Neutral Citation Number: [2024] EWHC 1423 (Ch)

**Appeal Reference: CH-2023-000003**

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**CHANCERY APPEALS (ChD)**

On appeal from the order of Chief Insolvency and Companies Court Judge Briggs made on 24th November 2022 – Case Reference: CR-2020-004447

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

**11th June 2024**

**Before** :

**MR JUSTICE EDWIN JOHNSON**

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**Between :**

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|---|---|
| **(1) ADRIAN CHARLES HYDE** | |
| **(2) KEVIN ANTHONY MURPHY** | |
| **(in their capacity as joint liquidators of Radarbeam Limited, a company in liquidation)** | **Appellants/ Applicants** |
| **and** | |
| **SUKHWINDER TODD** | **Respondent** |

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**Andrew Mace** (instructed by JMW Solicitors LLP) for the Appellants/Applicants
**Maxwell Myers** (instructed by Rainer Hughes Solicitors) for the Respondent

Hearing date: 26th April 2024

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# JUDGMENT

**Remote hand-down: This judgment was handed down remotely at 11.00am on Tuesday, 11th June 2024 by circulation to the parties and their representatives by email and by release to the National Archives.**

**Mr Justice Edwin Johnson:**

Introduction

1. This is my reserved judgment on an appeal against an order of Chief Insolvency and Companies Court Judge Briggs (**"the Judge"**) made on 24th November 2022. By that order (**"the Order"**) the Judge dismissed the application of the Appellants/Applicants for summary judgment on their claim against the Respondent pursuant to Section 214 of the Insolvency Act 1986 (**"Section 214"**). The Judge also awarded the Respondent his costs of the application, and directed that the claim be listed for a CCMC.

2. The Order was made pursuant to and for the reasons set out in an unreserved judgment (**"the Judgment"**) delivered by the Judge at the conclusion of the hearing of the application for summary judgment (**"the Application"**).

3. The Appellants/Applicants appeal against the Order pursuant to a permission to appeal which I granted, following an oral hearing of the permission application, by an order made on 18th January 2024.

4. On the hearing of the appeal (**"the Appeal"**) the Appellants/Applicants were represented by Andrew Mace, counsel. The Respondent was represented by Maxwell Myers, also counsel. Both counsel also appeared at the hearing of the Application before the Judge. I am grateful to both counsel for their assistance at the hearing of the Appeal, by their written and oral submissions.

The conventions of this judgment

5. All references to Paragraphs in this judgment are, unless otherwise indicated, references to the paragraphs of the Judgment. Italics have been added to quotations.

The parties

6. The Appellants/Applicants, to whom I will refer as **"the Appellants"** in the remainder of this judgment, are the joint liquidators of a company called Radarbeam Limited (**"the Company"**).

7. The Respondent was the sole director of the Company, from its original incorporation. The Respondent and his wife, Mrs Hardip Todd, were the owners of the shares in the Company.

The Company

8. The Company was incorporated on 23rd May 2002. The Company went into administration on 7th April 2014, and was subsequently placed into creditors' voluntary liquidation on 4th December 2014. The Appellants were appointed as liquidators of the Company on the same date.

9. I believe that the only known creditor of the Company in the liquidation is His Majesty's Revenue & Customs (**"the Revenue"**), which submitted a claim in the liquidation in the sum of £2,119,485.

10. The principal evidence of the Appellants in support of the claim under Section 214 (**"the Section 214 Claim"**) is a lengthy first witness statement of Mr Hyde, the First Appellant. This witness statement, which has been amended, is dated 9th February 2021. Mr Mace confirmed to me, at the hearing of the Appeal, that the pleading of the Section 214 Claim is effectively to be found in this witness statement.

11. According to this witness statement the Company commenced trading in May 2002 and was involved in the sale of used cars until 19th February 2003, when it notified the Revenue that the Company's business was then to operate as a retail shop supplying mobile phones and accessories to the public. The Company was largely exporting to Europe and Dubai.

The relevant history of the Company

12. The Company appears to have traded successfully until June 2006 when the Revenue denied the Company's entitlement to deduct input tax in relation to the Company's VAT returns. The denial of input tax related to transactions carried out during the accounting periods 04/06, 05/06 and 06/06. The total sum denied by way of input tax was £4,963,525. The relevant VAT returns for these three accounting periods (**"the Denied Returns"**) were formally rejected by a notification by the Revenue issued on 16th October 2007.

13. The Revenue's ground for denying the Company's input tax was that the input tax had been incurred in transactions connected with the fraudulent evasion of VAT, and that the Company knew or should have known of the connection. I understand that the type of fraud alleged by the Revenue is known as MTIC fraud.

14. In addition to this the Company submitted a VAT return for the accounting period 03/06 on 31st March 2006, with a claim for repayment of input tax (**"the March Return"**). In relation to the March Return the Company was repaid the claimed input tax on 25th May 2006. Subsequently however the Revenue notified the Company of its decision to deny this input tax. The notifications were given on 3rd November 2008 and 31st March 2009. Notifications of assessment were also issued on these two dates for the respective amounts denied, which were £937,125 and £593,075, amounting to a total sum of £1,530,200 (**"the Demanded Sum"**). The Revenue's ground for these assessments was the same as its ground for rejecting the Denied Returns; namely that the relevant input tax had been incurred in transactions connected with the fraudulent evasion of VAT and that the Company knew or should have known of the connection.

15. The Company appealed against the decision of the Revenue to deny the deduction of input tax in relation to the Denied Returns. The appeal was made to the First-tier Tribunal Tax Chamber (**"the FTT"**) and was heard over a number of days in November 2009 and July 2010. The FTT handed down their decision (**"the FTT Decision"**) on 10th September 2010. The FTT Decision is lengthy and detailed. For present purposes four matters are of particular relevance:
    (1) For the reasons set out in the FTT Decision, the Company's appeal was dismissed.
    (2) It was part of the Company's case that the Company had not known and neither could nor should have known of the frauds in the supply chains relevant to the Denied Returns for 04/06 and 05/06. It was also part of the Company's case that the supply chains relevant to the Denied Return for 06/06 were not tainted by fraud.

(3) These parts of the Company's case failed. After reviewing the evidence in great detail, the FTT found that the Company had actual knowledge of the fraud in the relevant supply chains in relation to the transactions in all three accounting periods; see the summary of the findings of the FTT in paragraph 106 of the FTT Decision.

(4) The FTT made specific findings that the Respondent had been aware of the relevant fraud in the supply chains; see paragraphs 114-133 of the FTT Decision. It is not entirely clear to me, on reading the FTT Decision, whether there was a finding as to when the Respondent first acquired knowledge of the fraud. Paragraph 126 of the FTT Decision contains what I take to be a finding that the Respondent's knowledge of the fraud went back, at least, to 2005.

16. The outcome of the Company's appeal to the FTT against the rejection of the Denied Returns is best summarised by quoting the final two paragraphs of the FTT Decision:

> *"133. For all these reasons we find that BCC's trade was fraudulent and was carried out as part of an overall scheme to evade the payment of VAT. There is no other rational or realistic conclusion that can be drawn. We also find that the Appellant had knowledge of the fraud, clearly demonstrated by all the factors we have identified and the findings we have made in relation to deals 1 – 9.*
> *134. The Appellant's appeal therefore fails in its entirety. We direct that the Appellant should pay the Commissioners costs of and incidental to and consequent upon the appeal, such costs to be assessed by a costs judge of the High Court in the event of their not being agreed."*

17. The Company applied to the FTT for permission to appeal against the FTT Decision. For reasons which it is not necessary to go into, the FTT did not issue its decision on this application until 13th January 2011, when it refused permission to appeal. The Company then applied to the Upper Tribunal Tax and Chancery Chamber for an extension of time within which to make its application for permission to appeal, and for a stay of the application itself, if an extension of time was granted. By a decision released on 7th March 2012, Upper Tribunal Judge Wallace granted the extension of time sought and stayed determination of the application for permission to appeal. For present purposes what is said by the Appellants to be most relevant in this decision is that Mr Ahmed, who appeared for the Company on the hearing of these applications, stated that there was no challenge to the FTT's finding of fact that the Company had actual knowledge of the fraud. This statement is recorded in paragraph 13 of the decision of Judge Wallace.

18. The substantive application for permission to appeal came before Upper Tribunal Judge Bishopp for decision. By a decision dated 28th June 2013 Judge Bishopp determined, on the papers, that there were no arguable grounds of appeal, and refused permission to appeal. The Company was entitled to renew the application for permission to appeal at an oral hearing. The Company exercised this right and also made an application to amend its grounds of appeal, so as to replace those grounds of appeal with what were described as new detailed grounds of appeal. The renewed application for permission to appeal was heard by Upper Tribunal Judge Herrington. By a decision dated 19th May 2014 (released to the parties on 30th May 2014) Judge Herrington refused permission to amend the grounds of appeal. This left the Company's existing grounds of appeal, which the Company had decided not to pursue. In the result, and in the absence of any grounds of appeal which the Company could pursue, Judge Herrington refused permission to appeal.

19. The decision of Judge Herrington brought the proceedings in the FTT and the Upper Tribunal to an end. By the date on which Judge Herrington's decision was released (30th May 2015) the Company had already entered administration, on 7th April 2014. As I have said, this was followed by a creditors' voluntary liquidation on 4th December 2014.

20. I will use the expression **"the Tribunal Proceedings"** to refer to the proceedings in the FTT and the Upper Tribunal which I have just summarised.

21. In an Officer's Questionnaire completed by the Respondent at the request of the Appellants, which is dated 2nd June 2015, the Respondent stated that the Company had not traded since 2007. In a Statement of Affairs in the administration of the Company, which was signed by the Respondent on 6th May 2014 (**"the Statement of Affairs"**), the Respondent stated that the Company had estimated total assets available for preferential creditors in the sum of £4,975,000 (accompanied by a manuscript note which reads *"Un Certain"*). The Respondent also stated that unsecured preferential claims against the Company amounted to £937,125 plus £1,961,992.

22. The Appellant's case is that the Company was insolvent throughout the period from 2006 to 2014, when the Company went into liquidation. So far as the position in 2006 is concerned, Mr Hyde says this, at paragraph 34 of his first witness statement:

> *"34. Whilst the Company's insolvency in 2006 is not in question, the actual level of its insolvency at that point is. We will show that in 2006 the HMRC level of debt increased from near zero (or otherwise repayment of any input tax would not have been made by HMRC) to £1,530,200 (being the aggregate of the amount of input tax denied/claimed in respect of the 03/06 Assessments* [the Demanded Sum]*) when an invalid return with regard to this period (03/06) was filed. It would appear that the Company submitted the 03/06 Return on 31 March 2006."*

23. In their proof of debt in the liquidation the Revenue, as I have said, claimed the sum of £2,119,485. As I understand the position, this sum comprised (i) the Demanded Sum, (ii) interest and penalties, and (iii) costs awarded to the Revenue in the Tribunal Proceedings. By way of reminder, the Demanded Sum comprised the two sums which were the subject of the notifications of assessment which were issued by the Revenue to the Company on 3rd November 2008 and 31st March 2009. The two sums were, respectively, £937,125 and £593,075, amounting to a total sum of £1,530,200.

24. As at 3rd December 2019 the Company had received the total sum of £339,385.27 into the Company's estate in the liquidation.

25. The Appellants' case, as I understand it, is that the Company was already insolvent in 2006 because it made a claim for input tax in respect of the 03 06 accounting period on 31st March 2006, which was paid by the Revenue on 25th May 2006. This created a debt to the Revenue, in the form of the Demanded Sum (£1,530,200), because the Company had no right to claim this input tax. The Company had no means of paying the Demanded Sum. Repayment of the Demanded Sum was duly demanded by the Revenue by the notices which it served on the Company in 2008 and 2009.

<u>Section 214</u>

24. Before coming to the Section 214 Claim, it is necessary to set out the relevant parts of Section 214. The key subsections are (1) to (5), which provide as follows:

> *(1) Subject to subsection (3) below, if in the course of the winding up of a company it appears that subsection (2) of this section applies in relation to a person who is or has been a director of the company, the court, on the application of the liquidator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper.*
>
> *(2) This subsection applies in relation to a person if—*
>
> *(a) the company has gone into insolvent liquidation,*
>
> *(b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and*
>
> *(c) that person was a director of the company at that time;*
>
> *but the court shall not make a declaration under this section in any case where the time mentioned in paragraph (b) above was before 28th April 1986.*
>
> *(3) The court shall not make a declaration under this section with respect to any person if it is satisfied that after the condition specified in subsection (2)(b) was first satisfied in relation to him that person took every step with a view to minimising the potential loss to the company's creditors as (on the assumption that he had knowledge of the matter mentioned in subsection (2)(b)) he ought to have taken.*
>
> *(4) For the purposes of subsections (2) and (3), the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both -*
>
> *(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and*
>
> *(b) the general knowledge, skill and experience that that director has.*
>
> *(5) The reference in subsection (4) to the functions carried out in relation to a company by a director of the company includes any functions which he does not carry out but which have been entrusted to him.*

The Section 214 Claim

25. As I have noted, the effective pleading of the Section 214 Claim is to be found in the first witness statement of Mr Hyde, as amended. While this renders it rather difficult to pin down the elements of the Section 214 Claim, my understanding of the way in which the Appellants put their case, based on my reading of Mr Hyde's first witness statement, is as follows:

    (1) In 2006 the indebtedness of the Company to the Revenue went from near zero to £1,530,200 (the Demanded Sum), as a consequence of the submission of the March Return on 31st March 2006. The March Return was invalid, as demonstrated by the subsequent notifications of assessment issued by the Revenue on 3rd November 2008 and 31st March 2009, requiring repayment of the Demanded Sum.

    (2) In the Statement of Affairs, signed by the Respondent on 6th May 2014, the Respondent stated that the Company had estimated total assets available for

preferential creditors in the sum of £4,975,000, the status of which was described as uncertain. This is assumed by the Appellants to have taken account of the sum of £4,963,525, which was the subject of the Denied Returns.

(3) The Company continued to trade in and after 2006, notwithstanding its insolvent state, with the Respondent taking no steps to improve or rescue or preserve the Company's financial position.

(4) When making the invalid claims for input tax in 2006, comprising the March Return and the Denied Returns, which were all made in relation to transactions connected to fraudulent activity, the Respondent knew or ought to have concluded that there was no reasonable prospect that the Company would then avoid going into insolvent liquidation.

(5) Alternatively, the Respondent knew or ought to have concluded that there was no reasonable prospect of the Company avoiding insolvent liquidation at the time (16th October 2007) when the Company was formally notified by the Revenue of the rejection of the Denied Returns.

(6) In the further alternative, the Respondent knew or ought to have concluded that there was no reasonable prospect of the Company avoiding insolvent liquidation on a series of subsequent dates which are identified by Mr Hyde in paragraphs 50 and 51 of his first witness statement. The Appellants say that there were at least eleven alternative occasions when the Respondent knew or ought to have concluded that there was no reasonable prospect that the Company would avoid going into insolvent administration or liquidation. These dates are itemised in paragraph 61 of Mr Hyde's first witness statement. The earliest of these dates was 31st March 2006, when the March Return was submitted. The last of these dates was the date of the FTT Decision; being 10th September 2010.

(7) The Company's asset position, including reasonably anticipated realisations, was clearly insufficient to enable it to meet its liabilities, either in the short, medium or long term and, in continuing to trade, the Respondent's conduct resulted in a loss to the Company in the sum of £2,119,485; being the amount claimed by the Revenue in its proof of debt in the liquidation.

(8) Despite knowing that there was no reasonable prospect that the Company would avoid going into insolvent administration or insolvent liquidation, the Respondent took no steps to minimise the potential loss to the Company's creditors of the kind which, in the circumstances, a reasonable director would have taken.

(9) The Company was worse off as a result of the continuation of trading (and/or any other continuing financial activities), as the Company's debts owed to HMRC continued to increase. The Respondent must have known or ought to have known there were no apparent reasonable prospects of the Company being able to successfully trade out of its financial difficulties.

(10) The Company was not placed into insolvent administration until April 2014, some 8 years after the Company first became insolvent. Had the Respondent taken steps to wind up the Company earlier, the Company's debts owed to HMRC (its only creditor) would have crystalised when the Company was placed into administration. As a minimum, the interest accruing on the HMRC debt would not have continued to increase. The Company's rights of appeal against the HMRC decision and the FTT's initial decision would have subsisted in the administration and so there was no good reason to delay taking action to put the Company into administration.

(11) As soon as the Respondent knew that the Company had insufficient assets for the payment of its debts in 2006 (and notwithstanding the fact that the Company

decided to appeal to the FTT at a later time against HMRC, without success, in respect of the input tax of £4,963,525), the Respondent should have introduced robust financial controls, which would have shown the inevitability of insolvent liquidation. This would also have been the case had the Respondent sought insolvency advice at the time. By submitting the March Return and the Denied Returns, from March 2006 onwards, the Respondent was knowingly increasing the Company's liabilities to HMRC, whilst at the same time causing further loss to HMRC.

(12) In all the circumstances the Respondent should be required to make a contribution to the Company, pursuant to Section 214, in the sum of £2,119,485; that is to say the amount of the debt owed to HMRC.

The Application – summary of the Appellants' case

26. In seeking summary judgment against the Respondent, the Appellants case was and remains that the test for summary judgment in CPR 24.3 can be satisfied in the present case on the basis of the documents in the case. The case for summary judgment was set out and explained by Mr Hyde in his fourth witness statement, dated 12th October 2021.

27. The principal document relied upon by the Appellants is the FTT Decision. As I understand the Appellants' case in the Application, it can be summarised as follows:

(1) The findings of fact made by the FTT in the FTT Decision can be relied upon by the Appellants in the Section 214 Claim.

(2) The FTT made the finding of fact that the Respondent was aware that the Company was involved in fraudulent trading, in and from 2006. In addition to this, in its applications to the Upper Tribunal for an extension of time for applying for permission to appeal and a stay of the application itself Mr Ahmed, who appeared for the Company on the hearing of these applications, stated that there was no challenge to this finding of fact by the FTT; see paragraph 13 of the decision of Upper Tribunal Judge Wallace released on 7th March 2012.

(3) As such the Respondent must have known that the Company was not entitled to submit either the March Return or the Denied Returns because these were claims for the recovery of input tax in relation to transactions involving fraudulent activity. Equally, the Respondent knew or should have known that it was not possible for the Company to continue trading or to avoid insolvent liquidation because any continuation of its trading would have required the Company to continue to be involved in what the Respondent knew to be transactions involving fraudulent activity.

(4) Putting the findings of fact in the FTT Decision together with the subsequent history of the Company up to the times when it entered into insolvent administration and then liquidation, the conditions in subsection (2) of Section 214 are satisfied.

(5) The statutory defence in subsection (3) of Section 214 is not available to the Respondent because there was no step which the Respondent did take or could have taken to minimise the potential loss to the Company's creditors. Once the Respondent knew or ought to have concluded that there was no reasonable prospect that the Company would avoid going into insolvent liquidation or entering insolvent administration, there was no step which the Respondent did take or could have taken to minimise the potential loss to the Company's creditors. The appeal to the FTT against the denial by the Revenue of the Denied Returns was always hopeless, and could and should have been seen by the Respondent to be hopeless.

Continued trading was not an option, because continued trading would have meant further involvement in fraud, and an increase in the Company's liability to the Revenue.

28. The amount sought, in the Application, by way of contribution pursuant to Section 214 was £1,880,292.50. The discrepancy between this figure and the figure of £2,119,485 is explained by Mr Hyde in his fourth witness statement, at paragraphs 38-43. The Appellants did manage to recover the sum of £338,070.70 on 13th March 2015, pursuant to a global settlement with First Curacao International Bank, which was closed in or around September 2006, during an Anglo-Dutch investigation into carousel fraud. Following this recovery an interim dividend of £104,000 was paid to the Revenue. In addition to this, the sum of £219,693.50 was paid to the Appellants on account of their fees. For the reasons explained by Mr Hyde, the Appellants have accepted that a part of these fees, in the sum of £135,192.50, should be credited to the Section 214 Claim as money which would otherwise have been made available to the liquidation estate of the Company. Once the figures of £104,000 and £135,192.50 are credited to the Section 214 Claim, the amount sought by way of contribution from the Respondent drops to £1,880,292.50.

The evidence in the Application

29. So far as the evidence in the Application was concerned the Application was formally supported by the fourth witness statement of Mr Hyde, dated 12th October 2021. As I understand the position the evidence before the Judge also included the various other witness statements filed in the Section 214 Claim. This evidence comprised the first witness statement of Mr Hyde, which I have already mentioned, which (in its amended form) was dated 9th February 2021. The Respondent filed a first witness statement of his own, in response to the Section 214 Claim, which replied to various parts of Mr Hyde's first witness statement. This first witness statement of the Respondent is undated, but I believe that it was filed on 18th March 2021.

30. There were also second and third witness statements of Mr Hyde, dated respectively 28th January 2021 and 22nd April 2021. In the third witness statement Mr Hyde responded to the Respondent's first witness statement.

31. The Respondent filed two further witness statements. The first of these further witness statements was a witness statement of Mr Ahmed, who acted for the Company in relation to the proceedings in the FTT and the Upper Tribunal. Mr Ahmed is a director of CTM Tax Litigation (**"CTM"**) and described himself, in his witness statement, as a tax litigator. The second of these further witness statements was a second witness statement of the Respondent dated 14th March 2022, which was expressed to be made specifically in opposition to the Application.

32. The evidence was completed by a fifth witness statement of Mr Hyde, dated 28th March 2022, made in response to the witness statement of Mr Ahmed and the second witness statement of the Respondent.

The Application – summary of the Respondent's case and the Appellants' response to that case

33. In his first witness statement, which was made in response to the Section 214 Claim and to Mr Hyde's first witness statement, the Respondent replies to various paragraphs in Mr Hyde's first witness statement. The principal points made by the Respondent are that he

actively pursued the Tribunal Proceedings, including the payment of substantial sums to CTM for its services and, subsequently, to Smith & Williamson. The Respondent asserts that it was in the best interests of the Company to pursue the Tribunal Proceedings. The Respondent says that he received advice from CTM that the appeal to the FTT had good prospects of success. The Respondent says that he invested his own money in an attempt to recover the money which he says was due from the Revenue pursuant to the Denied Returns, and did everything possible, including re-mortgaging his own property, to try to keep the Company afloat.

34. In the final part of his first witness statement, which is headed *"Points in opposition to the Liquidator's case"*, the Respondent makes a series of points in support of his position that the Appellants had failed to demonstrate either that the Company was insolvent at a given point in time or that, as a result of trading continuing after that point, the deficit to creditors increased.

35. After making reference to the case of *Brooks v Armstrong* [2016] EWHC 2893 (Ch), the Respondent states his case on the question of whether he made the position of the Company worse, in the following terms, at paragraphs 33-39 of his first witness statement:

> *"33. Further to paragraph 29, the Court will no doubt be aware that, in Brooks v Armstrong the court accepted that although the directors were guilty of wrongful trading (i.e. should have put the company into liquidation sooner – which is not accepted I am guilty of) but the directors were successful in establishing that, as the only creditors were HMRC for historic debt and the landlord (who would have suffered rent arrears for the fixed terms of the lease irrespective of the point of liquidation) the continued trading did not in fact cause an increase in deficiency to creditors.*
>
> *34. Looking at what the asset/liabilities position of the Company was at that point and what the outcome would have been if the I had placed the company into liquidation at that point, it is clear that this does not mirror what the Claimant asserts. According to the filed accounts for May 2006, the company had cash in the bank account of £11,000 and debtors of £12 million, I assume (given the length of time which has elapsed) that this money was formed of suppliers and other debtors, which is why the debtors were written down to £500,000 in the May 2007 accounts. I submit that an expert may need to interrogate those debtors figures to ascertain how much would actually have proven collectable had the company gone into liquidation at that point – as the Claimant has not done so. By May 2007, the company's assets comprised of cash at the bank of £458,000 and debtors of £500,000. The position remained unchanged up to and including the May 2013 accounts. In other words, the position to creditors did not deteriorate over that period at all.*
>
> *35. I am unsure as to why the administration statement of affairs did not list cash in the bank as an asset and why the liquidators have only recovered cash in the amount of £338,000. The Claimant has yet to explain why the cash at the bank figure dropped from £458,000 to £338,000 after May 2013 – I do not know why this occurred as I was not responsible for filing the accounts. As a result of the above, the Applicant is to explain why this is the case and only this money has been recovered.*
>
> *36. I maintain, in my opinion, that I actually improved the position by converting those debts into cash between June 2006 and May 2007 rather than*

*worsening it, and then acted entirely properly by preserving that cash at bank up to the point of the administration.*

*37. I believe there is a strongly arguable case that the overall detriment to creditors by virtue of the continued trading between those periods was only £121,000 being the reduction in the cash at bank during that period. Again, this is subject to any explanation as to why the cash at bank balance dropped from £458,000 to £337,000. However, this is subject to an explanation as to why the bank balance has dropped.*

*38. The continued trading or otherwise between 2006 and 2013 is entirely irrelevant to the wrongful trading argument unless that trading increased the overall deficit to creditors, which is not the case as HMRC are the only creditor and that all relates to pre-June 2006 liabilities. The interest point is also entirely irrelevant due to the fact that the debt to HMRC would have remained unpaid and therefore continued to accrue interest whether the company was placed into liquidation in 2006 or 2013.*

*39. However, as stated throughout these proceedings, my position is reserved as to the instruction of a forensic expert, which could aid the Court in calculating the exact figures referred to above and throughout the Applicant's statement."*

36. This evidence is answered by Mr Hyde in his third witness statement. For present purposes it is not necessary to provide a detailed summary of this evidence. The relevant point is that Mr Hyde gives evidence disputing the bulk of what is said by the Respondent in his first witness statement, for the reasons set out in Mr Hyde's third witness statement. Mr Hyde summarises his evidence in response in the following terms, at paragraphs 28 and 29 of his third witness statement:

*"28. Mr Todd continues to make bald and misleading assertions in an effort to confuse matters. As shown above, where we have had responses from the people Mr Todd claimed advised him of the good prospects in respect of the FTT decision and any subsequent appeal it is clear they did not. That is supported by the findings in the FTT Decision. Mr Todd also falsely claimed that he had passed the Company's books and records to the former administrator.*

*29. At the relevant time Mr Todd involved the Company in transactions that were connected to the fraudulent evasion of VAT. Mr Todd had actual knowledge of the fraud in those chains. There can be no basis for him to argue that he was acting other than in breach of Section 214 Insolvency Act 1986. That clearly distinguishes this case from the circumstances in Brooks v Armstrong [2016] EWHC 2893 (Ch)."*

37. In his fourth witness statement made specifically in support of the Application, Mr Hyde goes through the arguments raised by the Respondent in a systematic fashion, giving his reasons for disputing each argument. Mr Hyde summarises what he says in response to the case advanced by the Respondent in paragraphs 20-28 of his fourth witness statement:

*"20. Despite being given every opportunity to plead his case, Mr Todd's witness statement dated 18 March 2021 is mere obfuscation. We have contacted the parties he has identified in his witness statement and they have not provided the confirmation Mr Todd suggested they would. This is dealt with in my previous witness statement other than in respect of Smith & Williamson, as*

*the documents were received after the date of my previous statement, being 22 April 2021.*

*21. The additional documentation we have obtained from Smith & Williamson do not suggest any advice was obtained by the Company or Mr Todd as to merits and/or prospects of success on the Company's appeals to the FTT Decision. On the contrary, it indicates Mr Todd did not have any reasonable grounds to continue with the sustained appeals. Mr Todd had actual knowledge of fraud.*

*22. Mr Todd continued with the appeals as by that time there was nothing more he could do. He was entrenched in the MTIC fraud.*

*23. Mr Todd has based his defence on the belief that his appeals in respect of the FTT Decision would ultimately be successful. On the facts that was not a decision that would be made by a director having due regard to Section 214 of the Insolvency Act 1986 and his obligations to the Company and its creditors.*

*24. In respect of the assertions made by Mr Todd in his witness statement dated 18 March 2021, I can confirm I have contacted all advisers mentioned by him and their responses were detailed in my previous witness statement ACH3 and in paragraph 21. Their responses did not support his assertions.*

*25. There is no evidence of any advice given to Mr Todd that he had a good case. The only documentation we have from the various counsel instructed relates to skeleton arguments and there are no opinions from counsel to support this assertion by Mr Todd. This is not surprising given the facts adduced at the hearing before the FTT Decision.*

*26. No director could be considered to have taken "every step with a view to minimising the potential loss to the company's creditors as (on the assumption that he had knowledge of the matter mentioned in subsection (2)(b)) he ought to have taken" if he were to involve the company in transactions he knew to be fraudulent.*

*27. As mentioned above, as far as I am aware, no appeals proceeded in respect of the HMRC decisions on the 03/06 Assessments.*

*28. In any event, and as stated in my previous witness statement, the Company's rights of appeal against the FTT Decision would subsist in administration and so there was no good reason for Mr Todd to delay placing the Company into administration until some 8 years after the Company first became insolvent (when the returns for 03/06, 04/06, 05/06 and 06/06 were submitted)."*

38. There is then Mr Ahmed's witness statement. In this witness statement, which is short, Mr Ahmed maintains that the Company did receive advice that there was a realistic prospect of success in the Tribunal Proceedings, in which he was involved as a director of CTM.

39. There is also the Respondent's second witness statement, made specifically in response to the Application. This witness statement is also short. The Respondent summarises the position, on his case, in paragraphs 4-8 of this witness statement:

*"4. The fourth witness statement of Mr Adrian Hyde dated 12 October 2021 seeks to generally argue:*

*(i) that the finding of the First Tier Tribunal decision in Radarbeam Ltd v Revenue & Customs [2010] UKFTT 431 (TC) (10 September 2010)*

*("FTT Decision") is conclusive of the facts and is the basis of the application for summary judgment.*

*(ii) Radarbeam's pursuance of the FTT case and subsequent appeal against the FTT Decision was contrary to legal advice.*

*5. In respect of the first point, (i) above, I continue to dispute the finding of the FTT Decision and will leave the legal arguments for my representatives at the hearing of his matter.*

*6. As to the second point, (ii) above, I have been provided with and have read a copy of the witness statement of Mr Liban Ahmed dated 7 March 2022. I agreed with the contents of that statement and the adopt the same without repeating it in my witness statement. I add that Radarbeam never received at any time any legal advice from any of its representatives, as set out in my first witness statement, suggesting that Radarbeam had a weak case that was bound to fail. My clear understanding of the advice given at all times was that there was a realistic prospect of success. It was acting on and in reliance upon that advice that Radarbeam continued.*

*7. Attached marked Exhibit ST2 is the last response from my own efforts to contact Mr Michael Patchett-Joyce and Mr Stephen Climie. As is evident, and despite Mr Climie being recorded in the judgment as having represented Radarbeam at the FTT, neither have responded.*

*8. I believe that there are genuine triable issues in this matter that require a full hearing with oral evidence."*

40. Mr Hyde responds to the witness statement of Mr Ahmed and the second witness statement of the Respondent in his fifth witness statement. Mr Hyde disputes the evidence of the Respondent and Mr Liban, for the reasons set out in the fifth witness statement. Mr Hyde summarises the position, on the Appellants' case, in paragraph 29 of his fifth witness statement:

> *"29. Despite having had some 15 months to adduce evidence in support of his defence, the Respondent has failed to do so, instead serving Mr Murphy and me only with ST2 and the flimsy witness evidence of Mr Ahmed, a statement which provides no positive evidence and, instead, is largely based on challenging the comments provided to our solicitors by the Company's barrister, Mr Patchett-Joyce with no grounds to support such challenges."*

<u>The Judgment</u>

41. The Judge began the Judgment with a summary of the principles of law relevant to an application for summary judgment. The Judge then proceeded to set out a summary of the history of the Company's trading and the appeal to the FTT. The Judge summarised the Appellants' case on the Application in the following terms, at Paragraph 7:

> *"7. Mr Hyde relies heavily on the findings of the FTT [46] and concludes that VAT claims made from "03/06, 04/06/ 05/06 and 06/06" were connected to fraudulent activity. He sets out a series of alternative dated from which he says the Respondent knew or ought to have known that there was no reasonable prospect that the Company would avoid going into insolvent liquidation and details how he calculates losses. It can be seen at once that* [*the*] *on a summary judgment application the court is asked to not only find that there is liability but that the liability began on one of the alternative dates and that the amount of liability is a certain sum. In the context of a wrongful trading claim summary judgment is unusual. This is due to the many*

*possible factually sensitive elements of such a claim, the discretionary nature of the relief and potential statutory defence. However, that does not mean summary judgment is not viable. In this case the Applicant says that the Respondent makes "no case out". This may be seen as the heart of the summary judgment application which itself is based upon the failure of the Respondent to file evidence despite the court granting further time to do so."*

42. The Judge then set out the relevant subsections of Section 214, and gave a further summary of the Appellants' case on the Application, in the following terms at Paragraphs 10 and 11.

> *"10. The Applicant relies on a signed statement of affairs and the decision of the First Tier Tribunal dated 10 September 2010 to provide the facts that are said to make the application for summary judgment justifiable and the basis for arguing that the Respondent has no real prospect of successfully defending the claim pursuant to CPR 24.2. It is argued that the key facts have now been established by the Tribunal (and the Applicant does not need to do so again) and the Applicant concurs with the findings of the Tribunal following his investigations and now concludes there is no defence for the Respondent. Mr Mace for the Applicant submits (in his written submission):*
>
> > *"The Applicants have made this application for summary judgment on the basis that the First Tier Tribunal made a finding that the Respondent knew that the transactions the Company was a party to were connected to fraud which led to losses for HMRC."*
>
> *11. The Applicant argues that the Respondent accepted the finding of the FTT which included a finding that the Respondent knew that the Company was a party to fraud which led to a failure to pay the debt owed to HMRC. This means it is not possible for the Respondent to argue that he had taken "every step with a view to minimising the potential loss to the company's creditors" if he had involved the Company in transactions he knew to be fraudulent or connected to fraud. The argument has merit."*

43. The Judge then set out the extract from paragraph 13 of the decision of Upper Tribunal Judge Wallace, to which I have made reference above. The Judge also quoted paragraphs 120-122 of the FTT Decision.

44. The Judge then summarised the case of the Respondent, at Paragraphs 16-19. At Paragraph 20 the Judge explained that he had been referred to the rule in *Hollington v Hewthorn* [1943] KB 587:

> *"20. I have been referred to the rule in Hollington v Hewthorn [1943] KB 587 a decision about a conviction for a criminal offence where it was found that in civil proceedings the evidence of the fact that the convicted person committed the offence was inadmissible. This was reversed by section 11 of the Civil Evidence Act 1968 so that the fact that a person has been convicted of an offence in a UK court is admissible in evidence to prove that they committed the offence and the person wishing to prove that they did not commit the offence may do so on the balance of probabilities."*

45. The Judge then proceeded to make reference to two further authorities. The first of these authorities was the decision of the Court of Appeal in *Ward v Savill* [2021] EWCA Civ 1378. The second of these authorities was *Hoyle v Rogers* [2014] EWCA Civ 257. In

relation to *Hoyle v Rogers* the Judge made reference both to the first instance decision of Leggatt J, as he then was, which has the neutral citation number [2013] EWHC 1409 (QB), and to the decision of the Court of Appeal. The Judge analysed these authorities in the following terms, at Paragraphs 21-25:

> *"21. The case was recently discussed by Sir Julian Flaux in Ward v Savill [2021] EWCA Civ 1378 who noted that the rule in Hollington v Hewthorn still applies in respect of judgments in previous civil proceedings so that a judgment, verdict or award of another tribunal is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other civil proceedings between different parties. And the Court of Appeal dismissed an appeal not to make admissible a finding that a declaratory judgment obtained in earlier proceedings, to which the defendant was not a party.*
>
> *22. In the course of the discussion in Ward v Savill reference was made to Rogers v Hoyle [2013] EWHC 1409 where Leggatt J (as he then was) considered the admissibility of an air accident report. He said [59]:*
>
> > *"A central part of a judge's task in a civil case is to evaluate the evidence adduced by the parties and to decide what conclusions may properly be drawn from that evidence. It is a cardinal principle, and an essential ingredient of the right to a fair trial before an impartial and independent tribunal, that in carrying out this task judges must form their own opinions by making their own evaluation of the evidence and must not defer to the opinion of anyone else."*
>
> *23. In his thorough examination he referred to Bird v Keep [1918] 2 KB 692, where the question arose whether the finding of a coroner's jury that a workman had died from suffocation by smoke was admissible as evidence of the cause of his death in later compensation proceedings brought by his widow. To Waddle v Wallsend Shipping [1952] 2 Lloyds Rep 105 where a wreck commissioner assisted by two naval architects and a ship's captain had made a previous decision about compensation for the applicant's losses following her husband's death. To claims in BCCI v Bank of England where the Treasury and the Bank of England had previously instituted an independent inquiry to review the adequacy of its supervision of BCCI, presided over by Bingham LJ. The report was not admissible at trial. And to Hollington v Hewthorn to which he gave extended consideration. Referring to the Privy Council in Calyon v Michailaidis [2009] UKPC 34, where Lord Rodgers said (at para 27):*
>
> > *"...the essential reasoning is compelling: unless the second court goes into the facts for itself, it cannot actually tell what weight it should properly attach to the previous decision. Which means that the previous decision itself cannot be relied upon."*
>
> *24. Leggatt J said:*
>
> > *"In the case of judgments in previous civil proceedings, I respectfully agree that this reasoning is compelling, once it is recognised that the opinion of a civil court on a question of fact is not as a matter of principle entitled to be treated as authoritative other than as between the parties to the proceedings."*
>
> *25. The appeal court, Christopher Clarke LJ (with whom Arden and Treacy LJJ agreed), whilst reiterating (and neatly summarising) the principle upheld the first instance decision explaining:*

*"[39] As the judge rightly recognised the foundation on which the rule [in Hollington v F Hewthorn & Co] must now rest is that findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it ("the trial judge"), and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial judge has heard…*

*[40] In essence, as the judge rightly said, the foundation of the rule must now be the preservation of the fairness of a trial in which the decision is entrusted to the trial judge alone…*

*[48] …The [air accident] report is not a bare finding such as one of carelessness or ownership of a painting. The statements of fact contained in the report, eg as to the position of the wreckage or the reported observations of the eye witnesses, are evidence which the trial judge can take into account in like manner as he would any other factual evidence, giving to it such weight as he thinks fit."*

46. The Judge then came to his actual decision on the Application, which is set out in Paragraphs 26-30. Starting with Paragraph 26, the Judge was not persuaded, for the purposes of the Application, that it was appropriate to rely on the findings in the FTT Decision:

*"26. The Applicant invites the court to make a finding that the Respondent had actual knowledge of fraudulent evasion of VAT, based on the findings summarised in the FTT as (i) they were thoroughly explained in the decision and (ii) they were subsequently conceded by the company at subsequent hearings. Those findings (matters of opinion) or any admissions made were in the context of proceedings where the parties are not the same. What characterises a judicial finding is that it is an opinion of a court or other tribunal whose responsibility is to reach conclusions based solely on the evidence before it. In my judgment this is more than a fanciful defence. The case needs to be proved."*

47. So far as the position of the Respondent was concerned, the Judge considered that the arguments advanced on behalf of the Respondent were more than merely fanciful. As the Judge explained, at Paragraph 27:

*"27. It is possible that the alleged fraud is unconnected with the allegation of wrongful trading as far as loss is concerned. The alleged fraud could of course cause loss to the Company but wrongful trading concerns losses that continued after a date when the Company should have ceased to trade. I can understand why the joint liquidators feel that this matter could be disposed of without trial because of the label attached to the actions of the Company in seeking to reclaim back the VAT. However, that does not necessarily answer the questions of fact to be determined in a wrongful trading claim. The trading to the detriment of creditors after the date of the VAT fraud is*

*something that needs to be proved. That is sufficient to dispose of the application as it is said that the fact of the fraud is sufficient to demonstrate that the Respondent knew that the company would enter insolvent liquidation from the date the VAT challenge. The evidence put forward by the Respondent is that there was no fraud that he acted reasonably, acted on advice and that there were no or minimal losses from the date elected by the joint liquidators. In my judgment the arguments advanced by the Respondent today are more than merely fanciful."*

48. The Judge then considered questions of causation and loss, at Paragraph 28:

> *"28. In argument the loss in this case is identified as interest accruing on a debt owed to the only creditor of the company, HMRC. This is because the debt said to be owed to HMRC arose before the date elected by the joint liquidators to pin-point the time when the Respondent knew or should have known that the Company could not avoid insolvent liquidation. There has to be a causal connection between the continuance of trade and the accrual of interest after 2006. I have not been persuaded that statutory interest was caused by an extended period of trade: See the analysis in Ralls Building [2016] 1 WLR 5190. The liquidators have simply failed to grapple with the test for loss merely relying on an assessment made by HMRC. In short the liquidators failed to advance and establish a properly formulated case that there had been any increase in net deficiency during the period of wrongful trading. There is a question of fact that also has to be decided. The Respondent says there was sufficient funds in the bank, FCIB, to pay the interest at the time and the costs and in any event he did not know of the debt at the time of Administration."*

49. The Judge then said this, at Paragraph 29:

> *"29. In my judgment this is a case where evidence can reasonably be expected to be available at trial that could affect the outcome."*

50. The Judge's overall conclusions on the Application were set out in the following terms, at Paragraph 30:

> *"30. The joint liquidators have nailed their colours to the mast in terms of the relevant dates (using alternative dates) after which the Respondent knew or ought to have concluded that the Company would not avoid insolvent liquidation. The case may seem obvious to the joint liquidators, but it deserves fuller investigation into the facts than what is possible on this application. I have hesitated in making a final decision because given the legal test for wrongful trading, the potential defence, the evidence of the Respondent, given the rule in Hollington v Hewthorn and given the issues raised about contribution, I am of the view that reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."*

51. In the result, the Application was dismissed.

<u>The grounds of appeal</u>

52. The grounds of appeal attached the Appellant's Notice filed by the Appellants identify five grounds of appeal. These grounds of appeal, which I shall refer to as **"Ground 1"** and so on, are, in summary, as follows:

(1) Ground 1 - the Judge went wrong in law or in the exercise of his discretion, in overlooking or alternatively giving insufficient weight to the findings in the FTT Decision and to the fact that the Respondent had previously accepted the findings of the FTT in respect of his knowledge of fraud and the Company's connection to the fraud. The Judge was wrong in law to find that the FTT Decision was not binding on the basis that the findings in the FTT Decision and the Respondent's acceptance of those findings were made in the context of proceedings which were not between the same parties.

(2) Ground 2 - the Judge misdirected himself with regard to the facts of the case when, in Paragraph 28, he identified the loss in the case as interest accrued on the debt to the Revenue. The loss to the Company was identified as both the Demanded Sum and the interest accrued on the sums comprising the Demanded Sum.

(3) Ground 3 - the Judge misdirected himself with regard to the facts of the case and the law when he found, in Paragraph 28, that he was not persuaded that the accrual of the statutory interest was caused by an extended period of trade.

(4) Ground 4 - the Judge misdirected himself with regard to the facts of the case and the law, in Paragraph 28, when he questioned the ability of the Appellants to rely upon the assessment made by the Revenue. This assessment has never been questioned by the Revenue and is supported by the Statement of Affairs. The *"assessment"* referred to in this ground (Ground 4) is not identified, but I take the reference to be to, or at least to include the notifications of assessment issued on 3rd November 2008 and 31st March 2009 in relation to the respective amounts of £937,125 and £593,075. It will be recalled that these two sums, which I am referring to as the Demanded Sum (£1,530,200), were the subject of a claim for repayment of input tax by the March Return. The Company was repaid the claimed input tax, in the total amount of the Demanded Sum, on 25th May 2006. Subsequently the Revenue notified the Company of its decision to deny this input tax, and raised the notifications of assessment which I take to be *"the assessment"* or part of *"the assessment"* which is referred to in Paragraph 28 and Ground 4.

(5) Ground 5 - the Judge misdirected himself with the regard to the facts of the case and the law when he stated, in Paragraph 30:

> *"I have hesitated in making a final decision because given the legal test for wrongful trading, the potential defence, the evidence of the Respondent, given the rule in Hollington v Hewthorn and given the issues raised about contribution, I am of the view that reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."*

The Judge had already misdirected himself with respect to the rule in *Hollington v Hewthorn* and then went on to find that there might be a potential defence and additional evidence of the Respondent, in circumstances where the Respondent had failed to adduce any material evidence in the two years from the issuing of the underlying proceedings (the Section 214 Claim), and in circumstances where the Respondent had been found, by the FTT Decision, knowingly to have been involved in MTIC fraud.

Applications for summary judgment – relevant guidance

53. I find it helpful, before coming to my analysis of the Appeal, to remind myself both of the terms of the relevant provision of the CPR, and of the guidance to be found in the authorities.

54. So far as the CPR are concerned, CPR 24.3 provides as follows:

> *"The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—*
>
> *(a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and*
>
> *(b) there is no other compelling reason why the case or issue should be disposed of at a trial."*

55. So far as guidance in the authorities is concerned, it seems to me that it is only necessary to make specific reference, in common with the Judge at Paragraph 3, to the judgment of Lewison J, as he then was, in *Easyair Limited v Opal Telecom Ltd* [2009] EWHC 339 (Ch). In his judgment, at [15], Lewison J provided the following invaluable guidance on the correct approach to an application for summary judgment:

> *"15. As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:*
>
> *i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
>
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*
>
> *v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
>
> *vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*

vii) *On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."*

56. *Easyair* involved an application by the defendant in that case for an order to strike out the claim made against the defendant or, in the alternative, for summary judgment against the claimant. Lewison J expressed his guidance as a statement of the correct approach on applications for summary judgment made by defendants. It seems to me however that the guidance is also applicable to applications for summary judgment made by claimants, subject to the obvious point that, in such cases, the question becomes whether the defendant has a realistic, as opposed to a fanciful prospect of a successful defence to the relevant claim.

57. In terms of the burden of proof on an application for summary judgment, Mr Myers drew my attention to the following note in Volume 1 of the White Book (2024 Edition), at 24.3.3:

*"In ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472, it was said that under r.24.2 the overall burden of proof rests on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and that there is no other reason for a trial. The existence of this burden is indicated by para.2(3) of Practice Direction 24; the applicant must: (a) identify concisely any point of law or provision in a document on which they rely; and/or (b) state that the application is made because the applicant believes that, on the evidence, the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relates, and in either case state that the applicant knows of no other reason why the disposal of the claim or issue should await trial. The essential ingredient is the applicant's belief that the respondent has no real prospect of success and that there is no other reason for a trial.*

*If an applicant for summary judgment adduces credible evidence in support of the application, the respondent then comes under an evidential burden to prove some real prospect of success or other reason for having a trial: Sainsbury's Supermarkets Ltd v Condek Holdings Ltd (formerly Condek Ltd) [2014] EWHC 2016 (TCC) at [13]. A respondent to a summary judgment application who claims*

*that further evidence will be available at trial must serve evidence substantiating that claim: Korea National Insurance Corp v Allianz Global Corporate & Specialty AG (formerly Allianz Marine & Aviation Vershicherungs AG) [2007] EWCA Civ 1066; [2007] 2 C.L.C. 748*:

> *"It is incumbent on a party responding to an application for summary judgment to put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding at trial. If it wishes to rely on the likelihood that further evidence will be available at that stage, it must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court. The court may then be able to see that there is some substance in the point and that the party in question is not simply playing for time in the hope that something will turn up. It is not sufficient, therefore, for a party simply to say that further evidence will or may be available, especially when that evidence is, or can be expected to be, already within its possession, as is the case here ..." ([14] per Moore-Bick LJ)."*

58. It will be noted that although the overall burden of proof rests upon the applicant, the evidential burden may shift to the respondent, in two important respects. First, if an applicant for summary judgment adduces credible evidence in support of the application, the respondent then comes under an evidential burden to prove some real prospect of success or other reason for having a trial. Second, if a respondent to a summary judgment application claims that further evidence will be available at trial, as contemplated by Lewison J in sub-paragraph (v) of the guidance set out above, the respondent must serve evidence substantiating that claim. The respondent must, at least in general terms, describe the nature of the further evidence, its source and its relevance to the issues before the court. Vague references to evidence which may turn up at trial are not sufficient.

<u>The Appeal - analysis</u>

59. I have come to the clear conclusion that the Judge was right to refuse the Application. It seems to me that the Section 214 Claim was not suitable for summary determination. In these circumstances it follows that the Appeal must be dismissed.

60. I say this at the outset of my analysis of the Appeal because it follows, from the conclusions which I have just expressed, that the Section 214 Claim will have to go to trial. In these circumstances it seems to me that it is not appropriate for me to engage in detailed analysis of the issues raised by the Section 214 Claim. The analysis and determination of those issues is for the trial of the Section 214 Claim. I am not, in my analysis of the Appeal, deciding any issues in the Section 214 Claim which are for trial. I am only deciding whether the Judge was right to decide that the Section 214 Claim was not suitable for summary judgment. For this reason my analysis of the Appeal is kept fairly short.

61. With these preliminary points in place, I turn to my analysis of the Appeal and my reasons for concluding that the Judge was right to refuse the Application.

62. In broad terms, there are two related reasons for my conclusion that the Judge was right to refuse the Application. I will explain those reasons before coming, briefly, to the individual Grounds.

63. My first reason goes back to the terms of Section 214. In the present case the Appellants must demonstrate, if the Section 214 Claim is to succeed, that, at some time before the commencement of the winding up of the Company, the Respondent knew or ought to have concluded that there was no reasonable prospect that the Company would avoid going into insolvent liquidation or entering insolvent administration. If the Appellants can demonstrate that the Respondent had this knowledge or ought to have had this knowledge at a particular date, the Appellants must then demonstrate that the Company suffered loss as a result of the failure of the Respondent to put the Company into insolvent liquidation at the point when he knew or ought to have known that there was no reasonable prospect of avoiding this result. On the Respondent's side, there is a defence to the Section 214 Claim if the Respondent can demonstrate that he took every step with a view to minimising the potential loss to the Company's creditors as he ought to have taken on the assumption that he was aware that there was no reasonable prospect that the Company would avoid going into insolvent liquidation.

64. The matters identified in my previous paragraph are acutely fact sensitive. I accept that this does not mean that an application for summary judgment cannot be made in proceedings where a claim is made pursuant to Section 214. What it does mean is that an application for summary judgment in a Section 214 claim is at risk of running into a factual issue or factual issues which are not suitable for determination on a summary basis.

65. The present case is such a case. I have provided a summary, earlier in this judgment, of the evidence which has so far been filed by the parties in the Section 214 Claim. In his evidence the Respondent has put in issue (i) what the financial position of the Company was in and after 2006, (ii) the knowledge which he had or should have had concerning the prospect of insolvent liquidation, and (iii) the question of whether he acted in the best interests of the Company in his pursuit of the Tribunal Proceedings. In relation to the last of these questions, the Respondent and Mr Ahmed have given evidence that advice was given that the Company had at least a reasonable chance of success in the Tribunal Proceedings.

66. Despite the best efforts of Mr Mace, in his submissions in support of the Appeal, and notwithstanding the evidence of Mr Hyde in response to the Respondent's evidence, I am simply not persuaded that the matters which the Respondent has put in issue in relation to the Section 214 Claim are suitable for summary determination. Whatever doubts one may entertain as to the merits of the Respondent's case, I do not think that it is possible to say, on the evidence, that the Respondent has no realistic prospect of a successful defence to the Section 214 Claim.

67. I give one example of matters raised by Mr Mace which did not strike me as suitable for determination on a summary judgment application. In his oral submissions Mr Mace referred me to the decision of Zacaroli J in *Hunt v Singh* [2023] EWHC 1784 (Ch). The case was heard as an appeal against the dismissal of a claim made against Mr Singh, a former director of a company which had engaged in a tax avoidance scheme which was successfully challenged by the Revenue. The liquidator of the company brought claims against the former directors which included claims for breach of fiduciary duty. All these claims failed at first instance. The liquidator appealed against the dismissal of one of the claims against Mr Singh. Zacaroli J described the principal issue raised by the appeal in the following terms, at [2]:

*"2. The principal question raised by the appeal is when, following the decision of the Supreme Court in BTI 2014 LLC v Sequana SA ("Sequana"), does a director's duty to take into account the interests of creditors arise, in circumstances where the company is at the relevant time insolvent, but its insolvency is due to a tax liability which the directors (wrongly, as it later turned out) believed at the relevant time had been avoided by a valid tax avoidance scheme entered into by the company. I will refer to this duty as the "creditor duty", recognising that it is nevertheless a duty owed to the company."*

68. Mr Mace drew my attention to the following statement of the judge, at [47]:

*"47. The fact that the Company disputed that anything was due to HMRC does not change the fact that it was insolvent. A disputed liability is not a contingent liability. At the time (i.e. throughout the relevant period) there either was an actual liability to HMRC or there was not: see, for example, Integral Memory PLC v Haines Watts [2012] EWHC 342 (Ch), per Richard Sheldon QC, sitting as a deputy High Court Judge, at §32. In fact, as is now know, there was an actual liability."*

69. Mr Mace's submission, on the basis of this statement, was that the Company was still indebted to the Revenue, notwithstanding its challenge, in the Tribunal Proceedings, to the Revenue's denial of the Company's claims to recover input tax by the Denied Returns.

70. Mr Mace also drew my attention to a further statement of the judge, at [51]:

*"51. It is important to emphasise that I have heard no contrary argument at all so that my conclusions have been reached solely on the basis of the arguments advanced on behalf of Mr Hunt. For the reasons which follow, however, I consider that Ms Hilliard's contention is broadly correct. In my judgment, assuming some element of knowledge is required, where a company is faced with a claim to a current liability of such a size that its solvency is dependent on successfully challenging that claim, then the creditor duty arises if the directors know or ought to know that there is at least a real prospect of the challenge failing."*

71. Mr Mace's submission, on the basis of this statement, was that the Respondent's position was effectively the same as the position of the directors described in [51]. As such, it was clearly not open to the Respondent to claim that he was entitled to act as he did on the basis of an alleged belief that the Company had some chance of a successful challenge, in the Tribunal Proceedings, to the Revenue's denial of the claims to input tax made in the Denied Returns.

72. The difficulty which seemed to me to confront Mr Mace, in seeking to rely upon these statements of the law in a summary judgment application, was that these statements have to be applied to the facts of the present case, in the context of the Section 214 Claim. This exercise is a fact sensitive exercise which requires the court, in the present case, to review all the evidence and make findings on that evidence, by reference to the provisions of Section 214 and the issues raised by those provisions. I do not say that such an exercise is impossible on a summary judgment application. It does seem to me that this exercise,

having regard to the evidence and issues in the present case, is not an exercise which can safely be carried out at the summary judgment stage.

73. I do not regard it as appropriate to go further into my first reason for upholding the decision of the Judge to refuse the Application. Further analysis of the issues in the Section 214 Claim and, in particular, further analysis of the matters raised by the Respondent, by way of defence to the Section 214 Claim, is for trial.

74. My second reason concerns the status of the FTT Decision in relation to the Section 214 Claim. The Appellants' case in support of the Section 214 Claim relies heavily upon the findings made by the FTT in the FTT Decision. In particular, the Appellants rely heavily upon the findings of the FTT as to the Respondent's knowledge, going back to 2006, that the transactions in which the Company was engaged were connected with the fraudulent evasion of VAT. Indeed, this is the basis for what I understood to be Mr Mace's argument that the Respondent, given his knowledge of this fraud (as found by the FTT), could not possibly have thought it reasonable to continue to allow the Company to trade when such continued trading would have perpetuated the Company's involvement in the fraud to which the Company's transactions were connected. Equally, as I understood Mr Mace's arguments, the Respondent must, given his knowledge of the fraud (as found by the FTT), have known that the Company had no right to submit the March Return or the Denied Returns.

75. All this assumes that the Appellants are entitled to rely upon the findings in the FTT Decision, in the Section 214 Claim, notwithstanding that the Respondent was not himself a party to the Tribunal Proceedings. It was not argued by the Appellants that the Respondent qualified as a person privy to the Company, as a party to the FTT Decision, and thus formally bound by the FTT Decision.

76. At first sight, the Appellants' reliance upon the FTT Decision would appear to be precluded by the rule in *Hollington v Hewthorn*. In *Hollington v Hewthorn* the plaintiff sought to rely in civil proceedings upon the defendant driver's criminal conviction for careless driving as evidence of his negligence. The Court of Appeal held that evidence of the conviction was inadmissible. Goddard LJ stated the relevant principle in the following terms, at pages 596-597 of the report of the case:

> *"A judgment obtained by A against B ought not to be evidence against C, for, in the words of the Chief Justice in the Duchess of Kingston's Case (1776) 2 Sm LC 13th ed. 644, "it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses or to appeal from a judgment he might think erroneous: and therefore .... the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers." This is true, not only of convictions, but also of judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who was not a party. If the judgment is not conclusive we have already given our reasons for holding that it ought not to be admitted as some evidence of a fact which must have been found owing mainly to the impossibility of determining what weight should be given to it without retrying the former case. A judgment, however, is conclusive as against all persons of the existence of the state of things which it actually affects when the existence of that state is a fact in issue. Thus, if A sues B, alleging that owing to B's negligence he has been held liable to pay xl. to C, the judgment obtained by C is conclusive as*

*to the amount of damages that A has had to pay C, but it is not evidence that B was negligent: see Green v. New River Co (1792) 4 Term Rep. 589, and B can show, if he can, that the amount recovered was not the true measure of damage."*

77. The actual result in *Hollington v Hewthorn* was reversed by Section 11 of the Civil Evidence Act 1968, so that the fact that a person has been convicted of an offence in a court is admissible in evidence in subsequent proceedings, in order to prove that the person committed the relevant offence. The principle or rule stated in the case remains in place however in respect of judgments in previous civil proceedings. A judgment of a previous court or tribunal is not admissible evidence to prove a fact in issue or a fact relevant to that issue in other civil proceedings between different parties.

78. The rule in *Hollington v Hewthorn* was considered by the Court of Appeal in *Ward v Savill* [2021] EWCA Civ 1378. The issue considered by the Court of Appeal was whether the appellants could rely upon a declaratory judgment granted to them in earlier proceedings, as against the respondent, who had not been a party to those proceedings. The Court of Appeal decided that they could not, for the reasons stated by Sir Julian Flaux C, with whose judgment Laing and Warby LJJ agreed. So far as the rule in *Hollington v Hewthorn* was concerned, the Chancellor confirmed the existence of the rule, and described its scope in the following terms, at [81]:

> *"81. Turning to the first ground of appeal, the starting point is the scope of the rule in Hollington v Hewthorn. The relevant passage in the judgment of the Court of Appeal is that at pp 596-7 of the Law Report as set out at [34] above. It is quite clear from that passage that the appellants' purported distinction between factual findings in a judgment which are not binding on a stranger to it and the legal effect of a judgment, which the appellants contend is binding on a stranger, is not a distinction recognised by the rule. The citation with approval from the Duchess of Kingston's case refers to "the judgment of the court upon facts found" distinguishing between the facts and the judgment and, as Mr Mather correctly pointed out, the circumstances of the Duchess of Kingston's case itself demonstrate that the rule is not limited to findings of fact but extends to the legal consequences of those findings, as determined by a court in its judgment."*

79. The Chancellor went on to say this, at [85]-[86]:

> *"85. In Calyon Mr Steinfeld QC, who also appeared for the claimants in that case, sought to persuade the Privy Council to depart from the established principles underlying Hollington v Hewthorn, but they declined to do so. In [28] of the judgment, the Privy Council recognised that, whilst the actual decision in Hollington v Hewthorn had been criticised, it continued to embody the common law as to the effect of previous decisions. It was in that context that they referred at [30] to [31] to the Report of the Law Reform Committee and concluded, not just that the reasoning of the Court of Appeal in Hollington v Hewthorn on this aspect of the law was compelling, but that it was significant that, in passing the Civil Evidence Act 1968, Parliament made no change to this aspect of the law. In other words, the rule in Hollington v Hewthorn represents a well-established principle of law which this Court should follow.*
>
> *86. That the rule in Hollington v Hewthorn is not limited to the inadmissibility of findings of fact in an earlier judgment against a stranger to it, but*

*encompasses also the legal effect of that earlier judgment, is consistent with the wider principle of procedural fairness enunciated in Gleeson v Wippell (as set out in [57] above) and applied by this Court in Powell v Wiltshire, that the suggestion that a stranger to an earlier judgment is bound by it is contrary to fundamental principles of natural justice. That wider principle is not limited to factual findings in the earlier judgment, but extends to the legal effect of the earlier judgment, hence the conclusion in Powell v Wiltshire that Mr Powell was not bound by declarations as to title in the aircraft in the earlier judgment: see per Latham LJ at [26] and Arden LJ at [37]. The wider principle was also succinctly summarised by Sales J (as he then was) in Seven Arts Entertainment Limited v Content Media Corporation Plc [2013] EWHC 588 (Ch) at [73]:*

> *"…the basic rule is that, before a person is to be bound by a judgment of a court, fairness requires that he should be joined as a party in the proceedings, and so have the procedural protections that carries with it. This includes the opportunity to call any evidence he can to defend himself, to challenge any evidence called by the claimant and to make any submissions of law he thinks may assist his case. Although there are examples of cases in which a person may be found to be bound by the judgment of a court in litigation in relation to which he stood by without intervening, in my judgment those cases are illustrations of a very narrow exception to the general rule. The importance of the general rule and fundamental importance of the principle of fair treatment to which it gives expression indicate the narrowness of the exception to that rule."*

80. Mr Mace's answer to *Hollington v Hewthorn* was that it is not open to a party in the position of the Respondent to relitigate with the Appellants, as liquidators of the Company, issues which had already been decided against the Respondent in the FTT Decision. In considering this answer it is necessary to make reference to only two of the authorities cited by Mr Mace.

81. The first of these authorities was *Secretary of State for Business Innovation and Skills v Potiwal* [2012] EWHC 3723 (Ch). The case was concerned with proceedings brought by the Secretary of State to disqualify Mr Potiwal from acting as a director. In the proceedings Mr Potiwal filed an affidavit in which he denied that he had been aware that the company, of which he had been the sole director, had participated in transactions connected with the fraudulent evasion of VAT. The Secretary of State applied to strike out this evidence on the basis that it was an abuse of the process of the court. The denial was said to be an abuse because the VAT Tribunal (as it then was) had previously concluded, in a decision made on the company's appeal against the Revenue's disallowance of its VAT claims for the relevant period, that Mr Potiwal had known that the company was participating in the fraudulent evasion of VAT.

82. In his judgment on the application Briggs J, as he then was, concluded that it would be an abuse to permit Mr Potiwal to relitigate the same issue of knowledge which had been determined by the VAT Tribunal. As Briggs J explained, at [28] and [29]:

> *"28. I have also concluded that to permit the issue as to Mr Potiwal's knowledge to be relitigated would indeed bring the administration of justice into disrepute, in the eyes of right-thinking people. In Re Thomas Christy (in*

*liquidation) [1994] 2 BCLC 527 Mr Manson sought to relitigate with his company's liquidator issues as to breach of duty and misfeasance which had been decided against him in earlier disqualification proceedings brought by the Secretary of State. The liquidator expressly disclaimed any suggestion that he and the Secretary of State had the requisite privity of interest to give rise to an estoppel per rem judicatam. After a review of the authorities, Jacob J said this, at page 537:*

> *"The Companies Court of the Chancery Division of the High Court has found, after a full trial, Mr Manson guilty of the five wrongful acts specified above. To allow relitigation of those before the self-same court would seem absurd to Joe Citizen who through his taxes pays for the courts and whose own access to justice is impeded by court congestion. Doing a case twice over would make no sense to him: all the more so if he was told that the costs of this would in all likelihood be borne by innocent creditors of the company which Mr Manson ran."*

*29. It makes no difference in my view that, in the present case, two different tribunals are involved, namely the VAT Tribunal and the Companies Court. Apart from that, Jacob J's words are fully applicable to the present case. Where, as here, the issue as to a director's knowledge of a complex MTIC fraud has been fully and fairly investigated by an experienced tribunal and the director found to have had the requisite knowledge, it seems to me that right-thinking members of the public would regard it as an unpardonable waste of scarce resources to have that issue relitigated merely because, by a simple denial and without deducing any fresh evidence, Mr Potiwal seeks to require the complex case against him to be proved all over again. In that context the facts that Mr Potiwal was indeed in privity of interest with Red 12, that he was its sole director and that he had the conduct of Red 12's appeal makes the point all the stronger."*

83. Briggs J concluded his judgment in the following terms, at [30]-[32]:

*"30. Re Thomas Christy Ltd was considered, without any apparent disapproval, in Secretary of State v Bairstow, at paragraph 32. It was treated as an application of the principle established in Hunter v Chief Constable of West Midlands. In Taylor Walton v Laing, after citing from the Hunter case, Buxton LJ said this, at paragraph 12:*

> *"The court therefore has to consider, by an intense focus on the facts of the particular case, whether in broad terms the proceedings that it is sought to strike out can be characterised as falling under one or other, or both, of the broad rubrics of unfairness or the bringing of the administration of justice into disrepute."*

*31. In my judgment a focus upon the thoroughness and fairness of the way in which the issue as to Mr Potiwal's knowledge of the underlying VAT fraud was conducted by the VAT Tribunal (and upheld on appeal), in proceedings in which, with full control of Red 12's case, Mr Potiwal had every opportunity to exonerate himself, but failed, demonstrates that this is a case to which both limbs of the Hunter principle fully apply.*

***Conclusion***

*32. The result is that those passages in Mr Potiwal's evidence in which he denies that he had knowledge of the VAT fraud in which Red 12 participated, to the extent found against him by the VAT Tribunal, should be struck out as an*

*abuse of process. The result is that the disqualification proceedings against him may be pursued in a very much more economical and efficient manner than would otherwise have been possible. I will give directions for the further case management of the proceedings, if they cannot be agreed."*

84. The second of these authorities was the decision of the Judge himself in *Mark John Wilson (in his capacity as Liquidator of E-Tel (UK) Limited (In Liquidation)) v Nemish Mehta* [2023] EWHC 1214 (Ch). The case was concerned with a claim by the liquidator of E-Tel (UK) Limited for compensation against Mr Mehta, the sole director of the company. The claim for compensation was made on the basis of alleged fraudulent trading and alleged fraudulent breach of fiduciary duties, arising out of the company's involvement in an MTIC fraud, for which Mr Mehta, the respondent to the claim, was said to be responsible. The respondent did not attend the trial of the claim but, as the Judge noted at the outset of his judgment, the liquidator still had to prove the claim.

85. As in *Potiwal* the liquidator relied heavily upon the findings of the FTT made in a decision on the company's appeal against the decision of the Revenue to deny its claim for the recovery of input tax. As in the present case, and as in *Potiwal*, the FTT made findings that the respondent had had knowledge of the MTIC fraud. The liquidator argued that he was entitled to rely upon the findings of the FTT on two bases. The first basis was that the respondent, as the sole director of the company and the person who had instigated and overseen the appeal to the FTT against the denial of input tax, should be treated as a privy of the company and thereby bound by the findings of the FTT. The second basis was that it would be an abuse of process to allow the respondent to relitigate the findings of the FTT as to his knowledge of the MTIC fraud.

86. The Judge considered that he was bound, by authority (including *Potiwal*), to reject the argument that the respondent was a privy of the company and thus formally bound by the findings of the FTT; see the judgment at [15]. The Judge did however accept the argument, on the basis of *Potiwal*, that it would be an abuse of process to allow the respondent to relitigate the issue of his knowledge, when findings had already been made by the FTT as to the state of that knowledge. As the Judge explained, at [16] and [17]:

*"16 However, she also submitted, and I agree, that this case is on all fours with the decision in that case of an abuse of process. She particularly submitted, and I accept, that it would be manifestly unfair for this applicant to have to undertake the expenditure required to conduct what would, in effect, be a re-trial of the many days spent before the Tribunal concerning the MTIC fraud and the respondent's knowledge. She also submitted that the respondent had had every opportunity at that hearing, both in giving evidence and during cross-examination, and indeed in regard to the preparation of the company's case, to defend both the company and himself against the allegations of knowledge. She also submitted, with which I also agree, that account should be taken of the thoroughness and fairness of the hearing – apparent from the judgment – before the VAT Tribunal, in circumstances of the respondent being in control of the company and its appeal, and the company being represented. Finally, she submitted it was clear that to ask this court to carry out the same exercise using the court's relatively limited resources would bring the administration of justice into disrepute, in particular taking into account also resources that the applicant would have to use. In all those*

*circumstances, her submission is that the respondent must be held to the outcome before the Tribunal, both as to findings of fact and decision.*

*17 I agree. In my judgment, it would be an abuse of process for him to cause the company to run a defence and seek to re-argue precisely the same facts and matters without being bound by the findings and any decision relevant to them. He was, after all, the director in charge of the conduct of the litigation, with a duty to ensure that it was properly conducted. It is apparent from the First-tier Tribunal's decision that this was a full-scale witness action, involving a complete denial by the company that the VAT input was not deductible. That might not have precluded new matters being asserted in evidence in this case (an issue which has not arisen) but it cannot be right that the respondent should, in effect, be allowed two bites of the cherry. Not only would it bring the administration of justice into disrepute, but it would be contrary to the overriding objective which applies to these proceedings."*

87. Mr Mace contended that the present case was on all fours with both *Potiwal* and *Mehta*. Just as it would have been an abuse in those cases to permit the respondent to relitigate the issue of his knowledge of the relevant VAT fraud, so it would be an abuse for the Respondent to relitigate the issue of his knowledge of the VAT fraud in the present case, in circumstances where that issue had already been the subject of thorough investigation and detailed findings by the FTT in the FTT Decision, and where the Company had made it clear, in its attempt to appeal to the Upper Tribunal, that it was not challenging the findings of fact made in the FTT Decision.

88. There may be very considerable merit in this argument. It may be, at trial, that the Appellants will be able to establish that they are entitled to rely upon the FTT Decision. For the purposes of the Application however it seems to me that there are two problems with making a summary determination of the question of whether the Appellants can rely upon the findings of fact in the FTT Decision or whether the Appellants can rely upon the decision of the Company not to seek to challenge those findings by an appeal.

89. The first of these problems goes back to my first reason for refusing the Application. I agree with Mr Myers that the Section 214 Claim raises issues, in relation to the Respondent's state of mind, which were not before the FTT. The FTT were not called upon to decide what the Respondent knew or ought to have known as to the prospects of the Company going into insolvent liquidation or insolvent administration, for the purposes of Section 214(2)(b). The FTT were not called upon to decide whether the Respondent took every step with a view to minimising the potential loss to the Company's creditors as he ought to have taken, bearing in mind what he ought to have known of the Company's financial position. I can see that the findings made by the FTT may be said to provide or substantially to provide the answers to those questions, but arguments of that kind seem to me to be for the trial of the Section 214 Claim, not for a summary judgment application.

90. In summary, the first problem seems to me to be that even if the Appellants are entitled to rely upon the findings of the FTT as to the Respondent's state of knowledge, I do not consider that those findings can be treated as decisive, at summary judgment stage, of the issues which I have identified in explaining my first reason for concluding that the Judge was right to refuse the Application. At trial, the court may conclude that the findings of the FTT can be treated as decisive of those issues, but that is a question for trial. The

position seems to me to be much the same in relation to the Company's decision not to challenge the findings of fact made by the FTT.

91. The second problem is the more fundamental question of whether the Appellants can rely upon the findings in the FTT Decision. At first sight the facts and circumstances of the present case appear to be indistinguishable from those before the court in *Potiwal* and *Mehta*. I am not however persuaded that it is appropriate to decide whether the Appellants can rely upon the findings in the FTT Decision on a summary basis.

92. It is true that there are cases where points of law or construction can and should be determined on a summary basis; see sub-paragraph (vii) of the guidance given by Lewison J in *Easyair*. If the court has all the relevant evidence before it, and if the relevant point of law or construction raises no issues of fact unsuitable for determination on a summary basis, there is unlikely to be any merit in allowing the relevant point of law or construction to go to trial. The court should grasp the nettle and decide the point.

93. I am not convinced that the question of whether the Appellants can rely upon the findings in the FTT Decision falls into this category. As I understand the Appellants' case, the argument that the Appellants are entitled to rely upon the findings in the FTT Decision is put, as it was put in *Potiwal* and *Mehta*, on the basis that it would be an abuse of process for the Respondent to be permitted to relitigate the findings as to this knowledge made by the FTT.

94. This assumes however that what the Respondent is seeking to do in this case, in his defence to the Section 214 Claim, does involve relitigating the findings in the FTT Decision and does constitute an abuse of process. In this context I repeat, for ease of reference, what Briggs J said in his judgment in *Potiwal*, at [30] and [31]:

> *"30. Re Thomas Christy Ltd was considered, without any apparent disapproval, in Secretary of State v Bairstow, at paragraph 32. It was treated as an application of the principle established in Hunter v Chief Constable of West Midlands. In Taylor Walton v Laing, after citing from the Hunter case, Buxton LJ said this, at paragraph 12:*
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> > *"The court therefore has to consider, by an intense focus on the facts of the particular case, whether in broad terms the proceedings that it is sought to strike out can be characterised as falling under one or other, or both, of the broad rubrics of unfairness or the bringing of the administration of justice into disrepute."*
>
> *31. In my judgment a focus upon the thoroughness and fairness of the way in which the issue as to Mr Potiwal's knowledge of the underlying VAT fraud was conducted by the VAT Tribunal (and upheld on appeal), in proceedings in which, with full control of Red 12's case, Mr Potiwal had every opportunity to exonerate himself, but failed, demonstrates that this is a case to which both limbs of the Hunter principle fully apply."*

95. As can be seen, the question of whether, in cases of this kind, there is an abuse of process involves a fact sensitive inquiry, requiring an intense focus on the facts of the particular case and, turning specifically to the present case, a focus upon the thoroughness and fairness of the way in which the issue as to the Respondent's knowledge of the underlying VAT fraud was conducted by the FTT. I would add to this, in the present case, the requirement for an intense focus upon the overlap or lack of overlap between (i) the

findings made by the FTT as to the Respondent's knowledge of the VAT fraud and (ii) the issues as to the Respondent's knowledge and state of mind which are relevant in the Section 214 Claim. The Appellants say that the position is clear, and can be seen to be clear at this stage. I do not accept this. In my view the question of whether there is an abuse of process or unfairness or the bringing of the administration of justice into disrepute in the present case, of a kind which was found in *Potiwal* and *Mehta*, is for trial. There may be other cases, involving an issue of this kind, where the position is clear and can be seen to be clear at the summary judgment stage. In my view, and by reference to the arguments and evidence in the present case, the present case is not such a case. I add that the position seems to me to be much the same in relation to the Company's decision not to challenge the findings of fact made by the FTT.

96. If, as I have concluded, the question of whether the Appellants can rely upon the findings in the FTT Decision needs to go to trial, it seems to me to follow that the Section 214 Claim cannot succeed at this stage, independent of my first reason for concluding that the Judge was right to refuse the Application. For this second reason I also conclude that the Judge was right to refuse the Application.

97. What I have said above is sufficient to dispose of the Appeal. I will however, as I have said, deal briefly with the individual Grounds.

98. It seems to me that Ground 1 is only viable if the Judge was obliged, at the summary judgment stage, to treat the findings of fact made in the FTT Decision as findings which were both binding on the Respondent and decisive of the Section 214 Claim. For the reasons which I have explained, I do not think that the Judge was so obliged. In my view the status and effect of the findings made by the FTT in the FTT Decision are matters to be determined at trial. The same applies, in my view, to the Company's acceptance of those findings in its attempts to appeal against the FTT Decision.

99. Given this position, it seems to me that the arguments as to the weight the Judge should have given to the findings of the FTT are misconceived. The weight to be given to the findings of the FTT is a matter for the trial judge to determine, once the status and effect of the FTT Decision in the Section 214 Claim have been determined.

100. If the correct reading of Paragraph 26 is that the Judge decided that the findings of the FTT were not binding upon the Respondent, then I would respectfully disagree with the Judge. It seems to me that this question remains to be determined at trial. This is not however my reading of Paragraph 26. It seems to me that what the Judge was doing, in Paragraph 26, was indicating that he was not willing to make a finding, at the summary judgment stage and based upon the findings of the FTT, that the Respondent had knowledge of the fraud. The reason for this unwillingness, on the basis of the Judge's analysis of the law, was that the rule in *Hollington v Hewthorn* precluded reliance on the FTT Decision for this purpose. I do not think that the Judge was ruling out, or intended to rule out the possibility that the Appellants would establish, at trial, that the Respondent was, for some reason or other, bound by the findings of fact in the FTT Decision. Equally, I do not think that the Judge was ruling out, or intended to rule out the possibility that the trial judge would think it appropriate to attach weight to the findings made by the FTT. It is important to keep in mind that the Judge was deciding whether the Appellants had established their case for summary judgment. The Judge was not deciding the Section 214 Claim.

101. Ultimately, and in relation to all of the Grounds, it seems to me that it is important to keep in mind what the Judge said in Paragraph 26, which I repeat for ease of reference:

> *"26. The Applicant invites the court to make a finding that the Respondent had actual knowledge of fraudulent evasion of VAT, based on the findings summarised in the FTT as (i) they were thoroughly explained in the decision and (ii) they were subsequently conceded by the company at subsequent hearings. Those findings (matters of opinion) or any admissions made were in the context of proceedings where the parties are not the same. What characterises a judicial finding is that it is an opinion of a court or other tribunal whose responsibility is to reach conclusions based solely on the evidence before it. In my judgment this is more than a fanciful defence. The case needs to be proved."*

102. What was said by the Judge in Paragraph 26 seems to me to bring out the distinction between what the FTT had to decide in the Tribunal Proceedings and what has to be decided in the Section 214 Claim. In common with the Judge I regard this distinction as material to the question of whether the Section 214 Claim was suitable for summary determination. Whether the distinction is, in the final analysis, a material distinction, is a matter for trial.

103. Ground 2 proceeds on the footing that the Judge mistakenly assumed, in Paragraph 28, that the loss claimed by the Appellants in the Section 214 Claim was restricted to the statutory interest which accrued on the debt to the Revenue, and thereby misdirected himself. I do not think that the Judge misdirected himself. It seems to me that what the Judge was doing, in Paragraph 28, was considering further the question of causation of loss, and making the point that the Appellants had more to do in order to prove the loss to the Company for the purposes of the Section 214 claim. It is clear from other parts of the Judgment that the Judge had well in mind the fact that the debt owed to the Revenue and the loss alleged to have been caused to the Company comprised more than statutory interest. Indeed, in Paragraph 1, the Judge identified the loss for which summary judgment was claimed, as £1,880,292.50. It is obvious that the Judge was not under the misconception that this sum was made up entirely of statutory interest.

104. Ground 3 reiterates the Appellants' argument that it was clear that the Respondent caused loss to the Company by not putting the Company into insolvent liquidation until 8 years after the March Return and the Denied Returns were filed by the Company, all of which made invalid claims for VAT. The Judge was not satisfied that this and other parts of the Appellants' case were established to the standard required for summary judgment purposes. In my view the Judge was right not to be so satisfied because, in this and other respects, there were fact sensitive issues raised which were not suitable for determination on an application for summary judgment.

105. In my view Ground 4 is misconceived. In making reference to the assessment by the Revenue it seems to me that the Judge was making the point that the fact of the assessment and any absence of challenge to the assessment did not, in and of themselves, establish the required elements of the Section 214 Claim. It seems to me that this was a legitimate and relevant point for the Judge to have made.

106. So far as Ground 5 is concerned, I do not think that the Judge misdirected himself as to the rule in *Hollington v Hewthorn*. The question of whether and, if so, to what extent that rule, which clearly still exists, prevents or affects the ability of the Appellants to rely upon the findings made in the FTT Decision is a question, as I have said, for trial. As I read Paragraph 30, this was essentially what the Judge was saying, in relation to the rule in *Hollington v Hewthorn*.

107. Beyond this, it seems to me that what the Judge was saying, in Paragraph 30, was that while the case might seem obvious to the Appellants, there were issues in the Section 214 Claim which required a *"fuller investigation into the facts of the case"*. For the reasons which I have set out in my analysis of the Appeal, I think that the Judge was right to take this view.

108. I note, in particular, that Ground 5, as set out in the grounds of appeal, includes the following assertions:

> *"15. The Judge had already misdirected himself with respect to the rule in Hollington v Hewthorn and then went on to find there might be a potential defence and additional evidence of the Respondent when the Respondent had failed to adduce any material evidence in the two years from the issuing of the underlying proceedings and in circumstances where the Respondent had been found to knowingly be involved in MTIC fraud."*

109. It seems to me that there are at least three misconceptions in these assertions. First, I do not consider that the Judge did misdirect himself with respect to the rule in *Hollington v Hewthorn*, for the reasons which I have already explained. Second, I can see the argument that the present case was not one which fell into the category of cases, identified in sub-paragraph (v) of the guidance given by Lewison J in *Easyair*, where it could reasonably be expected that there would be further evidence at trial. This however seems to me to miss the essential point being made by the Judge, which was that there were fact sensitive issues in the Section 214 Claim which were not suitable for summary determination and required fuller investigation at trial. Third, it was in the FTT Decision that the Respondent had been found to have knowledge that the Company was involved in transactions connected with fraud. Whether and, if so, to which extent the Appellants could rely on those findings in the Section 214 Claim is a question which, in my view, should be left for trial. As I read Paragraph 30, the Judge was saying essentially the same thing, in relation to the findings made by the FTT in the FTT Decision.

110. In summary, I do not consider the Grounds, whether taken individually or collectively, disclose any good reason for setting aside the Judge's decision to refuse the Application.

<u>An additional point</u>

111. For the sake of completeness, and although the point is academic in the light of my decision on the Appeal, there is an additional point with which I should deal.

112. At the conclusion of his oral submissions in support of the Appeal Mr Mace identified what it was he was seeking, by way of the order to be made on the Appeal. Mr Mace confirmed that he was asking for the Order to be set aside, and went on to say that he was asking the appeal court either to grant summary judgment on the Section 214 Claim or to direct a rehearing of the Application.

113. In his oral submissions in response Mr Myers objected to the Appellants seeking to substitute an order for summary judgment on the Section 214 Claim, if the Order was set aside. Mr Myers' complaint was that it had only come out in Mr Mace's oral submissions that the Appellants were seeking the substitution of an order for summary judgment, if the dismissal of the Application by the Judge was set aside. Mr Myers complained that this was unfair. In the absence of prior notice that this was what the Appellants intended to do, so Mr Myers submitted, the appeal court did not have before it all of the evidence which had been before the Judge, and the Respondent was not ready to argue the question of whether, on the totality of the evidence before the Judge, summary judgment should be granted on the Application (assuming the setting aside of the Order).

114. Given my decision on the Appeal this point does not arise but, as I have said, I will deal with the point for the sake of completeness.

115. The starting point is the Appellant's Notice, by which the Appeal was commenced. Section 9 of the Appellant's Notice identifies the order sought by the Appellants in the Appeal. What the Appellants did was to tick the box confirming that they were seeking an order setting aside the order which was the subject of the Appeal; that is to say the Order. The Appellants did not state that they were seeking any different or substituted order on the Appeal.

116. Turning to the grounds of appeal, they conclude in the following terms:

> *"16. For the reasons above the Appellants submit that the Summary Judgment order ought to be set aside and/or the findings made, as detailed above, be reconsidered."*

117. The skeleton argument in support of the Appeal, which was filed before permission to appeal had been granted, concluded with a request for the appeal court to allow the Appeal and *"make an Order in the terms of the draft order in the bundle."*. The only draft order which I have been able to find in the appeal bundle is a draft order granting permission to appeal. So far as I can see there was no draft order in the appeal bundle which set out the relief sought by the Appellants in the Appeal itself.

118. It seems to clear to me that the Appellants should have made it clear, in section 9 of the Appellant's Notice and in their grounds of appeal and in their skeleton argument in support of the Appeal, what it was they were seeking on the Appeal. It is essential that any appellant makes clear the full terms of the relief sought on an appeal.

119. I did however find it difficult to see why there was a problem in the present case in this respect, notwithstanding the failure of the Appellants to state in terms that they were seeking summary judgment in the Appeal. The Appeal was not an appeal against a decision made at a trial, after the hearing of oral evidence. The Judge was asked to grant summary judgment on the Section 214 Claim. The order sought before the Judge was an order that the Respondent pay the sum of £1,880,292.50 to the Appellants, with interest thereon. The order was sought on the basis of the evidence before the Judge. Essentially, the Appellants' case was that it was clear on the evidence before the Judge, without the necessity for a trial and without the necessity for oral evidence or cross examination of witnesses, that the Respondent had no real prospect of a successful defence to the Section 214 Claim.

120. If I had been persuaded by the Appellants' case it seems to me that this would necessarily have been because I would have been persuaded that the position was sufficiently clear for the Judge to have granted summary judgment on the Section 214 Claim. It also follows that I would have had to have been persuaded that this was the position, on the basis of the evidence before me in the Appeal.

121. On the hypothesis set out in my previous paragraph I find it difficult to understand the logic of requiring any kind of rehearing of the Application. If I had been persuaded that the Judge should have granted summary judgment on the Section 214 Claim, I find it difficult to see why I could not, on that hypothesis, have set aside the Order and substituted an order for summary judgment. The substituted order would have followed, logically, from my decision to set aside the Order, which would itself have been a decision reached on the evidence before me in the Appeal.

122. My conclusions on this additional point, had it been a live point, are as follows. I accept Mr Myers' complaint that the Appellants should have made it clear that they sought an order for summary judgment in the Appeal, assuming that the Order was set aside. If however I had been persuaded to set aside the Order, I do not think that it would have been right for me to stop there and leave the Application undecided. On that hypothesis it seems to me that the correct and appropriate course would have been for me to make a substituted order for summary judgment on the Section 214 Claim. The making of such an order would inevitably have followed from my decision to set aside the Order. Equally, I cannot see that this course would have caused any prejudice to the Respondent, given that the Respondent would have had the opportunity, on the hearing of the Appeal and in his defence of the Judge's decision, to put all the arguments as to why summary judgment should not have been granted and should not be granted.

The outcome of the Appeal

123. For the reasons set out in this judgment the Appeal fails, and falls to be dismissed. I will hear counsel, as necessary, on any matters arising consequential upon my dismissal of the Appeal. In the usual way the parties are encouraged to agree, subject to my approval, as much as they can in terms of the order to be made consequential upon the dismissal of the Appeal.