Case No: CO/2542/2020

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

[2020] EWHC 2255 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/08/2020

Before
SIR ROSS CRANSTON
Sitting as a High Court judge

- -

Between :

THE QUEEN (ON THE APPLICATION OF INGENIOUS CONSTRUCTION LTD)	**Claimant**
- and -	
THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS	**Defendant**

- -

ANDREW YOUNG (instructed by **LEXLAW**) for the **Claimant**
JAMES PUZEY, JOSHUA CAREY & LAURA STEPHENSON (instructed by **HMRC**) for the **Defendant**

Hearing dates: 12 AUGUST 2020

- -

Approved Judgment

SIR ROSS CRANSTON:

Introduction

1. This is an application by Ingenious Construction Limited ("ICL" or "the company") for interim relief and permission to apply for judicial review of the decision of the Commissioners for Her Majesty's Revenue and Customs ("HMRC") dated 29 June 2020 to refuse to reinstate its VAT Registration pending an appeal to the First-tier Tribunal Tax Chamber (the "Tribunal" or "FTT"). That appeal is on the substantive issue of HMRC's decision to cancel ICL'S VAT registration. ICL contends that the decision to cancel has prevented it from trading and unless its registration is quickly restored by means of urgent interim relief it will become unable to pursue its appeal to the Tribunal.

2. ICL's application for urgent interim relief came before Holman J on the papers late on 22 July 2020. While sympathetic, Holman J decided that he should not make an order given that HMRC had only been served 24 hours previously and had not had the opportunity to respond to the claim or the application for interim relief. He ordered that the matter be listed for an oral hearing to consider the application for urgent interim relief and, if there was time, the application for permission. He also ordered that HMRC's Acknowledgment of Service be filed and served by 6 August 2020.

Background

3. ICL is predominately concerned with supplying construction services for remodelling domestic property, for example, constructing and extending a basement room. It appears that the work is conducted mainly in higher value properties. The company was first registered for the purposes of VAT on 11 December 2012. Its directors are Mr Giles Ellis and Mr Paul Morris.

4. HMRC began inquiries into ICL's tax position in July 2019. There was correspondence and meetings. The company was placed on what is called Trader Monitoring, which involves bi-monthly visits and monthly phone calls.

5. HMRC's concerns are illustrated in their letter to the company of 13 December 2019. In that letter HMRC stated that in respect of ICL's VAT returns in the second half of 2018 and the first part of 2019, 60 of its transactions (where the whole chain had been established) commenced with a defaulting trader, resulting in a loss to the public revenue that exceeded £233,263.00. The letter warned that HMRC could deny the company its input tax credit. It stated that ICL should satisfy itself that it had undertaken sufficient due diligence, commensurate with the perceived risk, to satisfy itself as to the integrity of its suppliers and customers and of the underlying supply chains.

6. On 23 April 2020 HMRC wrote to ICL's directors to indicate that they had obtained information that led them to believe that ICL had been using its VAT registration solely or principally for fraudulent purposes. HMRC's position was, the letter continued, that the right to VAT registration, or to remain registered for VAT, did not arise when the principal aim of that registration was to facilitate a fraud on the VAT system. Reference was made to *Case C- 527/11, Ablessio* in the Court of Justice of the European Union.

7. The letter continued that ICL would be deregistered for VAT with effect from 6 April 2020. After outlining HMRC's understanding of the law entitling it to cancel a VAT registration, the letter set out the factors which it considered indicated that ICL was principally or solely registered to abuse the VAT system by facilitating VAT fraud:

> "Ingenious Construction Ltd had back-to-back transactions with Fraudulent Defaulters (RWR Contract Management Ltd ["RWR"]– Shelton Solutions Ltd ["Shelton"] – Kernow Contracting Services Ltd ["Kernow"]). Whilst Ingenious Construction Ltd may satisfy the formal requirements for VAT registration under Schedule 1 of the VAT Act 1994, HMRC considers that the VAT registration is being used to facilitate VAT fraud, and in accordance with the principles recited above, its VAT registration should be cancelled."

8. The letter then explained that ICL could request that the decision be reviewed within HMRC or it could appeal to the Tribunal. Asking for a review or lodging an appeal, the letter explained, would not result in automatic reinstatement of its VAT registration number.

9. Separately that day, 23 April 2020, HMRC wrote to ICL denying the company's right to deduct input tax of £241,727 for the period June 2018 until June 2019, without prejudice to the outcome of their review for other periods. HMRC was satisfied that those transactions related to the fraudulent evasion of VAT. The letter said that HMRC had taken into account features of trade evident from reviewing the transactions and activities of the company, including:

> "100% of Labour/Payroll services the business received in the period were from Fraudulent Defaulters and amounts traced back to Tax Losses.
>
> There was no evidence of any meaningful due diligence undertaken by Ingenious Construction Ltd on any of their clients or suppliers.
>
> [ICL] had back-to-back transactions with Fraudulent Defaulters. (RWR Contract Management Ltd – Shelton Solutions Ltd – Kernow Contracting Services Ltd)."

The letter had a lengthy appendix listing the transactions.

10. HMRC issued an assessment on 5 May 2020 for the disallowed input tax of £241,727 plus interest.

11. ICL did not seek internal HMRC review. On 20 May 2020 its solicitors lodged an appeal with the Tribunal. They stated that the appeal was urgent and requested that it be expedited since the action of deregistering had a serious prejudicial impact on the company and was manifestly and obviously wrong.

12. The same day, 20 May 2020, ICL's solicitors also wrote to HMRC asking that it restore ICL's VAT registration pending the outcome of its client's appeal to the Tribunal. The letter said that ICL was in the business of legitimate construction services and it was wholly disproportionate to cancel its VAT registration and effectively bring its legitimate trading to an end.

13. On 21 May 2020 ICL's solicitors made a hardship application to HMRC under section 84 of the VAT Act 1994, referring to the impact of HMRC's actions and of the Covod-19 pandemic, which had severely affected the construction industry. They attached a letter from the company's accountants attesting to the severe prejudice should HMRC seek payment of the disputed assessment at the current time. There was reference to the cancellation of at least one otherwise profitable contract. The accountant's letter stated that the company's financial position had already deteriorated as at 31 March 2019, whereby their net assets had declined by nearly 90 percent compared to 12 months previously. After that, the letter continued, the company had become burdened with additional debt in an attempt to build a long term and sustainable future.

14. On 3 June 2020 FTT Judge Poole decided that it was appropriate that the Tribunal appeal be heard on an expedited basis and made directions for that to occur.

15. On 15 June HMRC refused to reregister ICL for VAT purposes: the company had been deregistered on the basis of abuse of the VAT system; HMRC maintained that the decision was correct; and they stated that they did not intend to restore VAT registration. HMRC took issue with the allegation of bad faith in the claim and that they were liable for misfeasance in public office. The letter drew attention to the decision of *Thames Wines Ltd v Revenue and Customs Commissioners* [2017] EWHC 452 (Admin) and to the need to issue judicial review proceedings promptly.

16. On 22 June 2020 ICL issued a letter before action in relation to a claim for judicial review in this court.

17. That same day, 22 June 202, HMRC applied to the Tribunal that its directions of 3 June 2020 be set aside in the absence of any evidence from ICL justifying expedition, and that other directions be made.

18. On 9 July, Judge Poole refused HMRC's application, although he extended the deadline until 29 July 2020 for HMRC's statement of case to be filed. He noted that "having themselves adopted the 'nuclear option' of de-registering the Appellant for VAT, it lies ill in their mouth to argue that the Tribunal's attempts to facilitate the speedy resolution of that dispute should be progressed without any priority at all, while the Appellant labours under the obvious difficulties inherent in carrying on making supplies which are, on their face, taxable (which HMRC do not dispute) whilst deprived of the benefit of VAT registration."

19. HMRC responded to the pre-action protocol letter on 29 June 2020. They said, inter alia, that they were not suggesting that ICL was itself fraudulent, only that it was facilitating fraud.

20. This judicial review and the application for urgent consideration was filed on 20 July 2020.

The witness statements

Giles Ellis, director of ICL

21. In a witness statement for the applications before me Giles Ellis, one of the two directors of ICL, explains the background to the business, the devastating effect of HMRC's decision on it, the appeal to the Tribunal and the procedural steps outlined earlier in the judgment. He alleges that HMRC intended to stop ICL from trading, thereby destroying it, and are seeking to punish and make an example of it for the alleged wrongdoing of some of its contractors, even though HMRC have told the company that it had not been fraudulent: [10], [14].

22. Mr Ellis then explains the operation of the business, which was to project manage the remodelling construction work using some 30 self-employed contractors to undertake the work: [22]. ICL engaged bookkeeping and accountancy services.

23. He states that the company also contracted out its payroll services to agencies, RWR from May 2018 to November 2018; Shelton from 22 November 2018 to 13 March 2019; and Kernow from March 2019 to June 2019. Mr Ellis explains that the agencies were identified by a third party, James Gilzean, who operated an electronic app that monitored the working hours and location of the self-employed tradesmen which the company used for its construction services. The agencies would check the status of the tradesmen it engaged on ICL's behalf, calculate the payments due to them and the appropriate tax deductions, and would ensure income tax and national insurance requirements were met. The agencies would physically make the appropriate payments owing: [24]-[27]. Payment for the agencies' services provided to ICL carried a charge to VAT which was deductible by ICL as input VAT.

24. Mr Giles continues that an agent was paid gross once every two weeks, including the tax contribution for the contractors, and it would then pay the tax onto HMRC. The agencies also ensured compliance with HMRC's Constructions Industry Scheme ("CIS") under which contractors deduct money from subcontractor's payments to pay tax. He states that the agencies were verified with HMRC prior to engagement to confirm they were registered, and that ICL would not have used them if they were not on the scheme and had not been verified.

25. Mr Giles adds that ICL encountered difficulties with its first two agencies, which appeared complacent and unresponsive and which made late payments to the company's tradesmen. Because of this, the company changed agencies. Mr Gilzean made recommendations for other agencies. Since ICL relied upon his app, there was no reason not to rely upon his recommendations.

26. The witness statement then outlines HMRC's inquiries, referred to earlier in the judgment. Mr Ellis states that at a meeting with HMRC on 14 January 2020 he asked the investigating officer, Mr Whitehouse, whether they would look to deny input tax credit if ICL had not committed VAT fraud. Mr Ellis states that he confirmed that he would not be seeking to deny ICL input tax, which he believes was because Mr. Whitehouse had recognised ICL was a legitimate taxable person and, as has been confirmed by HMRC's solicitor, had not committed fraud.

27. Mr Ellis then refers to the steps taken after the company received HMRC's letters of 23 April 2020.

James Whitehouse, HMRC

28. Mr Whitehouse is an officer of HMRC employed within the Fraud Investigation Service, deployed to monitor and investigate traders suspected of being involved in labour fraud in construction and payroll company fraud.

29. Mr Whitehouse explains that six of the company's VAT return periods contained transactions linked to VAT tax losses, from June 2018 until June 2019, and sets out in tabular form a list of transactions in chronological order. He explains the beginning of the inquiries in July 2019 and that there was a meeting of HMRC officers with Mr Ellis and the company's accountants on 3 September 2019. He then spoke to the company's accountants on 6 November 2019 about the information required.

30. Mr Whitehouse explains that he and another HMRC officer met Mr Ellis and Mr Paul Morris, the other director of ICL, together with its accountants, on 19 November 2019. HMRC's note of that meeting states that Mr Morris said that he was responsible for undertaking CIS verifications. When asked why the company had paid RWR £62,085.54 before CIS verification took place and before a contract existed, Mr Morris replied that its priority was to ensure that wages were paid timeously and sometimes paperwork was delayed. Messrs Ellis and Morris explained that the contract for services with RWR had been signed by Mr Gilzean - a friend of Mr Morris' brother, Mr Neil Morris - on the company's behalf. The transfer to the other payroll companies was at Mr Gilzean's initiative; they put their trust in Mr Gilzean and the only checks they undertook were CIS verification and VAT registration

31. Mr Whitehouse continues that on 13 December 2019 he wrote to ICL and advised them that they had been placed on trader monitoring. There was a further meeting on 14 January 2020 where he and another HMRC officer met Mr Ellis, Mr Morris and the company's accountants.

32. In his witness statement Mr Whitehouse sets out in some detail the supplies to ICL from RWR (and the supplies to RWR from a third party), Shelton and Kernow, and the tax losses involved. It appeared that the first date that ICL received labour supplies from RWR was on 30 April 2018.

33. As part of his inquiries Mr Whitehouse also reviewed the supplier of payroll services at the time of deregistration, which was a company called Boxvn Limited ("Boxvn"). Boxvn was not filing its VAT returns, including the transactions that were taking place with ICL. As of 6 August 2020, he adds, Boxvn had still not met its obligations for VAT and not submitted three VAT returns consecutively. (I note in passing that Mr Gilzean and Mr Neil Morris are directors of Boxvn.)

34. In addition, Mr Whitehouse sets out the position of Mr Gilzean as ICL's agent. Initially he provided IT and technological assistance but began organising ICL's supply of labour and payroll services, although it appeared that he did not receive any direct remuneration from ICL. Mr Whitehouse states that in his view the company gave Mr Gilzean full control of the supply of labour without any precautions or risk assessments except to verify the VAT registration and CIS numbers of each supplier. There was no evidence to show that ICL conducted checks of the labour workforce being supplied, including whether they met statutory or regulatory obligations such as requirements for Construction Skill Certification Scheme cards and qualifications. Mr Whitehouse opines that ICL did not follow the CIS verification processes that are

required before making their first payment for supplies of labour with any of the fraudulent defaulters.

35. Mr Whitehouse then turns to the evidence that in his opinion supported the conclusion that the fraud could continue. Boxvn's VAT return for August 2019, November 2019 and January 2020 had not been submitted. He states that ICL "has moved from one fraudulent defaulter to another, starting with RWR then Shelton and then Kernow. It would appear that Boxvn were next in the cycle as a defaulting supplier."

36. In his statement Mr Whitehouse says that Mr Ellis had told him on 14 January 2020 that he knew, to a point, of tax fraud in the construction industry, and the company's accountants told him on 19 November 2019 that they certainly knew of the *Kittel* principle, a reference to *Joined cases C-439/04 & C-440/04*. (That case establishes that it is lawful for national tax authorities to refuse to allow a person to deduct input VAT where it is ascertained, having regard to objective factors, that the supply was to a taxable person who knew or should have known that, by her purchase, she was participating in a transaction connected with the fraudulent evasion of VAT.)

37. Mr Whitehouse adds that he had issued Notice 726 and given the directors HMRC's "How to spot a missing VAT trader" and "Use of labour providers: advice on due diligence". Mr Ellis and Mr Paul Morris had both read section 6 of Notice 726 during the meeting. Mr Whitehouse advised them that the section referred to goods but the principle applied also to services. He had also advised them that the section offered guidance to due diligence checks and steps they could take to ensure the integrity of their supply chains.

38. Mr Whitehouse says that on 1 June 2020 he spoke with ICL's solicitor, Mr Ali Akram of Lexlaw, and indicated that HMRC would not re-register the company for VAT pending the outcome of the Tribunal appeal. When Mr Akram asked for an explanation, Mr Whitehouse said that he would seek advice before providing further information.

Lawfulness of deregistration

39. For ICL Mr Young deployed a number of arguments. He contended that although these were not for final determination at this point, I should take a view about them since they went to the strength of ICL's case for interim relief and permission. There was also the need for a High Court precedent on the matter. In his very extensive Detailed Grounds of Claim and before me, Mr Young majored on the lawfulness of HMRC's actions under Community law.

40. In Mr Young's submission HMRC had no power to deregister a person's VAT registration. If they had no power to deregister, the company was entitled to be restored to the register and HMRC's refusal to do so was unlawful. The court should order interim relief. He also submitted that the High Court needed to grant permission because, if the Tribunal agreed with him, it would have no jurisdiction to consider the company's appeal. Thus the matter would need to return to the High Court, well after the time limit to apply for judicial review had expired. Permission granted now would preclude the limitation problem.

41. Mr Young's submission began with the point - accepted by HMRC - that there was no explicit power in domestic law to deregister a person's VAT registration. In a detailed exposition of Community law, Mr Young contended that HMRC was wrong in their submission that the power lay there. In his submission there was nothing in any Community case about VAT deregistration. In particular *Case C- 527/11, Ablessio* - the case on which HMRC relied – said nothing about deregistration, but rather was about the possibility of a Members State being able to refuse to register where the purpose of registration was to facilitate tax evasion and domestic law conferred upon the tax authority the power to do that.

42. As to domestic law Mr Young referred to the details of the VAT Act 1994. Section 3(1) provided that a person is a taxable person for the purposes of the Act while he is or is required to be registered under the Act. Schedule 1 contained various mandatory provisions with respect to registration. In short, these meant that a person who made taxable supplies in excess of the prescribed level had to be registered so that, in turn, HMRC was obliged to register them. The power in paragraph 13 of Schedule 1 to cancel registration had to be construed in that context. This was not a case as under section 88C of the Alcoholic Liquor Duties Act 1979 where HMRC had a discretion, in that case to refuse approval if the person was not considered fit and proper.

43. Regarding domestic case law, Mr Young submitted that in *R (on the application of Tidechain) v Commissioners for Her Majesty's Revenue and Customs* [2015] EWHC 4031 (Admin) the law was not in dispute, and the power of HMRC to deregister was accepted without consideration of the detailed points he was making. *Millennium Energy Trading Limited v The Commissioners for HM Revenue and Customs* [2018] UKFTT 633, he submitted, was no assistance, since the judge there was deciding whether the Tribunal had full appellate or simply supervisory jurisdiction and there were no submissions on the nature of the Tribunal's jurisdiction.

44. In my view it is not arguable that HMRC do not have power to deregister. Schedule 1 paragraphs 13(2) and 13(5) of the Value Added Tax Act 1994 gives HMRC the power to cancel a VAT registration when satisfied that a registered person has ceased to be registrable and is not entitled to be registered. The power to cancel a VAT registration in the particular case of fraudulent use derives from the Community law doctrine of abuse, explained in the registration context in *Case C- 527/11, Albessio*. The issues in that case raised questions different from the present, but the court recognised that in accordance with the Sixth VAT directive 2006/112 the tax authorities of a Member State had a general power to act proportionately against the abuse of VAT registration so long as there was sound evidence giving objective grounds for their conclusion: [28], [30], [34], [38].

45. Under well accepted principles, there is no need for national implementing legislation of the principle prohibiting abuse in the context of the Sixth VAT directive: *Halifax plc v Commissioners of Customs and Excise Case C-255/02*, Advocate-General Maduro's Opinion, [62]-[82]; *Pendragon Plc v Revenue and Customs Commissioners* [2015] UKSC 37, [2015] 1 WLR 2838, [27], per Lord Sumption (with whom Lords Neuberger, Reed, Carnwath and Hodge agreed); *Mobilx Ltd (In Administration) v Revenue and Customs Commissioners* [2010] EWCA Civ 517, [2010] STC 1436, [49], per Moses LJ (with whom Carnwath LJ and Sir John Chadwick agreed).

46. In *Tidechain* [2015] EWHC 4031 (Admin) Simler J considered the paragraphs in *Ablessio* referred to and reached the conclusion that that case established that "where there is sound evidence based on an overall assessment of all the circumstances of the case and evidence gathered, giving objective grounds for considering that it is probable that a person's existing registration number is being used fraudulently then the VAT registration may be cancelled." She added that it was then for domestic courts to examine whether, having regard to all the circumstances of the case, the domestic tax authority had established to the requisite standard the existence of such sound evidence.

47. Albeit that the arguments of unlawfulness Mr Young advanced were not before Simler J, it would be difficult for me to disregard her considered conclusion unless I thought it was arguably flawed. I do not. I am fortified in my conclusion by the decision of Robin Purchas QC, sitting as a deputy High Court judge in *Thames Wines Ltd v Revenue and Customs Commissioners* [2017] EWHC 452 (Admin), and that of FTT Judge Barbara Mosedale in *Manhattan Systems Ltd v Revenue and Customs Commissioners* [2017] UKFTT 862 (TC), [42].

48. Despite being a decision on interim relief and permission, *Thames Wines* [2017] EWHC 452 (Admin) is also authority that deregistration in accordance with *Ablessio* extends beyond situations where a VAT registration is itself being directly used for fraudulent purposes to those where it is being used as part of a chain which includes other suppliers who are acting fraudulently. In this regard it seems to me that the best approach is to ask whether the taxpayer who is not itself fraudulent is nonetheless facilitating fraud or abuse as a participant in the *Kittel* sense of having knowledge or the means of knowledge of a connection with fraud.

49. Mr Young also contended that the deregistration was retrospective and thus in breach of the Community law principles of legitimate expectation and legal certainty. I am not persuaded that the decision was retrospective. On behalf of HMRC Mr Puzey explained that 6 April 2020 was the date the decision was taken but because of the disruption caused by the Covid-19 pandemic the letter was not sent until sometime later. This is a matter which can be explored further in the Tribunal. Mr Young also contended that somehow the Community law requirement that a register of taxable persons be maintained precluded deregistration, but that would require that a registration be frozen for all time. Again this is a matter which may require further exploration in the Tribunal.

50. The upshot of this is that my opinion Mr Young's challenges to the following propositions are not arguable: (i) HMRC has power to deregister a person where a VAT identification number is being used to evade the payment of tax on the basis that it is no longer entitled to be registered for VAT; (ii) there is no need for implementing legislation since the power to deregister derives from the Community law doctrine of abuse and is therefore part of domestic law; (iii) the power extends beyond cases where registration is being directly used for fraudulent purposes to where it can be shown by reference to objective factors that a person's VAT registration is being used to facilitate fraud and that it knew or should have known of that; and (iv) the remedy against deregistration is by means of an appeal to the Tribunal, section 83(1)(a) of the VAT Act 1994 providing for appeals in cases of the cancellation of a VAT registration.

Interim relief

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

52. Secondly, it is necessary in the balance to consider - because of the possible violation of the fair hearing provisions of Article 6 of the European Convention on Human Rights (Article 47 of the Charter of Fundamental Rights and Freedoms) - whether a claimant can demonstrate that the absence of interim relief would render an appeal to the Tribunal illusory because by the time it is heard it would no longer be viable or would have ceased to exist: *OWD Ltd (t/a Birmingham Cash and Carry) (In Liquidation) v Revenue and Customs Commissioners* [2019] UKSC 30, [2019] 1 WLR 4020, [56]-[60] referring without disagreement to Burnett LJ's judgment in the Court of Appeal: [2017] EWCA Civ 956.

53. In explaining the point in the Court of Appeal, Burnett LJ said that it would be necessary for a claimant to establish that the Tribunal appeal would be illusory to a high degree of probability and with compelling evidence: [81], [85]. He stated that compelling evidence would call for more than a narrative statement from a director of the business speaking of the dire consequences of delay. Rather, that type of statement should be supported by documentary, financial evidence and a statement from an independent professional doing more than reformulating his client's stated opinion.

54. Mr Young contended that in the present case, were interim relief to be denied ICL would "bleed to death" before the Tribunal heard the appeal. Mr Ellis had explained the crisis facing the company in his witness statement, and the trading and financial difficulties were set out in the company's letter to HMRC on 20 May 2020 and in its hardship application dated 21 May 2020.

55. In my view none of this constitutes the compelling evidence which Burnett LJ referred to in order to demonstrate that the Tribunal appeal would be rendered ineffective. The limited financial evidence before the court demonstrates HMRC's action was only one part of its financial ill-health. As we have seen the 21 May 2020 letters from ICL's solicitors and accountants attributed the company's problems to the Covid-19 pandemic, as well as to HMRC's decision to deregister it for VAT. Indeed, the accountant's letter explains that ICL's situation had already deteriorated as at 31 March 2019 and after that it had become burdened with additional debt. There is no independent, compelling evidence of an imminent risk of business collapse.

56. A third principle governing interim relief in this context is the high hurdle which a claimant needs to surmount. In *CC & C Ltd v HM Revenue & Customs* [2014] EWCA Civ 1653, [2015] 1 WLR 4043, the Court of Appeal reasoned that this was because

Parliament did not provide for the Tribunal to have power to make suspensory orders pending the outcome of an appeal, so that it was not open to the court to provide remedies for which the statute had not provided. In defining the high hurdle, Underhill LJ (with whom the others agreed) held that it was not simply a matter of showing a realistic chance of success and that HMRC's action was unreasonable, but that there was something along the lines of an abuse of power, impropriety or unfairness.

57. In this case Mr Young contended that even if it was lawful for HMRC to deregister, their decision to deregister in this case was flawed because it breached the Community law requirement of proportionality and was completely inappropriate. HMRC had conceded that ICL was not itself fraudulent; their argument was that it was facilitating fraud. Moreover, HMRC could not rationally claim that all of ICL's transactions were linked to fraud, only that some of them were. Moreover, added Mr Young, HMRC had adopted the "nuclear option" of de-registering the company, when there were less drastic courses such as the *Kittel* assessment.

58. Finally, Mr Young referred to the circumstances of the deregistration and submitted that it was inevitable that the Tribunal would agree that HMRC's action was wrong. Taken at its highest, ICL had used an app to monitor self-employed tradesmen and went on to rely upon the recommendations of those behind the app as to whom it should contract out payroll services without conducting adequate due diligence. It was the payroll service contractors and not ICL which fraudulently defaulted in paying VAT.

59. Although the final decision will be for the Tribunal it does not seem to me that ICL has a realistic prospect of success. I have summarised at some length the witness statements of Mr Ellis for the company and Mr Whitehouse for HRMC. In short, over a period of 15 months or so, ICL received supplies of tradesmen services from three companies in turn, RWR from May 2018, Shelton and Kernow, each of which failed to account for the VAT the company paid it. The last of these companies, Kernow, acted until June 2019. Over that 15 months period there were 60 transactions, accounting for around half of the sum of the company's total input tax claimed over that period. ICL then began trading with a further defaulting trader, Boxvn. The director of Boxvn was Mr Gilzean, who was joined as a director by Mr Neil Morris, the brother of Mr Paul Morris, who was a director of ICL along with Mr Ellis.

60. In his witness statement Mr Ellis, and in meetings with HMRC, Messrs Ellis and Morris, accepted that they relied on Mr Gilzean who operated the electronic app to undertake checks on the payroll agencies and to sign contracts. All they knew was that the payroll companies were registered for the CIS and VAT. Trading took place before a contract was in place with RWR, and with RWR and Kernow before CIS verifications. No due diligence was undertaken, and Messrs Ellis and Morris did not deal with representatives from its labour suppliers. Mr Gilzean instructed ICL about who should be paid and then organised the change-over in supplier from one defaulting company to the next. It appeared that tax fraud was to continue with ICL's new payroll services agent, Boxvn, with whom there was a closer connection through its directors.

61. In these circumstances it seems to me that there is a good case that HMRC acted proportionately, appropriately and on the basis of objective factors in deregistering

ICL, and refusing to restore it to the register, given the risk which the company posed to the VAT system. It matters not that the company was not itself fraudulent; as explained earlier a person who facilitates fraud or abuse of the VAT system in the sense of having knowledge or the means of knowledge of a connection with fraud is a participant in the fraud. Here the company was supplied with labour over a period of almost two years by a number of companies all of which resulted in tax losses, and it conducted no real due diligence upon them. It was simply not good enough to rely on Mr Gilzean acting as their agent without any steps taken by ICL's directors in their dealings with the payroll companies. There is nothing to suggest in HMRC's actions an abuse of power, impropriety or unfairness.

Conclusion

62. For these reasons the company has not surmounted the high hurdle necessary for interim relief in the form of its restoration to the VAT register. Nor has it met the prerequisites for the grant of permission to proceed with judicial review of HMRC's actions. In addition to the factors already mentioned, I note that Judge Poole has ordered expedition for hearing the appeal in the Tribunal. Mr Puzey for HMRC informs me that the appeal hearing has been given a three- month window from early October this year. ICL therefore has an adequate alternative remedy and the application for permission fails for that reason as well. There is no need for me to consider whether additionally permission should be refused because ICL had not applied promptly as required under the CPR for applications for judicial review.