Neutral Citation: [2023] UKFTT 339 (TC)

Case Number: TC08773

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/00949

VAT – Appellant sole director and "controlling mind" of CCA Distribution Ltd – MTIC judgment issued May 2020 – FTT determined that Appellant knew the transactions were connected to fraud – HMRC issued Appellant with Director's Liability Notice for almost £2m – appealed by Appellant in part on basis that he did not know the transactions were connected to fraud – HMRC application to strike out those parts of Appellant's grounds of appeal as an abuse of process – application allowed

Heard on 20 February 2023
Judgment date: **24 March 2023**

Before

TRIBUNAL JUDGE ANNE REDSTON

Between

ASHLEY CHARLES TREES

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: The Appellant attended as a litigant in person, with some assistance from Mr David Adamson

For the Respondents: Christopher Kerr and Ben Hayhurst of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION AND SUMMARY

1. Mr Trees was the sole director and beneficial owner of CCA Distribution Ltd ("CCA"). In 2007, HMRC issued decisions which denied CCA the right to deduct input tax of £9,874,254.54 on the basis that the related transactions were connected with the fraudulent evasion of VAT, and that Mr Trees knew, or should have known, of that connection. CCA appealed to the FTT.

2. By a decision issued on 14 May 2020 the FTT (Judge Mosedale and Mrs Hunter) said they were "in no doubt that Mr Trees knew that all of CCA's transactions in the period in question were connected to fraud", and refused CCA's appeal. Their judgment was published as *CCA Distribution Ltd v HMRC* [2020] UKFTT 222 (TC) ("*CCA 2020*").

3. On 7 July 2021, HMRC issued CCA with a civil evasion penalty of £1,974,850 under the Value Added Taxes Act 1994 ("VATA"), s 60(1), and on the same day, issued Mr Trees with a Director's Liability Notice ("DLN") of the same amount under VATA s 61, on the basis that the conduct giving rise to the penalty was wholly attributable to his dishonesty.

4. Mr Trees appealed the DLN, in part on the basis that he did not know the transactions were connected to fraud. On 14 July 2022, HMRC applied to strike out those parts of his grounds of appeal, submitting that this had already been decided in *CCA 2020,* and it would be an abuse of process for Mr Trees to relitigate the issue. Having considered the submissions of both parties and the relevant case law, I agreed with HMRC.

5. HMRC also applied for *CCA 2020* to stand as evidence in Mr Trees' appeal, and for a change to the directions. For the reasons given at §92ff I also allowed those applications. Directions for the onward progress of Mr Trees' appeal have been issued at or around the same time as this decision notice.

BACKGROUND

6. CCA was incorporated in 2001; Mr Trees was at all relevant times its beneficial owner and sole director. In 2003, it began trading in mobile phones. In 2006, the Court of Justice of the European Union decided in *Kittel* (C- 439/04) that input VAT recovery could be denied:

> "where it is ascertained, having regard to objective factors, that the taxable person knew or should have known, that by his purchase he was participating in a transaction connected with fraudulent evasion of VAT…"

7. In 2007, HMRC issued decisions denying CCA the right to deduct input tax of £9,874,254.54 in relation to transactions in VAT periods 04/06, 05/06, and 06/06, on the basis that those transactions were connected with the fraudulent evasion of VAT, and that CCA, through the controlling mind of its sole director, Mr Trees, knew or should have known of the connection.

8. CCA appealed those decisions to the FTT. The appeals were heard between 15 March and 4 April 2012. The FTT (Judge Cornwell-Kelly and Mr Agboola) could not agree on the outcome. The judge exercised his casting vote to uphold CCA's appeal and Mr Agboola dissented. The judgment was published on 22 April 2013 under reference [2013] UKFTT 253 (TC).

9. HMRC appealed to the UT, which overturned the FTT decision in a judgment published under reference [2015] UKUT 513 (TCC). CCA obtained permission to appeal to the Court of Appeal. On 23 November 2017, that Court dismissed CCA's appeal and remitted the case to the FTT for a fresh hearing before a differently constituted Tribunal.

10. That new hearing took place over twelve days between 30 April and 17 May 2019. The, FTT issued its decision in *CCA 2020* on 14 May 2020. There was no appeal against that decision.

11. In all those hearings, CCA was represented by James K Pickup QC and Simon Gurney of Counsel, while HMRC were represented by Mr Kerr and Mr Hayhurst, both of Counsel; at the UT and Court of Appeal hearings, they were led by Jeremy Benson QC. Mr Kerr and Mr Hayhurst also represented HMRC in this application hearing.

12. CCA entered administration on 21 August 2009 and was dissolved on 16 November 2022.

The judgment in *CCA 2020*

13. The judgment in *CCA 2020* runs to 483 paragraphs and 66 pages. During the hearing, Mr Trees gave evidence-in-chief for around a day led by Mr Pickup; he was cross-examined by Mr Kerr for around three days, followed by Mr Pickup's re-examination.

14. The FTT made detailed findings of fact before saying, under the heading "conclusion on knowledge":

> "[470]…we have to consider the facts of the particular case to decide if HMRC have proved on the balance of probability that Mr Trees knew at the time that CCA's transactions were connected to fraud.
>
> [471] It should be clear from what we have said above that we do find that it is proved. There were a number of factors even by themselves showed on the balance of probabilities that Mr Trees did know of the fraud: all of them combined put the matter beyond any doubt."

15. The FTT went on to summarise the facts:

> "[474] We have found that CCA did know that its deals were dictated to it (§§304-309) and that its banking was dictated to it (see §299-303 and §§310-324): knowing any one of these matters meant Mr Trees could not have been in any doubt that CCA was participating in transactions orchestrated for the purpose of VAT fraud. He knew CCA was not trading as a free agent in any grey market.
>
> [475] But even if we were to put those findings of fact aside, we would still conclude that Mr Trees knew that CCA's transactions were connected to fraud. CCA was offered deals far too good to be true: it was offered the opportunity to make phenomenal profits over a short space of time for doing virtually nothing; the deals required no special skill nor utilisation of any carefully cultivated contacts, they involved few costs and no commercial risk. CCA knew that its customers had little interest in the product traded, it knew about the patterns in the trading that had no rational explanation, it knew that its trading environment was uncommercially benign (see §§269-298). The only explanation for all of this was clearly that the transactions were orchestrated for the purpose of fraud; that conclusion is all the more obvious when Mr Trees was well aware that there was VAT fraud taking place in

mobile phone trading. From this we would conclude that it was very clear that Mr Trees knew that CCA's transactions were connected to fraud.

[476] But it is even more certain that he did: he acted as a person who did know of the connection; CCA's deal documentation was inadequate reflecting that Mr Trees knew that it did not really matter; similarly CCA did not inspect the goods; CCA's due diligence was inadequate and undertaken to satisfy HMRC; negative indicators were ignored; CCA held inadequate insurance against some risks and none against others despite the high value of the goods; CCA was not willing to cooperate with HMRC over IMEI numbers where such cooperation might have helped reveal circulation of the phones and thus the fraud. Mr Trees had a relationship of trust with Future which was clearly involved in the fraud and this relationship continued long after the suspicions of an innocent trader would have been raised."

16. The FTT then summarised the points put forward on behalf of CCA and the reasons why they had been rejected:

"[477] None of factors put forward by appellant as indicating Mr Trees did not know actually countered or explained away any of these findings. CCA's cooperation with HMRC was limited and self-interested; Mr Trees did not rely on [HMRC Officer] Mr D'Rozario's opinions; HMRC was definitely not better placed to spot the fraud than Mr Trees; while Mr Trees did choose to put his own money at risk, this was at least as consistent with confidence that HMRC would not discover any fraud, as with any innocence; CCA's prior trading could only have given CCA confidence that HMRC would continue to repay it its input tax claims; its employees were not aware of anything untoward but there was no reason why they would know as it was Mr Trees who exclusively conducted the deals and in any event their evidence was so general it does not exonerate Mr Trees."

17. The FTT concluded at [478]:

"We are in no doubt that Mr Trees knew that all of CCA's transactions in the period in question were connected to fraud. As we have found that they were so connected, CCA's claim for input tax on the transactions was correctly denied by HMRC on the basis of *Kittel*. The appeal is DISMISSED."

18. Under the heading "Means of knowledge", the FTT then continued:

[479] HMRC's alternative case was that if CCA (acting via Mr Trees) did not know of the connection to fraud, then it ought to have known of it. We do not need to deal with this allegation in view of the fact that we have found that Mr Trees clearly did know of the connection to fraud, but for the sake of completeness we will deal with it briefly.

[480] We are satisfied that, had Mr Trees not known of the fraud, he ought to have known of it. In summary, there are so many factors that ought to have made Mr Trees deeply suspicious, that when considered in combination, a person would realise that the only reasonable explanation for them was that the transactions were all orchestrated for the purpose of fraud.

[481] As we said above, we have found that CCA did know that its deals were dictated to it and that its banking was dictated to it. But even if we were to put those findings of fact aside we would still conclude from the rest of the matters

> that Mr Trees did know that CCA ought to have known its transactions were connected to fraud. Mr Trees knew that CCA was offered deals far too good to be true: it was offered the opportunity to make phenomenal profits over a short space of time for doing virtually nothing; the deals required no special skill nor utilisation of any carefully cultivated contacts, they involved few costs and no commercial risk. CCA knew that its customers had little interest in the product traded, it knew about the patterns in the trading that had no rational explanation, it knew that its trading environment was inexplicably benign. The only explanation for all of this was clearly that the transactions were orchestrated for the purpose of fraud; that conclusion is all the more obvious when Mr Trees was well aware that there was VAT fraud taking place in some mobile phone trading. From this we would conclude that it was very clear that Mr Trees ought to have known that CCA's transactions were connected to fraud.
>
> [482] CCA's appeal would have been dismissed on this ground if we had not already dismissed on basis Mr Trees did know of the connection to fraud."

19. In accordance with Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules", any appeal against *CCA 2020* had to be made by 56 days from the date of issue. No appeal was made.

The penalty and the DLN

20. On 7 July 2021, HMRC issued CCA with a civil evasion penalty under VATA s 60(1). That section is headed "VAT evasion: conduct involving dishonesty", and subsection (1) reads:

> "In any case where—
>
> (a) for the purpose of evading VAT, a person does any act or omits to take any action, and
>
> (b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability), he shall be liable…to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct."

21. Subsections 2 and 3 specify that claims for input tax repayments are within the scope of the section where the amount was "falsely claimed". In this case, the VAT "falsely claimed" was the £9,874,254.54 at issue in *CCA 2020*. The penalty was 20% of that amount, so £1,974,850. The 80% reduction was maximum permitted under the statute. CCA has not appealed the penalty.

22. On the same day, 7 July 2021, HMRC issued Mr Trees with a DLN under VATA s 61. That section is headed "VAT evasion: liability of directors etc". Subsection (1) reads:

> "Where it appears to the Commissioners—
>
> (a) that a body corporate is liable to a penalty under section 60, and
>
> (b) that the conduct giving rise to that penalty is, in whole or in part, attributable to the dishonesty of a person who is, or at the material time was, a director or managing officer of the body corporate (a "named officer"),
>
> the Commissioners may serve a notice under this section on the body corporate and on the named officer."

23. HMRC issued the DLN to Mr Trees on the basis that the conduct giving rise to the penalty charged to CCA was wholly attributable to his dishonesty. Mr Trees asked for a statutory review of the DLN; the review officer upheld the decision.

The name on the Notice of Appeal

24. On 15 December 2021, the Tribunal received a Notice of Appeal. The name of the Appellant was given as CCA Distribution Ltd. Attached to the Notice was a letter, also headed CCA Distribution Ltd, together with a copy of the HMRC review decision.

25. The Tribunal pointed this out to the parties at the beginning of the hearing. It was common ground that Mr Trees was seeking to appeal the DLN issued to him personally, and that the references to CCA were mistaken.

26. Rule 9(1)(a) of the Tribunal Rules states:

> "the Tribunal may give a direction substituting a party if—
>
> (a) the wrong person has been named as a party."

27. Under that Rule, I directed that Mr Trees was to be substituted for CCA Distribution Ltd as the Appellant in this appeal; this is confirmed in the written directions issued after the hearing.

The grounds of appeal

28. Mr Trees' grounds of appeal were contained in two documents. The first was the letter attached to his Notice of Appeal ("the Letter"); the second was a "schedule of points refuting knowledge of connection to fraud" ("the Schedule"). The Letter said in multiple places that Mr Trees had "no idea" the transactions were fraudulent. It included the following passage and others in similar vein:

> "I was unknowingly the victim of a very sophisticated fraudulent operation and I have emphasised this, under oath, throughout all proceedings. Even now I don't know how the scam worked…I didn't know, I had no suspicion whatsoever…the truth is I didn't know, I had no suspicion whatsoever, I now know that I was undoubtedly manipulated but I was not instructed what to do at all."

29. The Letter also sought to rely on a "line check" which CCA had paid a well-known firm of accountants to carry out on its supply chain, on the basis that no-one involved in fraudulent activity would have paid for such a check. Mr Trees also said he had been "regularly visited" by HMRC and had done "almost everything they asked", and that when they "raided" CCA, he had "invited them to take everything and to return what they didn't need", adding "who does this when they have something to hide".

30. In relation to the DLN, the Letter said that "HMRC appear to be relying exclusively on some incorrect assumptions made by the Tribunal" which he had listed in the Schedule. That document began by saying:

> "First and foremost I would like to emphasise, as I have right from day 1 and under oath in the witness box, I was duped into participation in these fraudulent activities and had no knowledge that the transactions were connected to fraud."

31. The Schedule continues over five pages, setting out the reasons why Mr Trees disagrees with various factual findings in *CCA 2020.*

THE STRIKE OUT APPLICATION

32. HMRC applied to strike out all parts of the Letter in which Mr Trees asserted that he did not know about the connection to fraud, as well as those where he challenged findings of fact made by the FTT; HMRC provided a marked up copy of the Letter identifying the relevant passages. They also applied to strike out the Schedule in its entirety. Mr Trees objected to the strike out.

33. I next set out the powers of the Tribunal to strike out grounds of appeal, followed by the law on abuse of process, with particular reference to decisions where the appellant was the "controlling mind" of a company involved in one or more MTIC transactions. I then summarise the parties' submissions and set out my conclusions.

The Tribunal's powers

34. Rule 8(3)provides that:

> "The Tribunal may strike out the whole or a part of the proceedings if
>
> (a)-(b)…
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

35. The UT considered the exercise of this power in *HMRC v Fairford Group plc* [2014] UKUT 329 (Simon J and Judge Bishopp), and held at [46]:

> "In our judgment an application to strike out in the FTT under r8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the FTT Rules to summary judgment under Pt 24). The tribunal must consider whether there is a realistic as opposed to a fanciful (in the sense of it being entirely without substance), prospect of succeeding on the issue at a full hearing, see *Swain v Hillman* [2001] 1 All ER 91 and *Three Rivers* [2000] 3 All ER 1 at [95], [2003] 2 AC 1 per Lord Hope of Craighead. A "realistic" prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Products Limited v Patel* [2003] EWCA Civ 472, [2003] 24 LS Gaz R 37. The tribunal must avoid conducting a "mini trial". As Lord Hope observed in *Three Rivers*, the strike-out procedure is to deal with cases that are not fit for a full hearing at all."

36. Mr Kerr submitted that this Rule allowed the Tribunal to strike out the parts of Mr Trees' grounds of appeal which constituted an abuse of process. He relied on *Shiner v HMRC* [2018] EWCA Civ 31 ("*Shiner*"), in which Patten LJ gave the leading judgment with which Sales LJJ agreed. In *C F Booth v HMRC* [2020] UKFTT 35 (TC) ("*Booth*"), Judge McNall helpfully summarised the background to *Shiner* and cited the key passage:

> "[63] I am satisfied that Rule 8(3)(c) does extend to striking-out as an abuse of process. That was the decision of the Court of Appeal (Patten and Sales LJJ) in *Shiner and Sheinman v Commissioners for HMRC* [2018] EWCA Civ 31. There, HMRC had issued closure notices against the Appellants amending their self-assessment returns. Those notices were the subject of appeal to the FtT, which included a challenge on the footing that the retrospective effect of

> FA 2008 section 58 contravened Article 56 of the EC Treaty: see Para [6]. But, in that regard, the taxpayers had also, as a 'pre-emptive strike' sought permission to bring a claim for judicial review against HMRC. The judicial review claim came to an end when it was dismissed by the Court of Appeal and the Supreme Court refused permission to appeal. On the basis of the Court of Appeal's decision, HMRC applied to the FtT for an order striking out the FtT appeals against the closure notices insofar as they relied on a breach of Article 56 EC, on the basis that the point was either (i) res judicata or (ii) an abuse of process because the taxpayers were seeking to relitigate a point which had already been decided against them.
>
> [64] Patten LJ remarked (at Para [19]):
>
> > 'The need to exercise caution in relation to any power to strike out proceedings prior to a full hearing is obvious. But it is a consideration which goes to the exercise of the power rather than to whether such a power exists. The Upper Tribunal in its decision at [55] did not take Mr McDonnell to have submitted that there was no power to strike out for abuse of process but in any event, in my view, the power contained in Rule 8(3)(c) is wide enough in its terms to include a strike out application based on those grounds. Such an application, if successful, would result in the First-tier Tribunal concluding that the relevant part of the appellant's case could not succeed. A power to strike out could also be said to be part of the power of regulation by the First- tier Tribunal of its procedure under Rule 5(1) (which was the view of the Upper Tribunal), but Rule 8(3)(c) is enough. There is no need to imply a power. It is worth observing that the equivalent provision in CPR 3.4(2) separates out a case where a statement of case discloses no reasonable grounds for bringing or defending the claim from a case where the statement of case is an abuse of the court's process. But for the First-tier Tribunal the Tribunal Procedure Committee has chosen a different but composite criterion of no reasonable prospect of success, which is wide enough to cover appeals which are legally hopeless as well as appeals which can be said to amount to an abuse of process. There is in my view express power to strike out on both grounds."

37. I respectfully agree with the Court of Appeal in *Shiner,* and with Judge McNall, and I find that the Tribunal has the power to strike out all or part of a party's case if it would be an abuse of process to allow those grounds to be argued.

Abuse of process

38. The leading authority on the meaning and application of the term "abuse of process" is *Johnson v Gore Wood & Co* [2002] 2 AC ("*Gore Wood*"), in which Lord Bingham gave the leading judgment. Mr Kerr also relied on *Hackett v HMRC* [2016] UKFTT 781 (TC) (Judge Berner) as well as *Booth.* I set out the relevant parts of those judgments below.

Gore Wood

39. In *Gore Wood* at page 22, under the heading "abuse of process", Lord Bingham said:

> "The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court…This does not however mean

> that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward. For there is, as Lord Diplock said at the outset of his speech in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536, an
>
> > 'inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people'."

40. Lord Bingham then examined the case law, before saying at page 31, in relation to "the underlying public interest" that:

> "there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole."

41. Later in the same passage, Lord Bingham said that in deciding whether there was abuse of process, courts should make

> "a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

42. He added at page 32:

> "Two subsidiary arguments were advanced by Mr ter Haar [QC for the plaintiff] in the courts below and rejected by each. The first was that the rule [of abuse of process] in *Henderson v Henderson* 3 Hare 100 did not apply to Mr Johnson since he had not been the plaintiff in the first action against GW. In my judgment this argument was rightly rejected. A formulaic approach to application of the rule would be mistaken. WWH was the corporate embodiment of Mr Johnson. He made decisions and gave instructions on its behalf. If he had wished to include his personal claim in the company's action, or to issue proceedings in tandem with those of the company, he had power to do so."

43. Lord Bingham went on to endorse the following passage from the judgment of Sir Robert Megarry V-C in *Gleeson v J Wippell* [1977] 1 WLR 510 ("*Gleeson*") at p 515:

> "…it seems to me that the substratum of the doctrine [of abuse of process] is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it

> just to hold that the decision to which one was party should be binding in proceedings to which the other is party.."

Hackett

44. The background to *Hackett* was as follows:

(1) Mr Hackett was the sole director of Intekx Ltd. HMRC had denied an input claim for period 09/06 on the basis that Intekx either knew or should have known that the related transactions were connected to fraud. Intekx appealed that decision, but the FTT refused the appeal; their judgment was published as *Intekx v HMRC* [2014] UKFTT 277 (TC) ("*Intekx 2014*").

(2) Intekx had also made (but subsequently withdrawn), two further appeals against HMRC decisions denying input tax claims, one relating to periods 07/09 to 10/12 and the other to periods 01/13 to 07/13.

(3) On 17 March 2015, HMRC issued Intekx with a deliberate inaccuracy penalty under FA 2007, Sch 24, and issued Mr Hackett with a Personal Liability Notice ("PLN") under Sch 24, para 19.

(4) Mr Hackett appealed the PLN, and HMRC applied to strike-out various parts of his Grounds of Appeal on the basis that he was seeking to re-litigate issues which in HMRC's submission had already been determined in *Intekx 2014*.

45. The key issue was set out by Judge Berner at [42]:

> "The question therefore is whether, in all the circumstances, it would be an abuse of process for Mr Hackett to argue in his own appeal against the personal liability notice, and as part of that against the penalty assessed on the company, matters which either were the subject of determination by the tribunal (in respect of the 09/06 period) or in relation to other periods could have been determined by the tribunal had the appeals in those respects not been withdrawn."

46. As noted above, the FTT had already previously determined *Intekx 2014*, which concerned period 09/06. In relation to that period, Judge Berner said at [43]:

> "So far as the 09/06 period is concerned, the relevant issues were the subject of a final determination by the tribunal in *Intekx 2014*, having considered on a hearing of the substantive appeal all the facts and evidence including the evidence of Mr Hackett. I have no doubt in that respect that it would be an abuse of process for Mr Hackett to seek to re-litigate the relevant issues determined by the tribunal in that appeal. Mr Hackett, in his capacity as director of Intekx, has had an opportunity to put forward his case that in that period there was no connection between the transactions of Intekx in that period and fraudulent evasion of VAT, and that Intekx did not know of any such connection. It would be contrary to the principle of finality of litigation to allow that determination to be re-visited on this appeal. It would be a clear abuse of process to do so, and there are no circumstances that could justify such a course."

47. In relation to periods 07/09 to 10/12 and 01/13 to 07/13, he said at [44]:

> "The circumstances for the other periods are different. In those cases there has not been any determination by the tribunal, whether on a substantive hearing

> or otherwise. There has been a withdrawal of those appeals…Although there is sufficient identification between Mr Hackett and Intekx not to preclude the application of the abuse of process principle, the fact that the present appeal is made by Mr Hackett and not by Intekx is also a relevant factor. It is also relevant that, at the time when the earlier appeals were withdrawn, Mr Hackett was unaware that he might be exposed to a personal liability notice in respect of a penalty assessment not then made upon Intekx."

48. He continued at [45]:

> "In the case of the prior appeals of Intekx for which on account of the withdrawal of those appeals there has been no determination of the facts and issues by the tribunal, it would in my judgment not be an abuse of the processes of the tribunal for those facts and issues to fall to be determined by the tribunal on this appeal by Mr Hackett. I would go further. To fix Mr Hackett with deemed findings in respect of those appeals, in the circumstances where he is appealing against a personal liability which has arisen only after those appeals were withdrawn would in my judgment be contrary to the interests of justice. Nor do I consider that requiring HMRC, on whom the burden of proof is accepted to fall in this appeal, to prove relevant facts which have so far not been substantively determined could be regarded in any sense as oppressive."

49. He set out his conclusions at [46]:

> "(1) It would be an abuse of process for Mr Hackett to dispute in the present appeal facts and issues determined by the tribunal in *Intekx Limited v Revenue and Customs Commissioners* [2014] UKFTT 277 (TC). His grounds of appeal must therefore be read subject to that caveat.
>
> (2) Otherwise, I conclude that it would not be an abuse of process for Mr Hackett to dispute in the present appeal facts and issues in the appeals of Intekx in relation to VAT periods 07/09 to 07/13 inclusive.
>
> (3) Subject to (1), I refuse HMRC's application to strike out any part of Mr Hackett's grounds of appeal."

50. Judge Berner's decision was appealed to the UT, see [2020] UKUT 0212, but there was no challenge to his conclusion in (1) above. The UT noted at [93] that Mr Hackett's counsel "did not dispute before us that to seek to relitigate the findings made in *Intekx* 2014 would be an abuse of the FTT's process".

Booth

51. The issue in *Booth* was similar: a company contesting a penalty sought to relitigate "the deliberate nature of the inaccuracy of [VAT] returns because the Appellant knew that it was not entitled to the input tax and zero rating claimed" despite that issue having already being determined by way of a previous *Kittel* decision. This was number (3) in a list of points put forward by HMRC's Counsel, see [71].

52. Judge McNall took the same approach as Judge Berner had done in *Hackett,* saying:

> "[73] I am entirely satisfied that it would be an abuse of process for the Appellant now to seek to re-litigate the relevant issues which were already determined by the FtT in 2017.

> [74] I am entirely satisfied that the matter of the Appellant's knowledge in (3) is a matter which was the subject of a final determination by the FtT in the 2017 Decision.
>
> [75] …
>
> [76] "The Appellant had a full opportunity to put forward its case as to the absence of connection to fraud, and its want of knowledge of such connection. In short, and in alignment with *Hackett*, it would be contrary to the principle of finality of litigation to allow the FTT's determinations in 2017 to be re-visited in this appeal. There are no circumstances which could justify such a course."

53. On appeal to the UT (see *C F Booth v HMRC* [2022] UKUT 217 (TCC)), the appellant argued that it was not relitigating issues previously decided "because the issues in the penalty appeal were different", and because the *Kittel* decision "cannot in any event determine the outcome of a subsequent penalty appeal which is criminal in nature", see [17(6)].

54. In relation to the first of those issues, the UT held at [43] that Judge McNall had been correct, since in the *Kittel* decision the FTT had decided "that [the] Appellant knew that its transactions, for which it was claiming input tax and zero-rating, were connected with fraud" and added "those findings have not been appealed".

55. The UT then considered the application of Article 6 of the European Court of Huma Rights ("ECHR"), holding at [58]:

> "In our judgment, the essential requirement of Article 6 is that in the current proceedings the Appellant has a right to a fair trial…The exact requirements necessary to ensure a fair trial will depend on the nature of the issue to be tried, its seriousness and all the circumstances of the individual case. What is required is a broad assessment of whether the particular charge brought against the Appellant is dealt with in a manner which provides a fair hearing when the proceedings are viewed as a whole."

56. The UT went on to decide that Mr Booth had received a fair hearing, saying:

> "[59] The Appellant received fair notice of the case against it in the form of HMRC's detailed Statement of Case and evidence. Both parties were legally represented. The Appellant had the right to present its evidence and to have HMRC's witnesses cross-examined. The burden of proof lay upon HMRC, albeit to the civil standard of proof (see the 2017 Decision at §275). Both parties were entitled to make submissions to the FTT on both the law and the evidence. The FTT gave a carefully considered decision which was meticulous in detail. The Tribunal Rules governing the FTT's procedure required the FTT to act fairly and justly in accordance with the overriding objective. As we have already discussed, the findings of the FTT in the 2017 Decision are, in effect, determinative of the issues raised by the penalty assessment, and in respect of those issues, taking all of the above factors into account, we conclude that the Appellant received a fair hearing.
>
> [60] In relation to HMRC's strike out application resulting in the 2020 Decision, we are again satisfied that the Appellant received a fair hearing at the 2019 Hearing. The hearing, again held in public, took place before an independent tribunal. The Appellant received notice of HMRC's strike out application. Both sides were legally represented and were able to present their

respective cases to the FTT. The FTT again gave a carefully reasoned decision."

57. In relation to the remaining issue, the UT said at [61] that "it cannot be correct that an appeal against the tax penalty that constitutes an abuse of process must be allowed to proceed simply on the basis that the penalty constitutes a 'criminal charge'."

Mr Kerr's submissions on the strike out application: knowledge of fraud

58. Mr Kerr relied on the case law set out above, saying that to allow Mr Trees to appeal on the basis that he did not know of the connection to fraud would be an abuse of process, for the following reasons:

(1) The FTT decided in *CCA 2020* that Mr Trees knew the transactions were connected with fraud.

(2) The DLN had been issued in relation to the self-same transactions as were under appeal in *CCA 2020.*

(3) Mr Trees was the *alter ego* and controlling mind of CCA.

(4) As Lord Bingham said in *Gore Wood,* there should be "finality in litigation and that a party should not be twice vexed in the same matter". HMRC would be "twice vexed" if they now had to prove a second time that Mr Trees knew the transactions were connected to fraud.

(5) In *Gore Wood*, Lord Bingham referred a party "misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before". In this case, the issue was whether Mr Trees knew of the connection to fraud; this was not one which "could have been raised before", but had instead been explicitly decided by the FTT in *CCA 2020.*

(6) In *Hackett,* Judge Berner held that it would be an abuse of process for Mr Hackett to seek to re-litigate the relevant issues determined by the tribunal *Intekx 2014*, and when the case went to the UT that part of his decision was not challenged.

(7) In *Booth* Judge McNall was similarly "entirely satisfied that it would be an abuse of process for the Appellant now to seek to re-litigate the relevant issues which were already determined by the FtT in 2017" and also held that "the matter of the Appellant's knowledge…was the subject of a final determination by the FtT in the 2017 Decision".

59. In relation to the ECHR Article 6 points considered by the UT in *Booth*, Mr Kerr said Mr Trees' position was substantially identical to that of Mr Booth, for the following reasons:

(1) Mr Trees had received fair notice of HMRC's case against CCA in the form of a detailed Statement of Case and evidence.

(2) At all four of the CCA hearings, the company had been represented by a QC and a junior, and both parties made submissions to the FTT on both the law and the evidence.

(3) During the second FTT hearing before Judge Mosedale and Mrs Hunter, both parties presented the evidence on which they relied; Mr Trees gave evidence-in-chief for around a day and was then cross-examined by Mr Kerr for around three days; this was followed Mr Pickup's re-examination. HMRC's witnesses were similarly cross-examined by Mr Pickup.

(4) In all four hearings, the burden of proof lay upon HMRC.

(5) In *CCA 2020*, the FTT gave a carefully considered decision which was meticulous in detail, running to 483 paragraphs and 66 pages.

(6) The Tribunal Rules required the FTT to act fairly and justly in accordance with the overriding objective.

60. Mr Kerr said that the only difference between Mr Trees' position and that of Mr Booth was that Mr Trees was not legally represented in this strike-out hearing. In his submission, this should not change the outcome. He said:

> "Mr Trees is self-representing (albeit assisted by Mr Adamson). HMRC submits it would be inappropriate to take this into account as part of the broad merits-based approach propounded in *Johnson v Gore Wood*. When a person is self-representing the Tribunal and HMRC will of course assist the taxpayer to ensure a fair process, but this should [not] and does not impact upon the application of the law."

61. Mr Kerr emphasised that knowledge that the transactions were connected to fraud does not equates to dishonesty. Instead, dishonesty is an additional element, which will need to be proved at the hearing of Mr Trees' appeal against the DLN, the burden being on HMRC. He referred to *E Buyer v HMRC* [2017] EWCA Civ 1416 in which Hallett LJ had said at [107]:

> "The line between honest conduct and dishonest conduct may be a fine one, in such circumstances. None the less, there is a line and entering into a transaction knowing that it is connected with fraud does not necessarily equate to dishonest conduct."

Mr Trees' submissions on the strike out application: knowledge of fraud

62. Mr Trees relied on Lord Bingham's statement that in deciding whether there was abuse of process, courts should make "a broad merits-based judgment which takes account of…all the facts of the case". He submitted that it would not be an "abuse of process" if he were to make submissions, supported by evidence, that he did not "know" about the connection to fraud, and it would also not be an abuse of process for the Tribunal hearing his appeal against the DLN to decide for itself whether he "knew" the transactions were connected to fraud.

63. He went on to say in order to win CCA's MTIC appeal, HMRC had to show that he *either* knew *or* "should have known" the transactions had been connected to fraud. There was thus no need for the FTT to find that he "knew", and it would therefore not be an abuse of process for that question to be decided in his penalty appeal.

64. He emphasised that the issue in this appeal was different: it was not whether he knew/should have known, but whether he had been dishonest. No such allegation had been made in the CCA litigation, and the question of his dishonesty had thus not been considered or decided by the FTT. Since the issue was different, it would not an abuse of process to allow him to put forward his whole case, including points which had been considered (but in his view wrongly decided) by the FTT.

65. Mr Trees said *CCA 2020* had not been appealed because the company was in administration, and as a result, the appeal rights lay with the administrators and not with him. CCA had previously been represented on a no-win no-fee basis, but that came to an end after the judgment in *CCA 2020* was issued, and he had no money to fund any further litigation. For

those reasons, he said it would be unfair if CCA's failure to appeal were to count against him in his appeal against the DLN.

66. Finally, Mr Trees did not agree with Mr Kerr that there had had a "fair trial" as required by Article 6. He said that in cross-examination he was sometimes not allowed to say everything he wanted to say, and this had been unfair.

The Tribunal's view on the strike out application: knowledge of fraud

67. For the reasons given by Mr Kerr, and for the further reasons set out below, I agree that it would be an abuse of process if the Tribunal allowed Mr Trees to appeal the DLN on the basis that he did not "know" of the connection to fraud.

68. Mr Kerr's submissions were soundly based on the principles established in *Gore Wood,* and applied in *Hackett* and *Booth.* In *Hackett,* Judge Berner decided it would be an abuse of process for the appellant to "to dispute in the present appeal facts and issues determined by the tribunal" in *Intekx 2014,* see the reasoning at [43] set out at §46. That part of his judgment was not appealed when *Hackett* went to the UT. In *Booth* Judge McNall came to the same conclusion for essentially the same reasons, and the UT confirmed he was correct to do so.

69. In *CCA 2020,* the FTT clearly and unequivocally decided that "Mr Trees knew that all of CCA's transactions in the period in question were connected to fraud", and that conclusion was founded on detailed findings of fact derived from careful examination of the evidence.

70. Mr Trees sought to rely on Lord Bingham's statement that in considering whether there is abuse of process, a court must make "a broad-merits based judgment". While correct, that approach requires me to take into account, not only "the facts of the case" and Mr Trees' interests, but also (a) the interests of HMRC, who should not be "twice vexed in the same matter" and (b) the public interest, which requires "finality in litigation", a principle "reinforced by the current emphasis on efficiency and economy in the conduct of litigation".

71. Mr Trees is right that the FTT *could* have decided CCA's appeal on the basis that he "should have known" of the connection with fraud, but that is not what happened. Instead, the FTT decided that "Mr Trees knew that all of CCA's transactions in the period in question were connected to fraud". The FTT therefore did not need to address HMRC's alternative "should have known" case. The concluding paragraphs of *CCA 2020* simply say that "had Mr Trees not known of the fraud, he ought to have known of it" and had that been the case, the FTT would have dismissed CCA's appeal on that ground, see [482] of the judgment. Those final comments were thus made on the hypothetical basis that the FTT had not found Mr Trees to have known that the transactions were connected to fraud.

72. *CCA 2020* has not been appealed, and is therefore final. It was true that it was for the administrator, and not Mr Trees, to appeal that judgment. But it was the administrator who had appealed HMRC's 2007 VAT decision, and who continued to be in control of CCA throughout the litigation, including the rehearing before the FTT in *CCA 2020.* In any event, issues already decided cannot be relitigated simply because the losing party has (for whatever reason) not appealed.

73. It is true, as Mr Trees says, that the issue to be decided in his appeal is different: the FTT hearing his appeal will have to decide whether he was dishonest, not whether he knew the transactions were connected with fraud. But that does not give him an unfettered right to put forward any grounds of appeal. In *Gore Wood,* Lord Bingham approved the *dictum* that it

would be an abuse of process to allow a person "to litigate a second time what has already been decided between himself and the other party to the litigation". Litigation between HMRC and CCA, of which Mr Trees was the controlling mind, has already been concluded on the basis that Mr Trees knew the transactions were connected to fraud. Allowing him to reargue that point would be to permit him to litigate it a second time.

74. That does not mean that Mr Trees cannot argue, at the hearing of his appeal, that he was not dishonest: that is a new point and the burden of proving it will rest with HMRC. But in deciding whether or not he was dishonest, the parties and the FTT hearing his appeal must start from the position that he knew the transactions were connected with fraud.

75. I also agree with Mr Kerr that all the requirements of Article 6 are satisfied. I do not accept that the FTT hearing was unfair because Mr Trees was sometimes prevented from saying everything he wanted. The purpose of cross-examination is not to give a witness a chance to expand on his evidence (other than incidentally by answering the questions put to him). As Lord Denning said in *Jones v NCB* [1957] 2 QB 55 at page 65:

> "It is only by cross-examination that a witness's evidence can be properly tested, and it loses much of its effectiveness in counsel's hands if the witness is given time to think out the answer to awkward questions; the very gist of cross-examination lies in the unbroken sequence of question and answer."

76. CCA was represented by two counsel, Mr Pickup QC and Mr Gurney, and the FTT panel was made up of a very experienced judge and member. It would thus be extremely surprising if there had been any unfairness in the cross-examination process, and I do not accept that this was the case. Instead, I agree with Mr Kerr that Mr Trees' position is the same as that of Mr Booth (see [60] of the UT judgment cited at §56), other than that Mr Trees was a litigant in person before this Tribunal. That did not prevent him having a fair hearing: he was provided in advance with HMRC's skeleton and so could consider all of their arguments in advance, and I took care to ensure he understood points being made against him, including directing a short adjournment to allow him discuss one issue with Mr Adamson, which he subsequently confirmed that he had understood.

77. I add for completeness that Mr Trees did not seek to argue that there was no abuse of process because the parties were different: CCA was the appellant in the MTIC appeal and he is the appellant in the DLN appeal. He was right not to take that point. It is clear from *Gleeson* (approved in *Gore Wood*) that where the parties are different there can still be abuse of process if there is "a sufficient degree of identity" between the original party and the new appellant. Both parties accepted that CCA was Mr Trees' *alter ego*, or, as Lord Bingham put it, his "corporate embodiment". *CCA 2020* is therefore binding in this new litigation between Mr Trees and HMRC.

The strike out application: factual matters

78. The Letter also included two factual matters, the "line check" and the extent of Mr Trees' co-operation with HMRC; further factual points were contained in the Schedule.

The line check

79. The line check was carried out by a well-known professional firm of accountants. Mr Trees emphasised that the check had cost £40,000, and said no-one would have paid that much money for a check of that sort had they been involved in fraudulent activity. He submitted that

when making findings of fact, the FTT in *CCA 2020* had "not given sufficient weight" to CCA's commissioning of that report.

80. Mr Kerr said Mr Trees had made the same point during the hearing of *CCA 2020.* The FTT considered his submissions, see [48] and [432] of the judgment, and found that the scope of the report was limited, and since it had taken place before the transactions in question, it did not assist CCA. Were Mr Trees permitted to re-argue these points to support his case that he did not know of the connection to fraud, that would constitute an abuse of process.

Co-operation with HMRC

81. The Letter stated that "over the years" Mr Trees had been "regularly visited by the VAT doing almost everything they have asked" and that when CCA was "raided" he "invited them to take everything and return what they didn't need", adding "who does this when they have got something to hide".

82. Mr Kerr said this had also been considered by the FTT in *CCA 2020,* see [459] to [466] of that judgment. The FTT concluded by saying: "we reject the appellant's case that the co-operation CCA offered to HMRC indicated that it had a clear desire to assist HMRC combat fraud and was not aware of the connection of its own deals to fraud". Mr Kerr submitted that if Mr Trees were permitted to reargue that point, it would be an abuse of process.

The Schedule

83. The Schedule contained a list of factual challenges to *CCA 2020*, including the following:

(1) the margins on CCA's products;

(2) the bank account with First Curacao International Bank ("FCIB");

(3) Mr Trees' relationships with (a) Future Ltd, one of the contra-traders; (b) other suppliers and (c) A1 Logistics and Freight Ltd, a freight forwarder;

(4) CCA's stock payment arrangements;

(5) whether the deals were "too good to be true";

(6) CCA's costs;

(7) the commerciality or otherwise of CCA's trading environment;

(8) the nature and extent of CCA's deal documentation;

(9) the lack of inspection of the goods; and

(10) CCA's due diligence.

84. Mr Kerr said that all the points in the Schedule had been considered in *CCA 2020,* and the FTT had made clear findings of fact on each of them. Mr Trees did not disagree, but instead accepted that the Schedule consisted of a list of issues on which he disagreed with the FTT's findings.

The Tribunal's view

85. It is clear from the foregoing that the two points in the Letter, and all the points in the Schedule, had been fully considered by the FTT as part of its assessment as to whether Mr Trees knew of the fraud.

86. They are included in Mr Trees' grounds of appeal to provide support for his case that he did not have that knowledge. Allowing him to make those factual points would thus be another way of relitigating the issue decided by the FTT in *CCA 2020*, namely whether Mr Trees knew of the connection to fraud. For the same reasons as set out in the previous part of this judgment, that would be an abuse of process.

Conclusion on the strike-out application

87. I allow HMRC's application to strike out the parts of Mr Trees' grounds of appeal which state that he did not know the transactions were connected with fraud. The relevant passages are those identified in HMRC's marked up version of the Letter, together with the entirety of the Schedule.

THE JUDGMENT IN *CCA 2020*

88. HMRC also applied for the judgment in *CCA 2020* to be "admitted as evidence" in the DLN proceedings. Mr Kerr relied on *Hackett*, where having decided that it would be an abuse of process to allow the appellant to challenge the facts or issues decided in period 09/01 because they had already been finally determined in *Intekx 2014*, Judge Berner said at [75]:

> "It follows from my conclusion that there can be no dispute as to the facts and issues determined by the tribunal in *Intekx* 2014 that, in relation to period 09/06, the decision of the tribunal in that appeal is admissible."

89. In *Hackett*, HMRC had also applied for the *Intekx* 2014 judgment to stand as evidence in relation to periods 07/09 to 10/12 and 01/13 to 07/13, on the basis that the circumstances were similar. Judge Berner allowed that application, holding at [48] that relevant evidence should be admitted unless there is a compelling reason to the contrary, and continued at [49]:

> "This is a case where, although questions of input tax recovery are necessarily viewed by reference to individual accounting periods, transactions must be examined not in isolation but having regard to their attendant circumstances and context, the relevance of 'similar fact' evidence and the fact that the tribunal, in examining the state of knowledge of the company and Mr Hackett, is entitled to look at the totality of the deals effected by Intekx, and their characteristics…It will be for the tribunal that hears Mr Hackett's appeal to determine what weight, if any, is to be accorded to the *Intekx 2014* decision outside the confines of its own facts and circumstances. It cannot, however, in the circumstances of this appeal, be regarded as irrelevant, nor have I been able to identify any compelling reason why the decision should not be admitted."

90. When *Hackett* reached the UT, there was no challenge Judge Berner's decision to admit *Intekx 2014* as evidence in relation to period 09/06. In relation to the later periods, the UT upheld Judge Berner's decision, saying at [95]:

> "The FTT decided that the decision in *Intekx 2014* was relevant for the reasons it gave at [49] of the Decision. We can detect no error of law in the FTT's approach. The FTT made the point that it will be for the tribunal that hears Mr Hackett's appeal to determine what weight, if any, is to be accorded to *Intekx 2014* outside the confines of its own facts and circumstances. In those circumstances, there is no basis on which we can interfere with the FTT's decision on this point and indeed we agree entirely with the FTT's reasoning."

91. In response to Mr Kerr, Mr Trees reiterated that he did not agree with the conclusions of the FTT in *CCA 2020* and wanted to dispute various findings of fact.

The Tribunal's view

92. HMRC's application is that *CCA 2020* be admitted as relevant evidence in relation to Mr Trees' appeal against a DLN issued in relation to exactly the same VAT periods as already had been considered by the FTT.

93. *Hackett* provides a helpful parallel. Mr Hackett did not seek to challenge Judge Berner's decision that *Intekx 2014* be admitted as relevant evidence in his appeal against the part of the PLN which related to period 09/06, in other words, the self-same period considered and decided in *Intekx 2014*. *CCA 2020* likewise provides highly relevant evidence in relation to Mr Trees' DLN appeal. Indeed, the UT in *Hackett* went further, upholding Judge Berner's decision that *Intekx 2014* was also to be admitted as relevant evidence in Mr Hackett's appeal against the parts of the PLN which related to other VAT periods not considered in *Intekx 2014*.

94. I also considered Rule 15(2) of the Tribunal Rules, which allows relevant evidence to be excluded if it would be "unfair" to admit it. Although not put in those terms by Mr Trees, in essence he was arguing that it would be unfair to admit *CCA 2020* because he wanted to submit at the hearing of his appeal that he did not "know" about the connection to fraud, and also to rely on the related factual points set out earlier in this decision, see §78ff.

95. I have already decided it would be an abuse of process for Mr Trees to advance those grounds at the FTT hearing of his appeal against the DLN. Consistently with that conclusion, I find that it is fair for the judgment itself to be admitted as relevant evidence in the hearing of his appeal.

OVERALL CONCLUSION AND APPEAL RIGHTS

96. I allow HMRC's application to strike out the identified parts of the Letter, and all of the Schedule. I also allow HMRC's application for the FTT judgment in *CCA 2020* to be admitted as evidence in the DLN proceedings.

97. The other matters raised by HMRC related to directions for Mr Trees' appeal; these were agreed between the parties during the hearing and are included in the directions to be issued at the same time (or shortly after) this decision notice.

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

ANNE REDSTON
TRIBUNAL JUDGE

Release Date: 24th MARCH 2023