event of his succeeding at trial’. If that is so, ‘the fact that the defendant may succeed at trial is no bar to the grant of an injunction’. But where there is ‘doubt as to the adequacy of damages for both parties the court must determine where the balance of convenience lies’. If matters are ‘evenly balanced’, it may be appropriate to take ‘such measures as are calculated to preserve the status quo’ (paragraph 47). But as Christopher Clarke J. went on to say, these are only ‘guidelines’ and ‘not a fetter on the Court's jurisdiction under section 37 [of the 1981 Act] to grant an injunction where it is just to do so" (paragraph 48).

63. In public law proceedings, the *American Cyanamid* principles have been applied in a modified way. The court's approach to the granting of injunctive relief in public law cases was considered in *R. v Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2)* [1991] 1 AC 603 (at pp.671 to 674), where Lord Goff of Chieveley said (at p.673B-E):

> ‘Turning then to the balance of convenience, it is necessary in cases in which a party is a public authority performing duties to the public that "one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed:" see *Smith v. Inner London Education Authority* [1978] 1 All E.R. 411, 422, per Browne L.J., and see also *Sierben v. Westminster City Council* (1987) 86 L.G.R. 431. Like Browne L.J., I incline to the opinion that this can be treated as one of the special factors referred to by Lord Diplock in the passage from his speech [in American Cyanamid] which I have quoted. In this context, particular stress should be placed upon the importance of upholding the law of the land, in the public interest, bearing in mind the need for stability in our society, and the duty placed upon certain

> authorities to enforce the law in the public interest. This is of itself an important factor to be weighed in the balance when assessing the balance of convenience. So if a public authority seeks to enforce what is on its face the law of the land, and the person against whom such action is taken challenges the validity of that law, matters of considerable weight have to be put into the balance to outweigh the desirability of enforcing, in the public interest, what is on its face the law, and so to justify the refusal of an interim injunction in favour of the authority, or to render it just or convenient to restrain the authority for the time being enforcing the law. … .'

64. Lord Goff went on to say (at p.674A-D):

> 'I myself am of the opinion that in these cases, as in others, the discretion conferred upon the court cannot be fettered by a rule; I respectfully doubt whether there is any rule that, in cases such as these, a party challenging the validity of a law must – to resist an application for an interim injunction against him, or to obtain an interim injunction restraining the enforcement of the law – show a strong prima facie case that the law is invalid. It is impossible to foresee what cases may yet come before the courts; I cannot dismiss from my mind the possibility (no doubt remote) that such a party may suffer such serious and irreparable harm in the event of the law being enforced against him that it may be just or convenient to restrain its enforcement by an interim injunction even though so heavy a burden has not been discharged by him. In the end, the matter is one for the discretion of the court, taking into account all the circumstances of the case. Even so, the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken.'

> 65. Those principles informed the decision of the Privy Council in *Belize Alliance v Department of the Environment of Belize* [2003] UKPC 63; [2003] 1 WLR 2839). In that case Lord Walker of Gestingthorpe said (at paragraph 39):
>
> > '39. Both sides rightly submitted that (because the range of public law cases is so wide) the court has a wide discretion to take the course which seems most likely to produce a just result (or to put the matter less ambitiously, to minimise the risk of an unjust result) …'"

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

Injunctive relief in VAT and duty cases

53. Both parties placed the Court of Appeal's decision in *CC&C* at the heart of their cases, and it is therefore necessary to consider it in some detail.

54. It arose in the context of the statutory regime which permits wholesale trading in alcoholic drinks and other dutiable goods which are held in, or moved between, excise warehouses without giving rise to an 'excise duty point' and thus attracting liability for excise duty. Such goods are generally described as 'duty-suspended' goods. The regime is governed by both EU and domestic regulations. The Warehousekeepers and Owners of Warehoused Goods Regulations 1999 (SI 1999/1278) (the Regulations) provide for persons holding or buying duty-suspended goods to be approved and registered by HMRC as 'registered owners'. The regime is highly prescriptive as regards the procedures and paperwork to be employed (a point fastened on to by Ms Nathan, as I have said, in her efforts to distinguish this case). There is a recognised problem of dishonest traders seeking to manipulate the system in order to evade duty. Pursuant to their statutory power, HMRC revoked with immediate effect the appellant company's registration under the Regulations on the grounds that it was no longer a 'fit and proper person' for the purposes of the conditions prescribed by HMRC under reg18.

55. The appellant appealed to the Tribunal against the revocation decision and also commenced separate judicial review proceedings seeking, by way of interim relief, an order that HMRC forthwith should restore its registration pending the determination of the Tribunal appeal. The company's case for interim relief was that, applying the balance of injustice test, the court should exercise its general jurisdiction under s 37(1) of the SCA 1981, to grant injunctive relief in all cases in which it appeared to the court to be just and

convenient to do so, so as to stay the effect of the revocation decision until the affected person had had the opportunity to exercise its options of internal HMRC review or appeal under the Finance Act 1994.

56. The judge at first instance refused interim relief, holding that, inter alia, the court should exercise very considerable caution before deciding to require HMRC to give even a temporary registration to somebody whom they had determined, under the statutory scheme contained in the Regulations, not to be a fit person to have a registration. In the Court of Appeal, Underhill LJ at [36] recorded counsel for HMRC's submission that the balance should:

> "…only come down in favour of restoring a trader to the register on an interim basis where, as he put it in his skeleton argument,
>
> > 'there is a case of irrationality on the part of HMRC which is sufficiently strong to amount to capriciousness or bad faith [and] that case is at least strong enough to justify permission to apply for judicial review notwithstanding the availability of the statutory remedies.'
>
> In his oral submissions he said that relief should only be granted where a claimant had shown an arguable case that HMRC had behaved so 'outrageously' that the Administrative Court was entitled to grant a remedy which was not provided under the statutory scheme. Such an approach was consistent with the balance of injustice test because it was necessary in striking that balance to take into account the public interest and, more particularly, the fact that Parliament - for policy reasons which it was for it to judge but which were well understandable - had intended to give HMRC a power of summary revocation which could only be challenged to a limited extent. He submitted that no arguable case had been shown of any such egregious conduct on the part of HMRC as would justify this court in intervening."

57. At [38] Underhill LJ said that he had no doubt the court had jurisdiction under s 37 to make the mandatory injunction sought, and that the question was what approach the court should take to the exercise of that jurisdiction. At [39] he answered that question as follows:

> 39. The starting-point seems to me that Parliament has enacted a self-contained scheme for challenging 'relevant decisions' by HMRC in relation to (broadly) excise management issues, which covers, inter alia, decisions to revoke the registration of registered excise shippers and dealers. It is trite law that where such a scheme exists it would normally be wrong for the High Court to permit decisions of the kind which it covers to be challenged by

way of judicial review. The effect of the authorities is conveniently summarised in the judgment of the Privy Council, delivered by Lord Jauncey of Tullichettle, in *Harley Development Inc v Comr of Inland Revenue* [1996] 1 WLR 727, 735-736:

> ‘In *R v Inland Revenue Comrs, Ex p Preston* [1985] AC 835 Lord Scarman said, at p 85: 'My fourth proposition is that a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision.' This proposition was elaborated in *Inland Revenue Comrs v Aken* [1990] 1 WLR 1374, 1380, by Fox LJ in the following passage: 'In *In re Vandervell's Trusts* [1971] AC 912., 933, Viscount Dilhorne said: 'but where the correctness of an assessment, and so the liability to pay income tax or surtax, is challenged, that can only, in my opinion, be decided by the special or general commissioners.' I refer also to the speech of Lord Diplock in that case, at p 944. That then is the true principle applicable in these cases, namely, that the statutory machinery is exclusive machinery for an appeal from a notice of assessment. There is normally no other. However, I do not say there are no cases in which, exceptionally, a challenge by way of judicial review or otherwise to a decision of the revenue would be possible. There may be cases where, for example, there has been some abuse of power or unfairness, which would justify the intervention of the court: see for example *R v Inland Revenue Comrs, Ex p Preston* [1985] AC 835. But that is exceptional. Normally the statutory machinery under the Taxes Management Act 1970 is the exclusive machinery for challenge to an assessment by a taxpayer. In my judgment there is nothing in the present case which comes near to such impropriety by the revenue as to justify departure from the normal procedure.' There

> are other dicta of high authority to the same effect. 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."

58. Because of Ms Nathan's submission that I could grant an injunction in aid of the Tribunal proceedings, without reference to the application for judicial review, it is important to note what Underhill LJ said at [40]:

> "40. Mr Jones [counsel for the company] submitted that although the claimant had framed its claim as one for judicial review it had not in fact been necessary to do so: the claim could have been formulated as a free-standing claim for interim relief 'in aid of the tribunal proceedings'. In so far as he was relying on the difference in the form of the proceedings, I do not think that this submission assists him. The principle identified above is not peculiar to claims for judicial review but applies to any claims in the High Court the effect of which is to usurp the role of a tribunal designated by statute to determine claims of the kind in question: see the long line of cases originating with *Barraclough v Brown* [1897] AC 615 and culminating in *Autologic Holdings plc v Inland Revenue Comrs* [2006] AC 118."

59. At [41] Underhill LJ said that it had been argued that the application was not going behind the appeal procedure provided by Parliament, but was supplementing it. He rejected that submission, saying that Parliament could have provided for the FtT to have power to make suspensory orders pending the outcome of an appeal, but it did not do so. He said he did not think that it was open to the court to provide remedies or procedures for which the statute did not provide, particularly so when, care was obviously taken to specify precisely what the Tribunal could and could not do. He added that where it is intended that the powers of the court, including the power to grant interim relief, may be deployed 'in aid of' another tribunal, that is typically done by express provision, eg, s 44 of the Arbitration Act 1996. He said that the absence of any power under the statute to suspend the effect of a relevant decision pending appeal may be capable of operating harshly in the case of decisions to revoke the registration of registered excise dealers and shippers, but it is not incomprehensible. He said that Parliament could reasonably have regarded the loss of registration pending an appeal as simply a risk of the business which traders had to accept.

60. At [43]-[45] he concluded (emphasis added):

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

44. In short, therefore, I believe that the court may entertain a claim for judicial review of a decision to revoke the registration of a registered excise dealer and shipper, and may make an order for 'interim re-registration' pending determination of that claim (subject, no doubt, to such conditions as it thinks fit), in cases

> where it is arguable that the decision was not simply unreasonable but was unlawful on one of the more fundamental bases identified above. Such cases will, of their nature, be exceptional. That approach may seem unfamiliar in as much as it involves making a distinction which it is not normally necessary to make between 'mere' unreasonableness and other grounds of public law challenge of the type identified above: indeed there are plenty of observations in the authorities to the effect that the various ways of formulating such a challenge tend to blur into one another (including, famously, by Lord Greene MR in *Wednesbury* itself: see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, 229). But I see no conceptual difficulty about making such a distinction where the circumstances call for it; and here it arises naturally from the way in which the jurisdiction of the tribunal is defined in section 16 of the 1994 Act.
>
> 45. Applying that approach, the answer in this case seems to me to be clear. On the limited materials so far available, Judge Keyser QC may have been right to acknowledge that there is an arguable case that HMRC's decision was one to which they could not reasonably have come. But I see no basis whatever for an argument that it amounted to an abuse of power or that it was improper or taken in bad faith …"

61. At [47] Underhill LJ considered whether HMRC was required to give a 'minded to' decision to the taxpayer when it was considering de-registering it, with an opportunity to make representations against de-registration before a final decision was taken:

> "47. It is for those reasons that I decided that this appeal should be dismissed. I should, however, like to add this. The view that I have taken of the law means that HMRC's power of revocation is indeed capable of A operating harshly, essentially for the reasons advanced by Mr Jones: if they make an unreasonable decision, the trader affected by their mistake will almost certainly suffer serious uncompensatable loss, which may sometimes be fatal to his business, before it can be corrected through the review or appeal mechanisms. It is all the more important, therefore, that they take all possible care to ensure that any such decision is well founded. The risk of B error is obviously increased if the trader has not been given an opportunity to draw to HMRC's attention, before the decision is taken, factual or other matters which they may have overlooked or mis-appreciated in their assessment of the grounds for revocation. I do not see why it should not

> be normal practice for a trader whose registration HMRC is contemplating revoking to be given prior notice of the intended decision, and the grounds for it, in the form of a "show cause" or "minded to" letter, with a limited time for response, before a final decision is taken. (Or the decision could be notified, but on the basis that it would not take effect for a limited period during which representations could be made.) Mr Brennan was asked in the course of oral submissions whether there was any reason why such a procedure could not be followed, but he was unable to suggest any. I could understand a concern about over-complicating the process of revocation; but in fact such a procedure would be substantially the same as the process of informal review which is already offered - with the crucial difference that it would occur before, rather than after, the decision had taken effect. I can also understand that there may be particular cases where HMRC reasonably take the view that the public interest requires the registration to be revoked without prior notice and with immediate effect; but in the light of the time taken to reach a decision in the present case it would be hard for them to maintain that that will always be so. None of this is directly pertinent to the present case because, as I have said, no case of procedural unfairness was advanced; and I need not therefore consider whether a failure to give prior notice of an intention to revoke might in an appropriate case constitute a sufficient unfairness to justify the intervention of the court. But I would encourage HMRC to give further thought to their procedures in this regard."

62. In footnote 3 to his judgement, which followed the sentence in [26] where counsel for the claimant had submitted that there '…is no route by which the trader can be compensated for a wrong decision, save in the very exceptional case where he can prove misfeasance in public office', Underhill LJ said:

> "It might be thought that another possible route was via article 1 of the First Protocol to the Convention on Human Rights and Fundamental Freedoms and section 6 of the Human Rights Act 1998, as canvassed by Lord Scott of Foscote in *Jain v Trent Strategic Health Authority* [2009] AC 853. But [counsel for the claimant] said that it was doubtful whether registration would fall within the scope of the article: he may have had in mind *R (New London College Ltd) v Secretary of State for the Home Department* [2012] PTSR D21 [2012] EWCA Civ 51]."

63. In his concurring judgment, Lewison LJ said at [48]-[50]:

> "48. I agree with the reasoning and conclusions of Underhill LJ, whose judgment I have read in draft. I add a few observations of my own.
>
> 49. As Underhill LJ has explained Mr Brennan accepted that the court has jurisdiction to grant the injunction claimed. But "jurisdiction" is a slippery word. As long ago as 1915 Pickford LJ pointed out in *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, 563 (approved by the House of Lords in *Fourie v Le Roux* [2007] I WLR 320, para 25):
>
> > "The first and, in my opinion, the only really correct sense of the expression that the court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, i e, that although the court has power to decide the question it will not according to its settled practice do so except in a certain way and D under certain circumstances."
>
> 50 Thus while I accept that the court has jurisdiction to grant the injunction in the first sense, the real question is whether the court's settled practice means that on the facts of this case it is inappropriate to exercise the power conferred on it by section 37(1) of the Senior Courts Act 1981. For the reasons given by Underhill LJ I am satisfied that it is. I too would dismiss the appeal."

64. Arden LJ agreed with both judgments.

65. The next case I need to consider is *ABC*. This concerned the legislative scheme for the wholesale of duty paid alcohol, and the need for approval by HMRC, which had been refused to the claimant company on the basis that HMRC did not consider it to be a fit and proper person (the statutory test). The main issue before the Court of Appeal was whether HMRC had the power, notwithstanding this conclusion, to grant the company temporary approval pending appeal. The Court of Appeal held that HMRC did have such a power.

66. In relation to the High Court's power to grant injunctive relief under s 37, the wholesalers challenged the decision in *CC&C*, and the limits it set on the High Court's powers, as having been decided *per incuriam*, or else said it could be distinguished as relating to a different statutory scheme (see at [63]). In the course of rejecting these challenges, Burnett LJ (as he then was) 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 h 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.
>
> Whilst on one reading, para 44 of the *CC & C Ltd* case [2015] 1 WLR 4043 might be thought to constrain the grant of relief to the types of case just referred to, I do not consider that could be a correct reading because Underhill LJ was avowedly not attempting an exhaustive definition of the additional element that might suffice."

67. At [62] Burnett LJ pointed out that there had been no discussion of the ECHR in *CC&C*, although its possible applicability had been noted. At [81] he said (again, emphasis added):

> "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.

> 82. It is sufficient to consider the arguments advanced before us by reference to article 6 and unnecessary to explore the altogether more complicated route of A1P1 because both parties coalesced around the proposition that it is the effectiveness of the appeal that would provide the necessary factual background even if an A1P1 argument could be advanced."

68. His reasoning in support of these conclusions was as follows (see [77]-[81]):

a. 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;

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

c. 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;

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

69. Importantly, at [83] Burnett LJ noted the acceptance by counsel for the company that it was not his case that interim relief should issue automatically even if a claimant could demonstrate that it would not be able to survive the wait for the appeal to be heard. It was accepted by the company 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 weigh when considering whether to grant an injunction, itself a reflection of the fact that the legislative scheme in question exists to protect the public purse and legitimate traders. He said at [84]-[85]:

> "85. A claimant seeking an injunction would need compelling evidence that the appeal would be ineffective. It would call for more than a narrative statement from a director of the business speaking of the dire consequences of delay. The statements should be supported by documentary financial evidence and a statement from an independent professional doing more than reformulating his client's stated opinion. Otherwise, a judge may be cautious about taking prognostications of disaster at face value. It should not be forgotten that a trader who sees ultimate failure in the appeal would have every incentive to talk up the prospects of imminent demise of the business, in an attempt to keep going pending appeal.

> Equally, material would have to be deployed which provided a proper insight into the prospects of success in an appeal. There is no permission filter for an appeal to the FTT. The High Court would not intervene in the absence of a detailed explanation of why the decision of HMRC was unreasonable. It must not be overlooked that the FTT is not exercising its usual appellate jurisdiction in these types of case where it makes its own decision. Finally, there would have to be detailed evidence of the attempts made to secure expedition in the FTT and the reasons why those attempts failed. Whilst the jurisdiction exists to grant interim relief in this way, its use is likely to be sparing because steps (i) and (ii) identified above should provide practical relief in cases which justify it and the circumstances in which it would be appropriate for injunctive relief to issue will be rare."

70. This passage needs to be read bearing in mind that, as I have explained, in relation to de-registration appeals the FtT exercises an appellate jurisdiction and not a supervisory jurisdiction.

71. The Court of Appeal held, contrary to the position of HMRC, that HMRC had the power to temporarily re-register a trader under the statutory scheme pending an appeal notwithstanding that it had *ex hypothesi* determined it not to be a fit and proper person for the purposes of the statutory scheme.

72. This case proceeded on appeal to the Supreme Court and is reported under the name *R (OWD Ltd (trading as Birmingham Cash & Carry) (in liquidation)) v Revenue and Customs Commissioners* [2019] 1 WLR 4020. Judgment was given on 19 June 2019. HMRC challenged the Court of Appeal's conclusion that they had power to grant temporary approval; on that question, the Revenue's appeal was allowed by the Supreme Court, which held they had no such power. That was the first question on the appeal. In her judgment at [5]-[7], Lady Black said the second question:

> "[5] ... 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 s 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."

73. Lady Black considered the second question at [50] et seq of her judgment. She noted at [59] that before the Court of Appeal there had been limited debate about the Convention aspect of the case, and that counsel for HMRC had accepted that the High Court could grant an interim injunction to vindicate the Convention rights of the wholesalers.

74. However, as I read her judgment, she did not in terms disagree with the analysis and general approach of Burnett LJ in the Court of Appeal (a point also recognised by the judge in *Ingenious* at [52]), whilst expressing the Supreme Court's 'unease' at the High Court making such an order in the context of the particular statutory framework involved because it would involve the court requiring HMRC to treat a trader as a fit and proper person when they had concluded that it was not (see at [70]-[72]).

75. She said at [63]:

> "[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 art 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 [by the judges at first instance] that the evidence produced by the wholesalers in support of their application for injunctive relief on an art 6 basis failed to meet the d required standard (see para [86] of Burnett LJ's judgment, set out above)."

76. *CC&C* was considered by Simler J in *Tidechain*. Given the basis on which Ms Nathan sought to distinguish *CC&C*, it is important to note that the decision challenged in *Tidechain* was a decision to de-register the company for VAT because HMRC concluded that it was using its VAT registration solely or principally for fraudulent purposes. The relevant factual and legal scenario was therefore the same as the one I am concerned with.

77. At [27]-[28] Simler J said:

> "27. The claimant takes issue with the merits and the reasonableness of that decision. Mr Suleyman addresses in detail in his affidavit the lack of merit and unreasonableness of the decision; and Mr Jones took me through each factor relied on by Mr Elms to show how unreasonable a basis it was for inferring fraud, particularly having regard to the claimant's business model and modus operandi …
>
> 28. The merits and reasonableness of HMRC's decision are matters for the FTT. It may well be that Mr Jones' submissions have force, particularly having regard to the claimant's business model, but that is not a matter on which I have jurisdiction to decide. The avenue of challenge prescribed by statute is the FTT and it is well established that judicial review is not an available remedy where an alternative remedy, such as a statutory appeal, exists. Where Parliament has identified an appeal route to the FTT, as is the case here, it is only rarely that courts will allow judicial review to be used co-laterally to attack the appealable decision. Examples of cases where this has been permitted include cases where abuse of power or unfairness amounting to a breach of contract or breach of representation are alleged. That is trite law and was reflected i n the conclusions of the Court of Appeal recently in *CC&C Limited v HMRC* [2014] EWCA Civ 1653 which is binding on me. Though Mr Jones sought to distinguish *CC&C* on the basis that it concerned a privilege in relation to registration whereas this case concerns an obligation, I do not regard that as a material distinction in this regard and consider those principles to be as binding here as they were in *CC&C*."

78. At [33]-[35], [39], Simler J rejected a fairness challenge based on a failure to warn the company that de-registration was being considered:

> "33. The claimant contends that it was given no opportunity to address the allegations levelled against it by HMRC in advance of the decision that is impugned here. That is so seriously procedurally unfair and irregular as of itself to require the decision to be quashed as unlawful. Moreover, according to the claimant, it supports the

proposition that there is an improper punitive element to the action taken by HMRC in this case.

34. I do not consider that this ground gives rise to arguable unlawfulness justifying the court's acceptance of jurisdiction. The absence of advance notice of deregistration or an opportunity to challenge a 'minded to' letter is a function of the statutory scheme which is not challenged and does not provide for advance notice to be given. That would not prevent HMRC in the exercise of care and management discretion from doing so i n any event, but in this case HMRC contend that they have in fact done so.

35. This is not a case where deregistration was a bolt out of the blue. As Mr Elms explains, the claimant was issued with warning letters and tax loss letters for a considerable time prior to deregistration …

…

39. Moreover, it seems to me that this allegation is so closely connected with questions concerning the merits of the deregistration decision and HMRC's entitlement to be satisfied that the claimant ceased to be a registrable person, all of which fall well within the statutory regime so as not to justify the court allowing the collateral process of judicial review to be used to attack the decision in circumstances where the appeal can be advanced on that very basis. For that further reason this ground is accordingly unarguable."

79. At [46] she addressed an argument based on A1P1:

"Finally, it is difficult to see how or why an AlP1 argument should cause this court to accept jurisdiction in a case where the legislation is not challenged and abuse of power is not alleged. Parliament's clear intention is that the FIT is the statutorily designated route of challenge to such decisions. The adverse impact of the decision that the claimant relies on is a consequence of the statutory scheme itself in the absence of any evidence of impropriety by HMRC, or any proper basis for alleging bad faith or abuse of power. The scheme does not provide for compensation, nor does it provide for interim relief. Those adverse consequences raised by the claimant could be raised in every case in which deregistration occurs, given the effect of deregistration is, as a matter of fact, to prevent a trader from carrying on trade beyond the threshold for registration. For all those reasons it seems to

> me that there is no arguable basis for judicial review raised by ground 2."

80. *Tidechain* was followed by Robin Purchas QC, sitting as a deputy High Court judge, in *Thames Wines Ltd v Revenue and Customs Commissioners* [2017] EWHC 452 (Admin), and by FtT Judge Mosedale in *Manhattan Systems*, [42].

81. The next case I come to is *DEF*. Judgment was given by Mostyn J on 14 March 2019, at a time when the Supreme Court's judgment in *OWD* was awaited (as the judge noted at [2]) of his judgment). The case concerned an application for what the judge called an *ABC* injunction, namely, an injunction requiring HMRC to grant the claimant temporary approval for the trade in duty-suspended alcohol pending its appeal to the FtT against HMRC's decision to withdraw its approval. HMRC having refused to do so at a time when (*per* the Court of Appeal's judgment in *ABC*) the law was that it did have the power to do so. The appeal was brought on the basis that without an injunction the claimant would become insolvent before its appeal could be heard. At [7] the learned judge said, in a paragraph which Ms Nathan emphasised in her Skeleton Argument:

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

82. In granting the injunction, the judge applied a three-stage test, which he said had not been materially in dispute (see at [3]-[5]): (a) had the claimant shown to a high degree of probability that if the order were not made, its appeal would be rendered nugatory or illusory; (b) if so, had the claimant shown that its appeal to the FtT was arguable and would not be susceptible to being struck out as disclosing no reasonable prospect of succeeding under rule 8(3) (c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273); (c) thirdly, if so, had the claimant shown, applying a balancing exercise, that the advantage to it in being allowed to trade outweighed the disadvantage to HMRC (including detriment to the public interest) in that event. On this question, the judge referred to HMRC's reliance on this issue on *Factortame Ltd (No 2)*, p673.

83. This was therefore a case where the injunction was sought on the additional Convention-based category identified by Burnett LJ in *ABC*, rather than on the basis of abuse of power, etc, established in *CC&C*.

84. On the facts, the judge granted the injunction sought: see at [39] et seq.

85. With all due respect to the learned judge, and despite the emphasis Ms Nathan placed on this case, I did not find it of particular assistance for the following reasons. Firstly, whether the High Court has power to grant 'an *ABC*

injunction' was, in the event, doubted by the Supreme Court in *OWD*. Second, at [8], the judge said:

> "8. The authorities say that the reason a stringent test is applied on the determination of the application is because in sec 16(4) of the Finance Act 1994 Parliament chose not to vest the FTT with the power to award interim relief. Therefore, it is said, the court should be cautious before it starts liberally wielding a power which Parliament, by design, did not include in the statutory scheme. I have to say, respectfully, that I doubt the logic of this argument …"

86. As I will make clear, I regard as binding on me the authorities which the judge doubted, namely *CC&C* and *ABC*, the latter of which, as I have said were approved of by the Supreme Court in *OWD*. Whilst the judge expressed the view he did, matters moved on after that.

87. Thirdly, whilst on a broad basis I do not especially differ from the judge's three-stage approach to the issues which the claimant was advancing, at bottom, it seems to me, his decision was one on the particular facts of the case.

88. The last case I need to consider in detail is the decision of Sir Ross Cranston in *Ingenious*. Judgment was given on 18 August 2020 and so it post-dates *DEF* by some margin. It also concerned a decision to de-register a company for VAT on the grounds of suspected fraudulent use of its VAT registration number. Ingenious contended that the decision to cancel had prevented it from trading and that, unless its registration was quickly restored by means of urgent interim relief, it would become unable to pursue its appeal to the Tribunal against de-registration. It was submitted ([54]) that if interim relief were to be denied the company would 'bleed to death 'before the Tribunal heard the appeal.

89. At [51]-[53], the judge said:

> "51. It was common ground that section 37 of the Senior Courts Act 1981 enabled this court to require HMRC to restore ICL to the register on a temporary basis. In addition to the ordinary law governing an application for interim relief, there are a number of additional principles which apply in this context. First, as in other areas of public law, the public interest carries significant weight in considering the balance of convenience: *R v Secretary of State for Transport, Ex parte Factortame Ltd. and Others (No. 2)* [1991] 1 AC 603, 673-674 per Lord Goff; *R (on the application of Medical Justice) v Secretary of State for the Home Department* [2010] EWHC (Admin). In this context the public interest is ensuring that HMRC is able to perform their duty of collecting lawfully imposed VAT and that fraud does not infect the VAT system.

> 52. Secondly, it is necessary in the balance to consider - because of the possible violation of the fair hearing provisions of Article 6 of the European Convention on Human Rights (Article 47 of the Charter of Fundamental Rights and Freedoms) - whether a claimant can demonstrate that the absence of interim relief would render an appeal to the Tribunal illusory because by the time it is heard it would no longer be viable or would have ceased to exist: *OWD Ltd (t/a Birmingham Cash and Carry) (In Liquidation) v Revenue and Customs Commissioners* [2019] UKSC 30, [2019] 1 WLR 4020, [56]-[60] referring without disagreement to Burnett U's judgment in the Court of Appeal: [2017] EWCA Civ 956.
>
> 53. In explaining the point in the Court of Appeal, Burnett LJ said that it would be necessary for a claimant to establish that the Tribunal appeal would be illusory to a high degree of probability and with compelling evidence: [81], [85]. He stated that compelling evidence would call for more than a narrative statement from a director of the business speaking of the dire consequences of delay. Rather, that type of statement should be supported by documentary, financial evidence and a statement from an independent professional doing more than reformulating his client's stated opinion."

90. At [56] the judge considered *CC&C*:

> "56. A third principle governing interim relief in this context is the high hurdle which a claimant needs to surmount. In *CC & C Ltd v HM Revenue & Customs* [2014] EWCA Civ 1653, [2015] 1 WLR 4043, the Court of Appeal reasoned that this was because Parliament did not provide for the Tribunal to have power to make suspensory orders pending the outcome of an appeal, so that it was not open to the court to provide remedies for which the statute had not provided. In defining the high hurdle, Underhill LJ (with whom the others agreed) held that it was not simply a matter of showing a realistic chance of success, but that there was something along the lines of an abuse of power, impropriety or unfairness."

Analysis

(i) Are CC&C and ABC distinguishable ?

91. I am unable to accept Ms Nathan's submission that *CC&C* and *ABC* can be distinguished from the present case on the basis that they concerned 'carefully calibrated' schemes that are relevantly different from the process of registration and de-registration for VAT. Like Simler J and Sir Ross Cranston,

I consider that I am bound by them and the narrow bounds that they place upon this Court's power to grant interim relief, and I do not share Mostyn J's doubts about their correctness, even if it were open to me to do so. In so concluding, I bear in mind that in *Willers v Joyce* [2018] AC 779, [9], Lord Neuberger said:

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

92. There are undoubted differences between the alcohol approval schemes in *CC&C* and *ABC*, and the process of registering for VAT, and I accept that Parliament has not in terms spelled out in statute the basis on which a taxpayer can be de-registered on the grounds of fraud (putting it broadly). However, these differences do not warrant a different approach to this Court's grant of injunctive relief. The processes involved are are, in material respects, the same. They all involve granting or denying or revoking approval/registration, and they all have a statutory route of review and a statutory right of appeal to a specialist Tribunal with wide powers. The harsh potential consequences for the taxpayers of an adverse HMRC decision are the same under all of the schemes. I note that in *ABC*, [64], Burnett LJ rejected an attempt to distinguish *CC&C* because of statutory differences in wording of the respective schemes for essentially these reasons.

93. I accept HMRC's general submission that the VAT deregistration scheme is sufficiently 'calibrated' to be considered on a par with these other schemes. Deregistration is clearly contemplated by VATA: [13(5)] of Sch 1 provides that the Commissioner shall not cancel registration unless they are satisfied that the person would no longer be 'entitled to be registered under this Act'. Hence it envisages deregistration for reasons other than by consent. In *Ingenious*, [41]-[44], Sir Ross Cranston rejected the submission as unarguable that there was no power to deregister on the basis of the *Ablessio* principle, and in my respectful view he was right to do so for the reasons he gave. That principle has, for some years now, been an accepted part of the domestic legal order and is the subject of the publicly available guidance from HMRC which I quoted earlier. Because of that, VAT registered traders can be in no doubt of the basis on which HMRC reserves the right to cancel their registration if they conclude that it is being fraudulently misused.

94. In my judgment, the Claimant's argument that Parliament has not considered deregistration on the abuse basis, and overlooked the potential harm to the taxpayer of there being no interim relief power in the Tribunal, has no

substance. Ms Nathan said, 'Parliament has not thought about it'. That premise is dubious. The *Ablessio* principle has been specifically acknowledged and preserved by Parliament in EU withdrawal legislation post-Brexit. Further, the VAT regime is long established and is regularly reviewed and amended. For example, very recently, in light of the Supreme Court's decision in *OWD* that HMRC had no power to grant temporary approval for the alcohol duty scheme at issue in that case, Parliament amended the Finance Act 1994 by s 131 of the Finance Act 2021 to introduce such a power.

95. Furthermore, and crucially, the passages from Underhill LJ's judgment which I set out earlier show that the foundation of his analysis and approach were general principles relating to the appropriateness of judicial review where Parliament has created a detailed appellate review scheme in relation to administrative decisions (of which VAT and duty are examples). There was nothing specific about the approval scheme involved in that case which led the Court of Appeal to the conclusions it reached.

(ii) Does this case fall within the scope of CC&C ?

96. The next issue is to examine the basis upon which S&S seeks to challenge the Decision in order to see whether it has established a sufficiently strong case on one of the exceptions (abuse of power, etc) which *may* justify this Court in intervening by way of injunctive relief. In *CC&C* Underhill LJ made clear at [44] that examination of a claimant's precise grounds of challenge is a required part of the analysis. He also made clear that, even if such an exceptional ground of challenge were established, the Court would then need to go on to consider whether the case was an 'appropriate' one (the word he used in [43]) for the grant of injunctive relief. This brings into play the general principles relating to the grant of injunctive relief in public law cases which I referred to earlier, including the balance of convenience and the risk of injustice. To be entitled to an injunction it is not sufficient for a claimant to show, for example, that HMRC has arguably been guilty of an abuse of power: that is just the gateway which the claimant needs to pass through before the court can come on to the question of public law injunctive relief generally.

97. The basis for S&S's judicial review application, as set out in its Grounds of Challenge accompanying the Claim Form, are as follows (paragraph numbers refer to that document):

    a. Abuse of power by HMRC's failure to give a 'minded-to' decision (at [16] and [62]-[65]). Paragraph 47 of *CC&C*, where Underhill LJ referred to this issue, is relied upon.

    b. Irrationality ([67] and [68]-[76]): it is said that HMRC has misunderstood the evidence or not taken matters into account, or adopted illogical reasoning. It is said HMRC has taken matters as indicators of fraud, which are not.

    c. Failure to take relevant considerations into account ([77], [78]); it is said that HMRC did not take into account any of the matters raised in

correspondence from and on behalf of the Claimants during the investigation in 2021.

d. Disproportionate to deregister S&S ([79]-[82]): it is said it was disproportionate to deregister the Claimant without first providing an opportunity to comment on the proposed deregistration, and disproportionate to deregister S&S in the circumstances of this case.

e. Breach of Article 6, 8 and A1P1 of the ECHR ([83]-[91]): again the failure to allow representations is relied upon, as what is said to be the 'empty shell' of an appeal route.

98. These Grounds of Challenge are broadly reflected in the Claimant's Skeleton Argument at [32], and they were amplified orally by Ms Nathan.

99. I asked Ms Nathan directly in argument how she put the case on abuse of power, given it was accepted that in an appropriate case HMRC can lawfully deregister a taxpayer for misusing their VAT registration. She responded it arose because: of what she said had been HMRC's failure to take into account relevant matters; their taking into account irrelevant matters; their misunderstanding of the facts; because they had not given the taxpayer an opportunity to correct them on the facts; and because they had not alerted the taxpayer to the possibility of deregistration.

100. In my judgment none of these grounds of challenge whether taken singly or together raises any, or any sufficiently, arguable issue that HMRC has been guilty of the sort of bad conduct that could properly be regarded as an abuse of power in the sense that that term is used in *CC&C*.

101. I accept that Underhill LJ's list of the types of conduct which might qualify was not intended to be exhaustive. However, the grounds of challenge in this case are all, in reality, ordinary public law grounds of challenge falling within the statutory regime and arguable on an appeal to the FtT. The fact that Ms Nathan labelled them 'abuse of power' does not change that: what matters is the substance.

102. S&S's core submission was that HMRC's case was based largely on unsubstantiated allegations. Ms Nathan took me at length and in detail to the evidence to make good that submission. In particular, she referred me to a number of passages in the evidence where she said Mr Hill and Ms Oldham had refuted the basis on which HMRC had acted, including, for example, in relation to undisclosed bank accounts; that it was a successor to two companies viewed by HMRC with suspicion; under-declarations of sales; and other matters. Thus, on the undisclosed bank account point, Ms Nathan took me to Mr Hill's second witness statemen at [10] where he said:

> "10. I understand that there have been allegations of an undisclosed bank account held by the Company and this contention is based, by Mr. Mills, on 'considerable monies transferred from the HSBC bank account to "SS Consulting Ser' (para. 79, subsection 5) and then gives as

> examples two such entries in August 2021 in subsection 6, declaring that for those two entries 'These do not seem to appear as corresponding entries on the disclosed Barclays bank statements. It implies potentially that an off-record bank account is being used.' I attach as Exhibit F3, the payment listings for the two entries in August 2021 cited by Mr. Mills, giving clear evidence that these were payments to the operatives engaged by the Company for those two weeks mentioned by Mr. Mills and not transfers to an undisclosed bank account. As Mr. Mills rightly states 'BP' is a notation on the HSBC account for 'Bill Payment'. However, Mr. Mills has totally misinterpreted the details where HSBC have quoted 'S S Consulting Ser' in the details."

103. I readily understand the submissions which were made, and accept the Claimant may well have answers for all of the allegations Mr Mills made against it in the Decision. However, all of the points Ms Nathan made on the evidence are ones which fall squarely within the scope of the FtT appeal. Indeed, Ms Nathan expressly accepted that they were points which could be evidenced and cross-examined upon in the Tribunal proceedings.

104. I can envisage circumstances in which an HMRC investigation had been carried out in such an unfair and egregious fashion, with HMRC (for example) absolutely refusing to engage with, or listen to, anything the taxpayer had to say by way of explanation - almost literally closing its ears – so that it could properly be said to be an abuse of power falling with the exceptional *CC&C* jurisdiction. But in my judgment this case falls a long way short of that sort of extreme situation.

105. As I have noted, HMRC's failure to give a 'minded-to' decision is referred to several times in the Grounds of Challenge and elsewhere as a central feature of the alleged abuse of power. Ms Nathan described it as 'fundamentally wrong'. She referred to cases on fairness such as *R v Secretary of State ex parte Doody* [1994] 1 AC 534. But in *CC&C*, when he dealt with this point at [47], Underhill LJ did no more than indicate a view this was something that HMRC *might* consider doing in *some* cases. He also made clear that there might be other cases where HMRC would be justified in not doing so. He did not go as far as to suggest a failure to do so would, of itself, amount to an abuse of power justifying the High Court's exceptional injunctive intervention. Indeed, the appeal was dismissed notwithstanding that CC&C itself had been given no notice by HMRC.

106. Where HMRC concludes on proper grounds that a VAT registered trader has been using its registration in order to facilitate fraud, there may be every reason why HMRC would not wish to give it notice. For example, they may conclude that to tip-off the trader in that way might cause or exacerbate further VAT fraud, or lead to the destruction or loss of evidence. There can be no absolute rule that HMRC must always give notice of intended de-registration.

107. I also consider S&S's argument about lack of notice fails on the facts. As I remarked during argument, the decision to de-register S&S cannot have come as a 'bolt from the blue' (to quote Simler J in *Tidechain*, [35]), given all that had transpired since the VAT investigation commenced in April 2020. I reject its submissions to the contrary. It was professionally advised throughout, and any competent adviser would have warned it of the possibility of de-registration, given the nature and scale of HMRC's concerns which were revealed during the investigation, and especially once the VAT assessment in excess of £23 million was issued in May 2021.

108. Ms Oldham of Chartergates has set out in great detail all of the dealings she had with HMRC on S&S's behalf, and has produced a significant quantity of material. It is fair to say that she does make criticisms of how HMRC and Mr Mills behaved during the investigation, and indeed at one stage she made a formal complaint. Nonetheless, it is clear there was full engagement by her, and by S&S, during the investigation in which they were both proactive.

109. To begin with, S&S knew it was being investigated by HMRC's Fraud Investigation Service. That department is referred to on all of HMRC's correspondence. That was a strong indication that HMRC was taking matters very seriously and that this was not a routine VAT inspection. Mr Mills' primary role is to investigate potentially fraudulent supply chains. Ms Nathan said the name of his department did not necessarily mean it was investigating fraud by S&S as such, but she did accept that her client would have realised this was a higher risk investigation.

110. In his witness statement Mr Mills also sets out the course of dealings between HMRC and S&S from April 2020 onwards and produces many letters and emails. Right from the outset de-registration was mentioned: Mr Mills told S&S in a letter on 18 May 2020 that if he did not receive evidence that it was still trading, then it would be de-registered.

111. Following the supply of records, in December 2020 Mr Mills emailed S&S to say that the liability of work done could not be ascertained, and that the use of invalid invoices needed to cease. These were, or should have been, potent warning signs for S&S. On 23 December 2020 Mr Mills emailed again warning S&S about the use of invalid sales invoices. In January 2021 Mr Mills wrote to S&S informing it that there were discrepancies between its records and those of its customers, in one case of 178%. From this, S&S should have known that the investigation was leading HMRC to have real and developing concerns.

112. Then there was the VAT assessment in May 2021 in excess of £23 million. On any view, that was a staggering sum. The assessment letter referred to not all bank accounts being declared, and that many requested records had not been provided. S&S must have realised by then that is was in very real trouble. There then followed the statutory review with which S&S fully engaged with its advisers but which was unsuccessful.

113. Overall, I accept HMRC's submission that during the investigation S&S was given multiple opportunities to comment on, and respond to, HMRC's

concerns (and, indeed, HMRC's failure to engage with S&S's responses was one of Ms Nathan's preliminary complaints, as I have said).

114. It follows that I reject the argument that the failure to give notice was an abuse of power. As I have said, nor do I accept Ms Nathan's other ways of putting the abuse of power point. S&S may have good grounds to attack HMRC's reasons for de-registration as being not properly evidenced, or wrong, or flawed in the other ways Ms Nathan set out. But all of these are ordinary grounds of challenge which can be advanced on the FtT appeal.

115. In my judgment, therefore, this is not a proper case to grant an injunction requiring HMRC to re-register the Claimant on the basis identified in *CC&C*. That is so whether the injunction is in aid of the judicial review, or to protect the Claimant's appeal to the FtT, the approach to both being the same: *CC&C*, [40]-[41].

(iii) Convention arguments

116. I turn to the Claimant's Convention arguments, namely, that its Convention rights under Articles 6, 8 and A1P1 will be rendered theoretical and illusory unless it is granted injunctive relief, because it will have become insolvent by the time the appeal is heard, rendering the appeal pointless. Like Eyre J, I accept that the Claimant has an arguable appeal to the FtT which does raise issues of substance.

117. I reject at once the suggestion that Article 8 is engaged in the present context. I accept that a company can have a private life under that article in some circumstances (see eg *Bernh Larsen Holding AS and others v Norway*, Application 24117/08), but there is no suggestion in any of the cases where the Convention has been discussed in relation to VAT registration or duty approval that Article 8 is engaged (see eg, *ABC*, [74]).

118. In relation to A1P1, even if VAT registration is a possession for the purposes of this article (which is a far from a straightforward question, as the *New London College* case shows ([2012] EWCA Civ 51], [79]-[98]), and Mr Kinnear argued it did not because it has no commercial value, it seems to me, as (with respect) it did to Burnett LJ in *ABC*, [75], [82], that the Claimant's arguments on Article 6 and A1P1 coalesce around the proposition that it is the effectiveness of the appeal that provides the necessary factual background, and that should be the real focus of the enquiry. Like him, therefore (and Lady Black in *OWD*, [56]) I propose to focus on Article 6.

119. The first question, in line with the authorities I have already considered, is whether S&S has shown there is a risk of pre-appeal insolvency to the high degree of probability required. The focus here is on the expert evidence.

120. In my judgment the Claimant has failed to demonstrate that there is such a risk. The headline conclusion of its expert David Bell, in his report of 17 September 2021 at [3.16] and [3.17] and in Section 5 was that if it remained deregistered, the Claimant would run out of cash reserves on 3 October 2021. However, as I have already noted, this forecast did not come to pass. At the

hearing before me (on 28 October 2021) I was not told that S&S had run out of cash, nor was that asserted in the Claimant's Skeleton Argument dated 25 October 2021, although the risk of insolvency was asserted in general terms. The accuracy and reliability of Mr Bell's opinion is therefore immediately thrown into doubt.

121. HMRC responded to Mr Bell's report in a statement from an accountant in their employ, Julia Brotherston. Her witness statement is dated 1 October 2021. She makes clear (at [1.10]) that she was providing a factual assessment, rather than acting as an expert witness in the sense of providing expert opinion evidence.

122. It is unnecessary to set out the detail contained in Ms Brotherston's statement, but in summary she takes issue with a number of the assumptions on which Mr Bell based his opinion. Appendix C to her witness statement presents, overall, a more optimistic view of the company's prospects than that presented by Mr Bell.

123. In his second witness statement of 27 October 2021, Mr Hill responded to a number of points which HMRC had made in their written submissions. These included accepting that S&S had not run out of money as Mr Bell had predicted; but that was because clients were prepared to stay with S&S until the outcome of this application, but that if it were to fail then they would leave; that some clients had left already; and that although he had taken a large dividend during the investigation, he would not have done so had he known the company was going to be deregistered.

124. With all due respect to Mr Hill, in considering his evidence, I have to bear in mind the warning of Burnett LJ in *ABC* that I need to be cautious about taking 'prognostications of disaster' from company directors at face value.

125. Overall, what I conclude from this evidence is that whilst there may be a risk of the Claimant becoming insolvent before the presently listed appeal in February 2021, it has not shown that there is a sufficiently high probability that that will be so. Its initial fears proved to be pessimistic, and matters may turn out so that it can survive until its appeal is heard.

126. There is also the broader point that, in the event that insolvency does become a real prospect, the Claimant's primary remedy to avert a potential breach of its Convention rights – its first 'port of call', as it was put in *OWD*, [59] – should be to seek further expedition of its FtT appeal. As I have said, the FtT has already engaged with the Claimant's appeal by listing it on an expedited basis in early February 2022. As a public authority, the FtT is bound under s 6 of the Human Rights Act 1998 to act compatibly with the Claimant's Convention rights, and that obligation *might* (it being entirely a matter for the FtT's own judgment) include further prioritising the Claimant's appeal to avoid a breach of its rights by ensuring its appeal was heard in time, should that prove necessary.

127. This conclusion makes it unnecessary to consider definitively where the balance of convenience or balance of injustice would come down if that

question needed to be decided. However, I recognise the very considerable force in the submission made by Mr Kinnear that even if the requisite risk of the Claimant's pre-appeal insolvency had been shown, the balance of convenience and consideration of all of the relevant factors would nonetheless come down in favour of refusing injunctive relief because of what he said is the overwhelming public interest in protecting the Revenue: (a) HMRC had acted to protect the public purse because it had concluded after a long and detailed investigation in which S&S had played an active part that there had been massive underpayment of VAT by the Claimant, as well as other serious problems with its compliance with the VAT system, and this was not therefore a case of the accidental underpayment of small sums of VAT; (b) to allow it to continue trading *pro tem* would therefore expose HMRC to a risk of further substantial loss; (c) there was evidence that Mr Hill had taken a large sum of money out of it by way of dividends during the course of HMRC's investigation, a figure some three times the amount taken in previous years, thereby weakening its financial position; (d) re-registering the Claimant for VAT would not necessarily lead to a restoration of the Claimant's prior position or save it from insolvency because it operates in a competitive market; (e) thus, its former clients might not return to it, but might prefer to place their business elsewhere; and (f) that Mr Bell had concluded that the Claimant is not able to pay the existing VAT assessment, and even if that figure were to be substantially reduced on appeal, on his figures, it still would not be able to do so, and so it would become insolvent in any event. There is also the point that to make the order S&S seeks would, in effect, require HMRC to register someone whom (rightly or wrongly) it had concluded had been facilitating VAT fraud and so should not be registered, Parliament having granted it that broad power. It seems to me that such an order would raise similar sorts of concerns which troubled the Supreme Court in *OWD*, [70]-[72], and these might tell significantly against the overall appropriateness of such an order being made.

Conclusion

128. I therefore reject this renewed application for injunctive relief.