Neutral Citation Number: [2024] EWHC 1130 (Ch)

Case No: CR-2016-006660

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14/05/2024

Before :

ICC JUDGE MULLEN

- -

In the matter of Phoenix Tech Limited (in liquidation)

And in the matter of the Insolvency Act 1986

Between :

Kevin John Hellard (as liquidator of Phoenix Tech Limited (in liquidation))	**Applicant**
- and -	
(1) Mr Nizakat Khan (2) Mr Jasbinder Singh	**Respondents**

- -
- -

Miss Faith Julian (instructed by **Wedlake Bell LLP**) for the **Applicant**
Mr Simon Farrell KC (direct access) for the **First Respondent**

Hearing date: 31st January 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14th May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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ICC JUDGE MULLEN

ICC Judge Mullen :

1. This is my judgment on the application dated 27th June 2023 ("the Strike Out Application") made by Mr Kevin Hellard, as liquidator of Phoenix Tech Limited (in liquidation) ("Phoenix"), to strike out the defence of Mr Nizakat Khan, and/or for summary judgment on Mr Hellard's application dated 24th November 2022 ("the Main Application").

2. The Main Application was made under sections 212 and 213 of the Insolvency Act 1986 and named Mr Khan and Mr Jasbinder Singh as respondents. It is based on an allegation that the business of Phoenix was carried on with intent to defraud HM Revenue & Customs ("HMRC") and/or for a fraudulent purpose, by reason of its participation in a form of VAT fraud, known as "missing trader intra-community" ("MTIC") fraud, sometimes known as "carousel" fraud. The respondents were the directors of the company during some or all of the period during which the transactions alleged to have been fraudulent took place.

3. Phoenix was incorporated on 7th August 2003 under the name M.K. Housing Limited. Mr Khan was appointed as a director on 15th August 2003 and was a 50% shareholder in the company. The remaining shares were held by a Mrs Sajida Khan. The business of the company was that of an agency matching landlords with tenants housed by social services and it had a relatively modest turnover prior to the autumn of 2005. During that time, it changed its name to its current style, ceased to operate as a housing agency and applied to be registered for VAT with effect from 1st November 2005. Its business at that point was described as "wholesale supplies of soft drinks, cakes and confectionery". Following successful registration, the company contacted HMRC to declare a change in its business activities to "computer components and other electrical products i.e. WIFI Routers, Pci Cards, Network Switches etc." Mr Singh was appointed as a director on 17th November 2005.

4. Between 30th November 2005 and 25th May 2006 Phoenix acted as what is termed a "broker" in 11 transaction chains in which it purchased mobile telephones and CPUs from a UK supplier and exported them to customers based in the European Union. Each of those transaction chains can be traced back to a VAT default on the part of the supplier that had purchased the goods from a supplier in the EU.

5. Mr Singh resigned as a director on 8th May 2006 and Mr Khan continued in office as Phoenix's sole director. The company submitted a VAT return covering the transactions on 12th June 2006. It claimed the right to deduct VAT and a repayment in respect of the transactions in the sum of £4,502,932.15. HMRC required further verification of the transactions and, on 8th May 2008, it denied the input tax claim in relation to four of the transactions. On 30th March 2010 it denied the remainder of the claim in relation to the transactions. It further issued a misdeclaration penalty against the company on 18th January 2011 in the sum of £607,387. The company appealed HMRC's decisions to the First-tier Tribunal (Tax Chamber) ("the FTT").

6. The appeal in relation to the denial of the input tax claim was heard in May, June, and August 2014. Mr Khan represented the company, gave evidence and was cross-examined. The appeal was dismissed by a decision dated 29th June 2015. The FTT found that HMRC had established fraudulent tax losses, as part of an orchestrated scheme for the fraudulent evasion of VAT. In relation to Mr Khan, the FTT concluded

that he had both the means of knowledge and actual knowledge that the transaction chains were connected to fraud. They rejected his submission that he was an "innocent dupe". Phoenix was ordered to pay HMRC's costs.

7. HMRC presented a winding-up petition on 14th October 2016, based in large part on the misdeclaration penalty, and the company was placed into compulsory liquidation on 28th November 2016. Mr Hellard was appointed as liquidator on 25th January 2017. HMRC has so far submitted two proofs of debt in the winding-up of Phoenix. The first totals £700,242.10 in respect of tax, the bulk of which is VAT, and the second totals £103,842.35, which is the costs of the appeal to the FTT.

8. Mr Hellard's claim in the Main Application, in summary, is therefore that:

   i) the business of Phoenix was carried on with an intent to defraud HMRC or, alternatively, a reckless indifference as to whether HMRC was defrauded;

   ii) the respondents, as the company's directors, knowingly and dishonestly participated in the carrying on of the business with intent to defraud HMRC;

   iii) it was a dishonest or, alternatively, a negligent breach of the respondents' duties as directors of the company to cause or allow it to trade in this manner.

9. He seeks:

   i) a declaration that the respondents had knowingly been parties to the carrying on of business to defraud creditors;

   ii) a declaration that the respondents were guilty of misfeasance and/or had breached their duties as directors in causing or allowing the company to carry on business with intent to defraud creditors and/or in allowing the company to enter into the transactions and incur the misdeclaration penalty, with the result that the company entered into insolvent liquidation, and are liable to compensate the company;

   iii) an order that Mr Khan and Mr Singh pay

      a) £218,992 and

      b) £1,622,163

   (being the element of the misdeclaration penalty and that part of the sum for which the company is liable following the rejection of the input tax claim referable to the first seven fraudulent transaction chains), together with interest at 8% per annum, compounded in equity;

   iv) an order that Mr Khan further pay

      a) £88,395 and

      b) £2,877,000

(being the element of the misdeclaration penalty and that part of the sum for which the company is liable following the rejection of the input tax claim referable to the remaining fraudulent transaction chains), together with interest at 8% per annum, compounded in equity.

10. On 8th February 2023, ICC Judge Jones directed the filing and service of points of claim, points of defence and points of reply. Mr Khan's defence to the application admits that the transactions were part of fraudulent MTIC transaction chains that resulted in loss to HMRC which he, as a director of the company, caused the company to enter into. He contends however that it was his belief that the company was entering into legitimate transactions and he did not know of any scheme to defraud HMRC. The defence denies "blind eye" or Nelsonian knowledge that the deals were connected to fraud, saying, "Neither Mr Khan nor Phoenix intended to be involved in a fraudulent chain and made efforts to assure itself that its traders were legitimate." It similarly denies that Mr Khan or Phoenix attempted to conceal the nature of the company's business from HMRC. In short, the defence says that Mr Khan and the company were "an unknowing part of a fraudulent transaction chain".

11. Mr Hellard issued the Strike Out Application on the basis that:

    i) Mr Khan is estopped *per rem judicatam* from denying that he had knowledge of Phoenix's participation in the MTIC fraud by reason of the FTT decision;

    ii) Mr Khan's attempt to defend the claim on this basis is an abuse of process because it is manifestly unfair to put the Applicant to the cost and delay of proving allegations that have already been proven in the FTT proceedings.

    iii) Mr Khan's defence of the claim is also an abuse of process because it would bring the administration of justice into disrepute to allow it to be relied upon in relation to allegations that have already been proven in the FTT proceedings.

Principles appliable to striking out and summary judgment

12. CPR 3.4 provides:

> "(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case
>
> (2) The court may strike out a statement of case if it appears to the court –
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
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> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
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> (c) that there has been a failure to comply with a rule, practice direction or court order.

> (3) When the court strikes out a statement of case it may make any consequential order it considers appropriate."

13. The approach to a strike out on the ground of abuse is to adopt a two-stage test. The first stage is to consider whether the conduct complained of is abusive. The second stage is to consider whether to exercise the discretion to strike out the case. The court must conduct a balancing exercise to identify the proportionate sanction, mindful that striking out is a last resort (see *Cable v Liverpool Victoria Insurance Co Ltd* [2020] EWCA Civ 1015, at paragraphs 45, 63 and 73).

14. CPR 24.3 provides:

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

I bear in mind the principles applicable to summary judgment applications, insofar as relevant, summarised by Lewison J in *Easyair Limited v Opal Trading Limited* [2009] EWHC 339 (Ch) at paragraph 15 –

i) The court must consider whether the defence has a realistic, as opposed to a fanciful, prospect of success (*Swain v Hillman* [2001] 1 All ER 91).

ii) A "realistic" case is one that carries some degree of conviction. This means a claim that is more than merely arguable (*ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472).

iii) In reaching its conclusion, the court must not conduct a "mini-trial" (*Swain v Hillman).*

iv) This does not mean that the court must take at face value and without analysis everything that a party says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents (*ED & F Man Liquid Products v Patel*).

v) In reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial (*Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550).

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. The court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add

to or alter the evidence available to a trial judge and so affect the outcome of the case (*Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63).

vii) It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.

Estoppel and abuse of process

15. The parties to the FTT proceedings and the proceedings in this court are different. In the former the parties were Phoenix as appellant and HMRC as respondent. In the current proceedings, the parties are Mr Hellard as applicant and Mr Khan and Mr Singh as respondents. The general principle, derived from *Hollington v Hewthorn & Co Ltd* [1943] KB 587, is that the judgment of one tribunal is not admissible evidence to prove a fact in dispute in other proceedings between different parties. There are however certain circumstances in which a party's case in those other proceedings constitutes a collateral attack on the earlier decision such that it amounts to an abuse of the process of the court.

16. In *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321, Sir Andrew Morritt V-C summarised the circumstances in which a party may be prevented from raising a case that is inconstant with a previous decision of a court or tribunal as follows, as far as they are relevant, at paragraph 38:

> "a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court.
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> …
>
> c) If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings.
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> d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute."

The Court of Appeal (Lewison, Arnold LJJ and Marcus Smith J) more recently cited paragraph (d) above with approval in *Allsop v Banner Homes Limited* [2021] EWCA Civ 7 noting that:

> "the doctrine of abuse of process is best framed, at least in the context of a 'collateral' attack on a prior civil decision, by reference to the test expounded by Lord Diplock and Morritt V-C."

17. I will consider the applicable principles in relation the grounds relied upon in the Strike Out Application below.

Estoppel *per rem judicatam*

18. This is sometimes referred to as "issue estoppel". It arises where a party to proceedings seeks to bring into issue a matter that has already been decided between the parties by a court of competent jurisdiction. The earlier decision is binding on the parties. Here, neither the liquidator nor Mr Khan were parties to the FTT proceedings, but the doctrine also extends to those in a relationship of privity with the parties. Ms Julian, counsel for the liquidator, submits that Mr Khan and the liquidator are in such a relationship of privity with Phoenix and HMRC, the parties to the FTT proceedings, respectively.

19. Privity was considered by Briggs J (as he then was) in *Secretary of State for Business, Innovation & Skills v Potiwal* [2012] EWHC 3723 (Ch). That was a decision on an application to strike out part of the defendant's evidence in answer to the Secretary of State's claim for a disqualification order. The basis of the application was that Mr Potiwal had caused the company of which he was the sole director and 40% shareholder, Red 12 Trading Limited, to participate in transactions connected with the fraudulent evasion of VAT, in that case, as here, MTIC fraud. Briggs J set out the relevant authorities as follows:

> "8. The question whether parties in successive litigation are in a relationship of privity, so as to give rise to estoppel *per rem judicatam* is not the subject of a wealth of authority. In *Carl Zeiss Stiftung v Rayner & Keeler and ors* [1967] 1AC 583, Lord Reid said, at page 910 G:
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> > 'It has always been said that there must be privity of blood, title or interest: here it would have to be privity of interest. That can arise in many ways, but it seems to me to be essential that the person now to be estopped from defending himself must have had some kind of interest in the previous litigation or its subject-matter. I have found no English case to the contrary.'
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> At page 936 G Lord Guest said:
>
> > '"Privies" have been described as those who are "privy to [the party] in estate or interest." (Spencer Bower on Res Judicata, p.130). Before a person can be privy to a party there must be community or privity of interest between them.'
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> 9. In *Gleeson v J Wippell & Co Ltd* [1977] 1WLR 510, at 515, having rejected mere curiosity or concern, including reputational

concern, as sufficient to establish privity of interest, Megarry VC continued as follows:

> '…it seems to me that the substratum of the doctrine 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. It is in that sense that I would regard the phrase "privity of interest." Thus in relation to trust property I think there will normally be a sufficient privity between the trustees and their beneficiary to make a decision that is binding on the trustees also binding on the beneficiaries, and vice versa.'

He continued, at page 516 A:

> "… it appears that for privity with a party to the proceedings to take effect, it must take effect whether that party wins or loses. As was said by Buckley J in *Zeiss No. 3* [1970] Ch. 506, 541 (where the question was rather different) 'The relationship cannot be conditional upon the character of the decision.'"

In relation to the second of those passages, Briggs J noted that it enabled the court:

> "to ask not merely whether it would be just to hold the losing party in the earlier proceedings bound, but whether it would be just if the decision in the earlier proceedings had gone the other way."

20. As well as being director and a shareholder Mr Potiwal was also responsible for giving instructions to the company's lawyers for the purposes of the VAT appeal, in which he was the company's only witness of fact. He had, the judge considered, both a strong financial and a reputational interest in the outcome of the proceedings. He decided that Mr Potiwal had privity of interest with the company:

> "17. In my judgment Mr Potiwal and Red 12 were clearly privies in the context of the proceedings before the VAT Tribunal, even though he was neither asserting a personal claim of his own, nor was he exposed to personal liability for costs in the event (as

> occurred) that the appeal failed. He was only slightly less obviously in privity of interest with his company than Mr Johnson was with his company in *Johnson v Gore Wood*. In my judgment the fact that he was only a 40 per cent shareholder in Red 12 by no means undermines an otherwise clear case for privity of interest between the two."

21. In *Potiwal* Briggs J held that the Secretary of State did not, however, have such privity of interest with HMRC. Briggs J accepted, at paragraph 20, that there was substantial overlap in interest between the Secretary of State and HMRC but the question was, first:

> "whether the degree of identification of interest makes it just for the one to be bound by the outcome of proceedings about that issue involving the other, and bound regardless which way that outcome goes. The effect of identification of two parties as privies is automatic, and gives rise to an estoppel which prevents the dispute or the issue being revisited, regardless of the circumstances of the first trial, and of the outcome. It is precisely because those consequences are automatic and potentially far-reaching that the law should in my view be slow to recognise privity of interest between different persons."

Secondly, he said that it would run against the grain of the development of the law, which was to regard *res judicata* as an aspect of the law of abuse of process, to identify:

> "a new class of privity of interest between two very different arms of government pursuing different aspects of the public interest, and being motivated in particular cases by different policy and funding considerations when doing so."

In the circumstances submission that Mr Potiwal was estopped *per rem judicatam* failed.

<u>Abuse of process by reason of manifest unfairness or bringing the administration of justice into disrepute</u>

22. Although the privity argument failed in *Potiwal*, at least in relation to privity between HMRC and the Secretary of State, that did not prove fatal to the Secretary of State's application. Briggs J held that it was manifestly unfair to the Secretary of State to have to prove the allegations which had already been decided in another tribunal:

> "23. It by no means follows from my conclusion that it would not be just to treat the Secretary of State and HMRC as privies that the relitigation of the issue as to Mr Potiwal's knowledge is nonetheless not an abuse. That question requires an examination of the circumstances of the hearing before the VAT Tribunal, from which it appears that HMRC expended over £400,000 of taxpayers' money in successfully resisting Red 12's appeal, by the meticulous presentation of the intricacies of the MTIC fraud in a way sufficient to persuade the experienced tribunal that Mr Potiwal knew about it, notwithstanding his detailed and

determined challenge, through Red 12, of every element of HMRC's case. Red 12 went into creditors' voluntary liquidation after the conclusion of the proceedings, and no part of that expenditure on costs was recouped by HMRC from Red 12, despite the Tribunal's order that it should be.

24. The Secretary of State's evidence on this application demonstrates that, if Mr Potiwal is to be permitted by a simple denial of the requisite knowledge to require the case to be proved against him a second time, hundreds of thousands of pounds of further costs, again funded by the taxpayer, will have to be incurred by the Secretary of State, again with no evidence that, if successful, a costs order will be practically enforceable against Mr Potiwal at the end of the day.

25. True it is that, as Miss Graham-Wells submits, Mr Potiwal does not now put in issue the existence of the underlying fraud. But proof against the management of an exporter of the requisite knowledge in an MTIC case is nonetheless an intricate process, requiring meticulous deployment of the underlying facts, and of the circumstances in which those facts were, or ought to have been, apparent to the company's senior management. Taking a broad brush, I consider it reasonable to assume that the cost to the Secretary of State of relitigating the issue as to Mr Potiwal's knowledge is likely to equal or exceed £200,000. The question is whether it would be manifestly unfair to visit that expenditure upon the Secretary of State in all the circumstances.

26 Those circumstances include the fact that Red 12 pursued but lost an appeal against the decision of the VAT Tribunal, and was refused permission for a second appeal, and that Mr Potiwal's evidence in the present proceedings, far from placing a different complexion on matters, consists of little more than a simple denial of knowledge. No challenge is or could be made to the substantive fairness of the proceedings before the VAT Tribunal. It is in my judgment nothing to the point that its procedure rules may be different and, in certain respects, less formal than those applicable to these disqualification proceedings. Furthermore, Mr Potiwal had every opportunity both in giving evidence and subjecting himself to cross-examination to defend himself against the allegations of knowledge which the Tribunal found to be proved, when rejecting swathes of his testimony as incredible.

27. In those circumstances I consider that it would indeed be manifestly unfair to impose the cost of relitigating that issue upon the Secretary of State. The critical distinction between this case and *Secretary of State v Bairstow* is that, prior to the disqualification proceedings against Mr Bairstow, the taxpayer had incurred no costs at all in relation to the issues which Mr Bairstow wished to relitigate. The previous proceedings had

> been between him and his solvent company. By contrast in the present circumstances, the taxpayer has been the funder of the litigation involving Red 12 and Mr Potiwal throughout, first for the purpose of defending the public purse from a fraudulent claim, and now for the purpose of seeking the disqualification of the sole director of a corporate participant in that fraud."

23. He was similarly satisfied that allowing the defendant to relitigate his case would bring the administration of justice into disrepute:

> "28. I have also concluded that to permit the issue as to Mr Potiwal's knowledge to be relitigated would indeed bring the administration of justice into disrepute, in the eyes of right-thinking people. In *Re Thomas Christy (in liquidation)* [1994] 2 BCLC 527 Mr Manson sought to relitigate with his company's liquidator issues as to breach of duty and misfeasance which had been decided against him in earlier disqualification proceedings brought by the Secretary of State. The liquidator expressly disclaimed any suggestion that he and the Secretary of State had the requisite privity of interest to give rise to an estoppel *per rem judicatam*. After a review of the authorities, Jacob J said this, at page 537:
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> > 'The Companies Court of the Chancery Division of the High Court has found, after a full trial, Mr Manson guilty of the five wrongful acts specified above. To allow relitigation of those before the self-same court would seem absurd to Joe Citizen who through his taxes pays for the courts and whose own access to justice is impeded by court congestion. Doing a case twice over would make no sense to him: all the more so if he was told that the costs of this would in all likelihood be borne by innocent creditors of the company which Mr Manson ran.'
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> 29. It makes no difference in my view that, in the present case, two different tribunals are involved, namely the VAT Tribunal and the Companies Court. Apart from that, Jacob J's words are fully applicable to the present case. Where, as here, the issue as to a director's knowledge of a complex MTIC fraud has been fully and fairly investigated by an experienced tribunal and the director found to have had the requisite knowledge, it seems to me that right-thinking members of the public would regard it as an unpardonable waste of scarce resources to have that issue relitigated merely because, by a simple denial and without deducing any fresh evidence, Mr Potiwal seeks to require the complex case against him to be proved all over again. In that context the facts that Mr Potiwal was indeed in privity of interest with Red 12, that he was its sole director and that he had the conduct of Red 12's appeal makes the point all the stronger.
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> 30. *Re Thomas Christy Ltd* was considered, without any apparent disapproval, in *Secretary of State v Bairstow*, at paragraph 32. It

was treated as an application of the principle established in *Hunter v Chief Constable of West Midlands*. In *Taylor Walton v Laing*, after citing from the *Hunter* case, Buxton LJ said this, at paragraph 12:

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

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

24. Recently the principle was followed by ICC Judge Jones in *Re E-Tel (UK) Limited (in liquidation)* [2023] EWHC 1214. That case, like the instant case, concerned an application by a liquidator under sections 212 and 213 of the Insolvency Act 1986 and the extent to which the respondent was to be permitted to raise disputes in relation to matters decided in the tax tribunal. Judge Jones said:

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

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

25. Mr Farrell KC, counsel for Mr Khan, referred me to *Conlon v Simms* [2006] EWCA Civ 1749. In that case, the question was whether a finding of dishonesty in the Solicitors' Disciplinary Tribunal was admissible in subsequent proceedings. Lawrence Collins J, as he then was, at first instance found that, though the findings of the tribunal were inadmissible, it was nonetheless an abuse of process for the defendant to mount a collateral attack on the decision of the tribunal because it would be manifestly unfair to the claimants and would bring the administration of justice into disrepute to permit the relitigation of the issue of dishonesty. In relation to this, Jonathan Parker LJ, with whom Moore-Bick and Ward LJJ agreed, said:

> "137. The abuse of process alleged against Mr Simms in the instant case falls into the same general category as the abuse of process which was found to exist in *Hunter* and which was alleged (unsuccessfully) in *Bairstow*: that is to say, a collateral attack on a previous final decision by a competent court (in the instant case the decision of the Divisional Court, upholding the findings of the SDT).
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> 138. Lord Diplock described the species of abuse of process which was found to exist in *Hunter* in the following terms (at *ibid.* p.541B–C):
>
> > 'The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.'
>
> …
>
> 141. However, as Lord Diplock also said in *Hunter* (at p.6536C), the circumstances in which abuse of process can arise are very

varied — indeed, he described the facts of *Hunter* as unique. So in the nature of things there can be no catch-all formula for identifying an abuse of process, since each case will depend on its own facts.

142. In *Hunter*, for example, it was the plantiffs who were abusing the process of the court. Hence Lord Diplock's reference to 'the intending plaintiff' in the passage from his speech in *Hunter* quoted in paragraph 138 above. Lord Diplock had no difficulty in finding (at *ibid.* p.541F–G) that the plaintiffs' 'dominant purpose' in bringing the actions was not to recover damages, but that the actions had been brought:

> '… in an endeavour to establish, long after the event when memories and witnesses other than [the claimants] themselves may be difficult to trace, that the confessions on the evidence of which they were convicted were induced by police violence, with a view to putting pressure on the Home Secretary to release them from the life sentences that they are otherwise likely to serve for many years to come'.

143. In *Bairstow*, on the other hand, the party said to be abusing the process of the court was the defendant in disqualification proceedings, but he had been the unsuccessful claimant in the previous action in which the relevant findings had been made.

144. It is also to be noted in this connection that in the *Reichel* litigation (*Reichel v. Bishop of Oxford (1889) 14 App Cas 259* and *Reichel v. Magrath (1889) 14 App Cas 665* — the two appeals being heard by the House of Lords on the same day), which was cited by Lord Diplock in *Hunter* (at p.542A–D) and by Sir Andrew Morritt V-C in *Bairstow* (at paragraph 28) as an example of a collateral attack on an earlier decision, the defendant in the second action had been the claimant in the first.

145. In the instant case, by contrast with the *Reichel* litigation, with *Hunter* and with *Bairstow*, Mr Simms is the defendant in the present action, and he was also the defendant before the SDT (albeit he was the appellant before the Divisional Court).

146. In such circumstances I consider that there is force in Mr Simms' submission that in denying the allegations of dishonesty made against him in the present action he is doing no more than continuing to protest his innocence of the charges brought against him by the Law Society, albeit he is doing so in the face of the adverse findings of the SDT and the Divisional Court: to use his own words, he has initiated nothing. At the very least, as it seems to me, that is a factor which should be brought into account in considering whether the *Bairstow* conditions are satisfied, on the basis that in general the court should be slower in preventing a party from continuing to deny serious charges of

> which another court has previously found him guilty than in preventing such a party from initiating proceedings for the purpose of relitigating the question whether he is guilty of those charges.
>
> 147. It should also be borne in mind, when determining whether a party (be he claimant or defendant) is abusing the process of the court by mounting a collateral attack on a previous court decision, that the practical effect of finding him guilty of such an abuse is to prevent him denying the allegations against him save in circumstances where he is in a position to adduce additional evidence which could not with reasonable diligence have been adduced in the earlier proceedings and which, if admitted, would have 'changed the whole aspect of the case' (see *Phosphate Sewage Co Ltd v. Molleson (1879) 4 App Cas 801* , 814 per Earl Cairns LC and *Hunter* at p.545B–F per Lord Diplock). To that extent the party guilty of abuse of process will, as I see it, be placed in a worse position in regard to the adducing of evidence than he would have been in had the previous decision been admissible as prima facie evidence (for it would be no more than that) of the facts found."

26. He considered that it was not unfair to the claimants to require them to plead and prove dishonesty. Indeed, in the context of that case he thought it would have been sufficient to prove one instance of dishonesty, if serious enough, to support their claim. The defendant was doing no more than continuing to deny dishonesty and he had not initiated any proceedings. "Right-thinking people" would consider it unfair to the defendant to import the tribunal findings as a whole and prevent him from requiring the claimants to prove their case.

27. Moore-Bick LJ added that:

> "169. The passage in the judgment of the Vice-Chancellor in *Secretary for Trade and Industry v Bairstow* to which I referred earlier might be taken to suggest that the answer is supplied by applying a broad test of unfairness, but I question whether that is so. If the Law Society had not taken disciplinary proceedings against Mr. Simms in the present case, the claimants would have had to plead and prove their case against him in the ordinary way and it could not have been suggested that it would be unfair to require them to do so. One is therefore bound to ask what makes it unfair to require them to do so simply because another tribunal has made certain findings of fact in proceedings to which they were not parties."

He continued:

> "173… Mr. Conlon and Mr. Harris were not parties to the disciplinary proceedings against Mr. Simms; nor did they have any direct interest in them. It is difficult, therefore, to see why as against Mr. Conlon and Mr. Harris Mr. Simms should be bound

> by the tribunal's findings and why it should be an abuse of process for him to relitigate the issues in this action. A perception of unfairness arises mainly from the fact that the issues in this action overlap to a significant degree with those in the disciplinary proceedings and that it would be expensive and time-consuming for Mr. Conlon and Mr. Harris to obtain the evidence needed to prove their case, but if that were sufficient to render it an abuse of process for Mr. Simms to put in issue the allegations against him the result would be that decisions reached in previous proceedings between different parties by tribunals of all kinds would effectively become binding on those parties for all purposes.
>
> 174. As Jonathan Parker L.J. has pointed out, this is not a case in which Mr. Simms invoked the process of the court in order to challenge the findings made by the Solicitors' Disciplinary Tribunal. As the defendant to the proceedings he simply put in issue the claimants' allegations and thereby required them to prove their case by any admissible evidence available to them. That there may be circumstances in which it is an abuse of the process for a party to seek to put in issue by his defence a matter determined against him in previous proceedings is demonstrated by cases such as *Reichel v Magrath (1889) 14 App. Cas. 665* and *North West Water Ltd v Binnie & Partners* , but the facts of those cases were unusual and not at all comparable to those of the present case. In these circumstances I am unable to accept that it would be unfair to require Mr. Conlon and Mr. Harris to prove their case in the usual way or that to do so would bring the administration of justice into disrepute. It follows that I am unable to accept that the course taken by Mr. Simms was an abuse of process."

28. So here Mr Farrell contends that the court should be similarly slow to prevent Mr Khan from answering the serious charge of dishonesty, particularly where a finding of dishonesty was not a necessary part of the decision of the FTT, as I shall discuss below. It is not unfair to the liquidator to require him to prove his case in the same manner as he would if the FTT proceedings had not been brought. It would, however, be unfair to Mr Khan to prevent him from continuing to maintain his ignorance of the fraud.

29. I should finally note that the role of the party in the proceedings is relevant but not decisive. In *OMV Petrom SA v Glencore International AG* [2014] EWHC 242 (Comm) Blair J said at paragraph 25:

> "In the present case, the position is the other way around to that in the Michael Wilson case. The claimant is the non-party to the arbitration, seeking to argue that the defence raised by the defendant is a collateral attack on the award. Again, the fact that it was the defendant in both proceedings was relied on by Glencore as a reason to refuse relief. However, it has been held in relation to court proceedings that it can be an abuse of process for a defendant to seek to reopen issues decided against it as

> defendant in previous court proceedings (*North West Water Ltd v Binnie & Partners* [1990] 3 All ER 547). In *Conlon v Simms* [2008] 1 W.L.R. 484 at [174], Moore-Bick L.J. said that the facts of that case were unusual, but he did not disapprove the decision. On this basis, Glencore's status as defendant in both proceedings is a relevant factor, but is not in itself a reason for refusing to grant Petrom relief which would otherwise be available."

What did the FTT have to decide?

30. The nature of MTIC fraud was described in *NatWest Markets plc v Bilta (UK) Limited* [2021] EWCA Civ 680 by the Court of Appeal (Asplin, Andrews and Birss LJJ):

> "4. The criminals involved in MTIC fraud exploit the fact that imports and exports of goods between Member States of the EU are VAT-free. Like all successful forms of fraud, the essential mechanics are simple. A trader ('the defaulter') imports goods from State A into State B, and sells them on within the latter State. No VAT would be payable on the goods when imported, but the onward sale (and any sales further down the chain within State B) would attract a liability to VAT until such time as the goods are exported to another Member State (which could be State A or State C). The final link in the chain will be the person who exports the goods, who is often an accomplice of the defaulter. The intervening sales and purchases are known as 'buffer transactions'.
>
> 5. The initial buyer in the chain in State B will pay the price of the goods plus VAT to the defaulter, or sometimes to a third party nominated by the defaulter (often, ostensibly, the person from whom he purchased the goods). The buyer would then be able to offset the VAT he had paid to the defaulter against any liability which he had to account to the revenue authority in State B for VAT received on the price of the goods he sold on. The exporter at the end of the chain can claim back from the revenue authority in State B the VAT that he has paid to the person from whom he purchased the goods, because the goods have now been exported to another EU State in a zero-rated transaction. Meanwhile, the defaulter would pay the price of the goods to its supplier in State A, syphon off the VAT (or pay it to an associate) and then vanish or, if a company, go into liquidation without accounting to the revenue authority in State B for the VAT."

Here, it is said that Phoenix was the "broker", or the final link in the chain.

31. I note that a more complex variant of the MTIC fraud uses a "contra-trade". This involves "clean" transaction chains, which do not involve the fraudulent evasion of tax, used to conceal the participant's role in "dirty" transaction chains, which do. Again some of the transactions here are said to have involved such contra-trades.

32. In *Kittel v Belgium* [2008] STC 1537 the Court of Justice of the European Union held that a trader will not be able to reclaim input VAT if it knew or should have known that the transaction in which it was involved was connected with a scheme for the fraudulent evasion of VAT. Those are two separate limbs and it is sufficient for the relevant tax authority to demonstrate that a taxpayer should have known that the transactions in which it participated were connected with the fraudulent evasion of tax. In this case the tribunal were satisfied of actual knowledge. Their conclusion was:

> "224. We were satisfied HMRC had established fraudulent tax losses and that there was an orchestrated scheme for the fraudulent evasion of VAT connected with the transactions which form the subject of this appeal.
>
> 225. As to the issue of knowledge, we have based our decision on the totality of the evidence and we were careful not to focus unduly on the issue of due diligence or judge the evidence with the benefit of hindsight. We were wholly satisfied that the circumstances of the Appellant's transactions viewed as a whole indicate that Mr Khan had actual knowledge that the transactions were connected to fraud. We found that some reasons carried more weight than others and we did not base our decision solely on one reason but rather the cumulative effect of our findings viewed in totality.
>
> 226. The factors identified above would in our view also support a finding of means of knowledge. That the deals were quite clearly 'too good to be true' must have been obvious to Mr Khan; the casual manner in which business was conducted, the little known about trading partners, the lack of any basis or substance to support Mr Khan's assertions that he was satisfied as to their integrity, the scant due diligence and the substantial turnover made for no added value and little work."

33. In coming to that conclusion they held that:

    i) Mr Khan "intended to trade in electronic such as mobile phones and CPUs from the outset and his failure to bring this to HMRC's attention was an attempt to disguise his true intentions";

    ii) "the only reasonable explanation" for his failure to tell HMRC of the nature of his trade until after registration for VAT was that "he was attempting to hide his true intention from HMRC";

    iii) the due diligence carried out by Phoenix was "no more than window dressing" and the "only reasonable explanation" for this was because the company "was aware of the contrived nature of the deals"; and

    iv) Mr Khan "was an intelligent man with experience of business and who was aware of the prevalence of MTIC fraud in the industry".

34. What the tribunal did not decide, and did not need to decide, was that Mr Khan was dishonest. In *E Buyer UK Ltd v Revenue and Customs Commissioners* [2017] EWCA Civ 1416 Vos C said at paragraph 82:

> "[I]f a summary of the applicable law is required along the lines of paras 86—87 of the UT's decision, I would simply summarise the principles as follows.
>
> (i) The test promulgated by the Court of Justice in the *Kittel* case [2008] STC 1537 was whether the taxpayer knew or should have known that he was taking part in a transaction connected with fraudulent evasion of VAT.
>
> (ii) Ultimately the question in every *Kittel* case is whether HMRC has established that the test has been met. The test is to be applied in accordance with the guidance given by the Court of Appeal in the *Mobilx* case [2010] STC 1436 and the *Fonecomp* case [2015] STC 2254.
>
> (iii) It is not relevant for the F-tT to determine whether the conduct alleged by HMRC might amount to dishonesty or fraud by the taxpayer, unless dishonesty or fraud is expressly alleged by HMRC against the taxpayer. If it is, then that dishonesty or fraud must be pleaded, particularised and proved in the same way as it would have to be in civil proceedings in the High Court.
>
> (iv) In all *Kittel* cases, HMRC must give properly informative particulars of the allegations of both actual and constructive knowledge by the taxpayer."

Continuing at paragraph 85 he said:

> "The key point, in my judgment, is that, whilst HMRC can, of course, allege that a taxpayer has acted dishonestly and fraudulently in relation to the transactions to which it was a party, they do not need to do so in order to deny that taxpayer the right to reclaim input tax under the Kittel test. The exercise upon which Judge Mosedale was engaged was, therefore, inappropriate. It was simply irrelevant for the F-tT to ask whether the allegations in the statement of case, if all proved, would necessarily lead to the conclusion that the taxpayer had been dishonest or fraudulent. It was even more inappropriate for Judge Mosedale to direct HMRC to plead dishonesty when it had expressly informed her that it did not wish to make any such allegation. It might be, of course, that if some or all of the allegations made in the statement of case were proved, that might (in theory, though not, of course, in practice) have allowed a tribunal to go on to make a finding that the taxpayer had been dishonest. But if HMRC does not seek such a finding, and if such a finding is not needed to support the conclusion that the

> taxpayer cannot recover its input tax, there is neither any need nor any utility in asking the F-tT to undertake that exercise."

35. Nor did it follow from a finding of knowledge of the connection to fraud that a person was a dishonest participant in the fraud. Vos C said at paragraph 78:

> "I should say something about what Judge Mosedale said at paras 31-32 of her decision. She concluded there that there was nothing in the *Mobilx* case [2010] STC 1436 which cast any doubt on what Briggs J had said to the effect that 'A person who knows that a transaction in which he participates is connected with fraudulent tax evasion is a participant in that fraud' and 'has a dishonest state of mind', so that what he (Briggs J) had said must be right in law. For the reasons I have already given, I do not think that such a bald proposition is right in law, because, as is acknowledged by all parties to this case, a person who knows that a transaction in which he participates is connected with fraudulent tax evasion may or may not have a dishonest state of mind."

36. Similarly, Hallet LJ said:

> "103. It is common ground that HMRC does not need to allege or plead dishonesty in order to deny the trader its claims to repayment of input VAT. The *Kittel* test does not require proof of dishonesty. However, if it does allege dishonesty, HMRC is obliged to plead the facts, matters and circumstances relied upon to show that the trader is dishonest. This is to ensure the trader knows in advance the case it must meet and to ensure a court or tribunal does not make a finding of dishonesty, with all the serious consequences that such a finding entails, on an inappropriate basis. Where serious allegations of fraud are made, cogent evidence commensurate with the gravity of the allegations made must be adduced.
>
> 104. Turning to the definition of dishonesty, this has proved controversial in both the criminal and civil law. The Court of Appeal Criminal Division in *R v Ghosh [1982] 1 QB 1053* attempted to reconcile a line of authorities that had provided different definitions of dishonesty for different criminal offences. It concluded the authorities were irreconcilable and provided a two stage objective and subjective test for dishonesty namely:
>
> (i) Was the conduct dishonest by the ordinary standards of reasonable and honest people?
>
> (ii) Must the defendant have realised that what he/she was doing was, by those standards, dishonest?

However, the second, subjective part of the test has itself been the subject of significant criticism.

…

107. I recognise that proof of participation in an MTIC fraud with actual knowledge of the fraud may be powerful evidence of conduct contrary to normally acceptable standards of honest conduct, and dishonesty in that objective sense. It may also provide powerful evidence of dishonesty in the subjective sense, if that additional element is required (as E Buyer appears to maintain). The line between honest conduct and dishonest conduct may be a fine one, in such circumstances. Nonetheless, there is a line and entering into a transaction knowing that it is connected with fraud does not necessarily equate to dishonest conduct in either the objective or the subjective sense.

108. I understood this to be accepted by the respondents, who expressly disavowed an intention to equate, in every case, an allegation of actual knowledge that a transaction was connected with fraud with an allegation of dishonesty. I was, therefore, puzzled by reliance on paragraph 41 of the judgment in *Megtian* (*supra*) in apparent support of the proposition that a "person who knows that a transaction in which he participates is connected with fraudulent tax evasion is a participant in the fraud" *and* has a dishonest state of mind. I do not believe that Briggs J (as he then was) intended to lay down any general proposition of law to that effect. If he did, I would respectfully disagree, because to do so would be to import the concept of dishonesty into every case in which actual knowledge is alleged, under the first limb of the *Kittel* test, and would not take account of the additional requirements attached to a plea and finding of dishonesty.

…

111. If, contrary to my view already expressed, it is necessary to import the concept of dishonesty into such allegations, more would be required to justify the assertion that these allegations are 'tantamount' to allegations of dishonesty. It is not clear to me from the UT's judgment why, having acknowledged that not every case of alleged actual knowledge of an MTIC fraud will involve an allegation of dishonesty, the UT concluded that in these two cases it did. In paragraphs 92, 93 and 101 of their judgment, the UT appear to have placed considerable reliance on HMRC's use of the words "orchestrated and contrived" to describe the scheme in each case, but, as I have endeavoured to explain, most MTIC frauds are by their very nature "orchestrated and contrived."

37. It should be noted that the test for dishonesty is no longer that set out in *R v. Ghosh*, referred to by Hallett LJ. The test is now that set out by the Supreme Court in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67. The fact-finding tribunal must –

    i) Ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held.

    ii) When once his actual state of mind as to knowledge or belief as to the facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.

38. As Mr Farrell noted, while this removes the requirement for a person to appreciate, subjectively, that his conduct was dishonest by the standards of ordinary decent people, Hallett LJ expressly stated that knowledge of an MTIC fraud does not equate with dishonesty in either the objective or the subjective sense. He submits that it therefore does not follow from the FTT's decision that Mr Khan was dishonest.

Discussion

39. Ms Julian's submission is that this case is on all fours with *Potiwal*. Like the defendant in that case, Mr Khan was the sole director when submitting Phoenix's returns and during the appeal before the FTT. He conducted the appeal himself. He had a strong reputational and financial interest in the outcome of the proceedings. He was the company's sole director and a 50% shareholder. The other 50% was held by a woman who shares his surname, who may be assumed to be a family member. His interests were entirely aligned with those of Phoenix so that he should be considered to have privity of interest with it. It appears to me that that is self-evidently so. Phoenix may not, quite, have been the alter ego of Mr Khan but Ms Julian is correct to submit that his own interests were bound together with those of the company. It is hard to see the basis on which he brought the appeal to the FTT other than to protect his own interests as director and shareholder.

40. As in *Potiwal*, it is more difficult to equate the interests of HMRC with those of the liquidator. Ms Julian accepted that a liquidator was not a trustee but submitted that, in this case, the position of the liquidator and HMRC as creditor was analogous to that of a trustee and beneficiary, as contemplated by Megarry V-C in *Gleeson v J Wippell & Co Ltd,* so that the decision was binding on both the liquidator and Mr Khan. Ms Julian submitted that the liquidator was bringing the claim for the benefit of creditors and the only creditor thus far to have proved was HMRC itself. There is, she argued, a sufficient connection between Mr Hellard and HMRC to create a privity of interest.

41. It does not appear to me that the identity of the sole proving creditor creates privity of interest between that creditor and the liquidator. It would be an arbitrary result for a liquidator to be bound to a decision, or not, by the accident of the identity of a creditor, who may merely be one of a number of as yet unidentified creditors. Nor was it argued that the liquidator must be regarded as a privy of the company, rather than HMRC.

Applying Briggs J's touchstone – had the decision of the tribunal gone the other way would it be just to regard the liquidator as similarly bound, it does not seem to me that the answer would necessarily be yes. If the tribunal had found that Mr Khan ought to have known of the fraud, but did not have actual knowledge of it, it would not in my judgment necessarily follow that the liquidator would be precluded from alleging both actual knowledge and dishonesty in a subsequent claim.

42. Ms Julian alternatively submits that it is manifestly unfair to the liquidator to require him to re-litigate issues which have already been decided after a lengthy and expensive hearing. The hearing took some 11 days and the cost to HMRC was in excess of £100,000. Mr Khan has already run the case that he was "an innocent dupe" before a tribunal that had considered, as she put it, swathes of evidence, before concluding that he had actual knowledge of the fraud. He was the instigator of the case and he must live with the findings of the tribunal.

43. I agree with Ms Julian. It is true to say that this case does not, as in *Potiwal,* risk the expenditure of large sums of public money twice over to prove the same facts. Nonetheless substantial public money has already been expended on a trial. Here it does appear to me that the identity of the principal creditor is relevant. HMRC would be subjected to the delay in the administration of the company's affairs occasioned by relitigating a question that it had gone to considerable time and expense in litigating already. Again, while the liquidator has entered into no win, no fee arrangements and has the benefit of indemnity insurance and Mr Farrell submits there is no risk of further expense to the taxpayer, it is inevitable that relitigating the issue of knowledge is likely to lead to costs and expenses that will erode the sums available for distribution to creditors.

44. It does not seem to me to be any answer to say that, had Mr Khan not pursued the FTT appeal, Mr Hellard would be obliged to pursue the claim and prove knowledge. That may be so but it is not what happened. He chose to bring the FTT proceedings and obtain a determination of his knowledge of the fraud. Unlike in *Conlon v Simms*, Mr Khan is not merely continuing to protest his innocence in a series of claims brought against him. He was the instigator of the FTT proceedings and chose to present a case that he, and therefore the company, was an "innocent dupe" in the fraud before the tribunal. That submission was rejected by the tribunal. Having taken that course it is manifestly unfair to the liquidator of that same company to be required to litigate the matter again. Nor is this a case where it would be sufficient for the liquidator to select and prove a single instance of knowledge, or a limited number of instances, in order to make out his case. The litigation of these issues would require the court to go over substantial material that has already been considered by the tribunal in detail after hearing evidence over the course of 11 days.

45. The proceedings in the FTT were thorough and fair. It appears to me that there is nothing in the point that Mr Khan was a litigant in person in those proceedings and now has the benefit of legal representation. The tribunal heard from 14 witnesses and produced a 61-page, 253-paragraph judgment on 29th June 2015. The decision notes that the tribunal took care to ensure that Mr Khan was able to present the case:

> "5. Mr Khan's email went on to confirm that the only area of dispute was the issue of knowledge or means of knowledge and he asked for clarification as to the appeal process as he felt

> 'somewhat disadvantaged.' HMRC responded by letter dated 14 May 2014 in which it was proposed that all of the witnesses be called to ensure that the Appellant understood the evidence, did not feel pressured into accepting it and was given the opportunity to test the witnesses. Mr Khan clarified on 15 May 2014 that he fully understood the evidence and the issues.
>
> 6. As a result of these exchanges the Tribunal took time prior to hearing any evidence to discuss with both parties the way forward. We were anxious to ensure that Mr Khan was not and did not feel in any way disadvantaged by his lack of representation without prolonging proceedings and costs unnecessarily. Mr Khan presented as an intelligent man who fully understood the nature of the HMRC's case. We bore in mind that the burden of proof rests with HMRC and concluded that in the interests of justice and fairness to both parties, and to ensure that the Tribunal was in a position to consider and assess the evidence fully, all witnesses would remain available to give evidence."

Elsewhere, he was noted in the decision to be a "highly intelligent man" who understood the nature of HMRC's proceedings, and it was not contended before me that that was wrong.

46. Ms Julian is similarly correct to say that the public would regard it as absurd that, having litigated the question at significant public expense in the FTT, Mr Khan should be entitled to have a second bite of the cherry, for the reasons that I have just set out in relation to unfairness. To those may be added the impact on court time of permitting relitigation of the question of knowledge. Other court users will inevitably be prejudiced by a trial which will run to several days, even if it did not take the full 11 days that were taken before the tribunal, and involve a significant amount of judgment-writing time. The hearing of other matters would be delayed by the repeat of the fact-finding exercise. It seems to me that this plainly would bring the administration of justice into disrepute.

47. The only proportionate response to such a wholesale abuse of process is to strike out the offending parts of the points of defence. I am therefore satisfied that the points of defence must be struck out as an abuse of process insofar as they are inconsistent with the findings of the tribunal. That is in reality the entirety of the defence, as its sole premise, aside from a short point of limitation, is predicated on absence of knowledge.

48. That does not however dispose of the whole of the liquidator's claim. He alleges, and must prove, that Mr Khan was a dishonest participant in the fraudulent scheme. Mr Farrell relies on Hallet LJ's observation in the *E Buyer* case that knowledge of fraud does not necessarily equate to dishonesty. The findings of the FTT were that Mr Khan knew of the fraud and, indeed, had sought to conceal the true nature of the company's business from HMRC but they did not make a finding of dishonesty. They were not asked to do so and it was not a necessary ingredient to the decision that they had to make.

49. Mr Farrell says that this must still be investigated. The fraud here was "miles away" and Mr Khan trusted the parties involved. It does not seem to me to be open to him to argue that in these proceedings. He voluntarily engaged the tribunal process and argued ignorance of the fraud. That was comprehensively rejected. While knowledge of the fraud and dishonesty are as, the Court of Appeal noted, separate questions, it seems to me that this is a case where knowledge of the fraud imports dishonesty. Mr Khan knew of the fraud and he was responsible for filing the VAT repayment claim. He was for most of the company's life its sole director. It appears to me that there is no real prospect that a finding of dishonesty could be avoided. This is not least because Mr Khan himself offers no explanation other than ignorance of the fraud.

50. It does not seem to me that the additional allegation of dishonesty would justify the exercise of my discretion against striking out the defence in relation to knowledge of the fraud. Having struck out the defence that Mr Khan did not know of the fraud, it must follow that there can be no defence to the allegation that he caused the company to participate in the scheme dishonestly. The findings of the tribunal establish what Mr Khan knew for the purposes of the first element of the *Ivey v Genting* test. There is simply no basis on which it could be said that his submission of VAT claims in relation to transactions that he knew to be connected to fraud was not dishonest in the objective sense contemplated in *Ivey*. None is offered.

51. That being so, a finding of dishonesty is irresistible. It might have been otherwise had Mr Khan identified reasons why he says that he knew of the fraud but nonetheless was not dishonest. He has not, choosing instead to re-hash a defence that was rejected by the FTT. Once it is not open to Mr Khan to deny that he, as sole director for much of the relevant period, knew that the transactions were connected to a fraudulent scheme to evade tax, and indeed that he had concealed the company's intended trade from HMRC, what possible other conclusion can be drawn in this case other than that Mr Khan was dishonest in allowing the company to participate in multiple transactions and submit the input tax claim accordingly? Looked at objectively, that conduct was self-evidently dishonest.

52. In the result, I shall strike out the defence insofar as it denies knowledge of the fraud and denies dishonesty. Further, I grant summary judgment on the allegation that Mr Khan dishonestly caused the company to participate in the scheme to evade tax in the knowledge of the fraud. I shall therefore go on to consider the liquidator's claims generally.

Fraudulent trading

53. Section 213 of the Insolvency Act 1986 provides as follows:

> "(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.
>
> (2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable

> to make such contributions (if any) to the company's assets as the court thinks proper."

54. This requires the liquidator to establish that:

    i) the business of Phoenix had been carried on with intent to defraud creditors, or any other fraudulent purpose;

    ii) Mr Khan participated in the carrying on of the business; and

    iii) he did so knowingly.

    (*Re BCCI; Morris v Bank of India* [2004] 2 BCLC 236, 243.)

55. It is not in doubt that participation in MTIC fraud falls within the ambit of the carrying on of business with intent to defraud creditors (see for example *Re TL Todd (Swanscombe) Ltd* [1990] BCC 125 at 128D, *Re Overnight (No.2)* [2010] BCC 796 at [11]). The question is whether Mr Khan knowingly participated in the carrying on of the fraudulent business of the company. Knowledge does not require him to know every detail of the fraud, and knowledge includes "blind eye" or Nelsonian knowledge (*Re BCCI; Morris v Bank of India* at paragraph 13). Dishonesty must be shown (*Bernasconi v Nicholas Bennett & Co* [2000] BPIR 8 at paragraph 13), as now understood in the light of *Ivey v Genting Casinos*.

56. The involvement of the company in a fraudulent scheme of tax evasion is not in dispute. For the reasons I have given, the striking out of the points of defence means that Mr Khan must accept that he had actual knowledge of the fraud. For the reasons that I have given, in this case that must be taken to import dishonesty. The success of the scheme depended on misleading HMRC into accepting a fraudulent input tax claim, and that was patently dishonest.

57. The remedy under s.213 focuses on the loss to creditors, rather than the company itself. In *Morphitis v Bernasconi* [2003] EWCA Civ 289 Chadwick LJ said:

> "53. The power under section 213(2) is to order that persons knowingly party to the carrying on of the company's business with intent to defraud make 'such contributions (if any) to the company's assets' as the court thinks proper. There must, as it seems to me, be some nexus between (i) the loss which has been caused to the company's creditors generally by the carrying on of the business in the manner which gives rise to the exercise of the power and (ii) the contribution which those knowingly party to the carrying on of the business in that manner should be ordered to make to the assets in which the company's creditors will share in the liquidation. An obvious case for contribution would be where the carrying on of the business with fraudulent intent had led to the misapplication, or misappropriation, of the company's assets. In such a case the appropriate order might be that those knowingly party to such misapplication or misappropriation contribute an amount equal to the value of assets misapplied or misappropriated. Another obvious case

> would be where the carrying on of the business with fraudulent intent had led to claims against the company by those defrauded. In such a case the appropriate order might be that those knowingly party to the conduct which had given rise to those claims in the liquidation contribute an amount equal to the amount by which the existence of those claims would otherwise diminish the assets available for distribution to creditors generally; that is to say an amount equal to the amount which has to be applied out of the assets available for distribution to satisfy those claims.
>
> …
>
> 55. … As I have said, I think that the principle on which that power should be exercised is that the contribution to the assets in which the company's creditors will share in the liquidation should reflect (and compensate for) the loss which has been caused to those creditors by the carrying on of the business in the manner which gives rise to the exercise of the power. Punishment of those who have been party to the carrying on of the business in a manner of which the court disapproves—beyond what is inherent in requiring them to make contribution to the assets of a company with limited liability which they could not otherwise be required to make—seems to me foreign to that principle. Further, the power to punish a person knowingly party to fraudulent trading—formerly contained in section 332(3) of the 1948 Act—has been re-enacted (and preserved) in section 458 of the Companies Act 1985. It could not have been Parliament's intention that the court would use the power to order contribution under section 213 of the 1986 Act in order to punish the wrongdoer. In my view, had the judge been right to find fraudulent trading in the present case, he would, nevertheless, have been wrong to include a punitive element in the amount of contribution which he ordered.'

58. *In Re JD Group Limited* [2022] EWHC 202 (Ch) Deputy ICC Judge Agnello QC said at paragraph 97:

> "In my judgment, the loss to HMRC is that which is caused by the fraud itself. Had the fraud not occurred, then the Company would not find itself liable because the transactions would have been genuine ones. This, in my judgment, is the approach envisaged in paragraph 53, when Lord Justice Chadwick states, '..where the carrying on of the business with fraudulent intent has led to claims against the company by those defrauded. In such a case the appropriate order might be that those knowingly party to the conduct which had given rise to those claims in the liquidation contribute an amount equal to the amount by which the existence of those claims would otherwise diminish the assets available for distribution to creditors generally; that is to

> say an amount equal to the amount which has to be applied out of the assets available for distribution to satisfy those claims.'

The loss to the creditors in this case is the deficiency caused by the imposition of the misdeclaration penalty and refusal of the input tax claim occasioned by the participation in the fraudulent scheme, leaving the company with a greater deficiency to creditors in the amount of the claim. Mr Khan was responsible for that and is liable to compensate the company for those sums.

Misfeasance – Breach of Duty

59. Section 212 of the Insolvency Act 1986 provides:

> "(1) This section applies if in the course of the winding up of a company it appears that a person who—
>
> (a) is or has been an officer of the company,
>
> …
>
> has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company.
>
> …
>
> (3) The court may, on the application of the official receiver or the liquidator, or of any creditor or contributory, examine into the conduct of the person falling within subsection (1) and compel him—
>
> (a) to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or
>
> (b) to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just."

60. The breaches of duty alleged here took place prior to the enactment of the Companies Act 2006 and were owed at common law. They included:

i) a duty to act honestly and *bona fide* in what Mr Khan considered to be the best interests of the company and, in circumstances where the company is insolvent or bordering on insolvency, its creditors;

ii) a duty to act in accordance with the company's constitution, and to exercise powers for the purpose for which they were conferred; and

iii) a duty to exercise reasonable skill, care, and diligence.

There is no period of limitation for a fraudulent breach of duty (s.21(1)(a), Limitation Act 1980).

61. It was a fraudulent breach of Mr Khan's duty to act honestly and in the best interests of the company to allow it to participate in a dishonest tax evasion scheme that was likely to lead to its winding up and a deficiency to creditors. The refusal of the input tax claim and the imposition of the misdeclaration penalty would inevitably lead to insolvency. Again, once Mr Khan's defence as to knowledge of the fraud falls away, he cannot be considered anything other than dishonest, applying the test in *Ivey v Genting*. He should compensate the company for the liability that he caused it to incur. That, again, is the imposition of the misdeclaration penalty and increase in the company's liabilities in a sum equal to the rejected input tax claim occasioned by the participation in the dishonest scheme.

Conclusion

62. The points of defence insofar as they contend that Mr Khan did not have knowledge of the fraudulent scheme are struck out. It follows on the facts of this case that the defence that he was not dishonest is unmaintainable and must similarly be struck out. That is in reality the whole substantive defence, save for the limitation question. The limitation period does not however run in the case of fraud. No other defence to the claim is offered. Summary judgment shall be entered against Mr Khan on the Main Application in the principal sum claimed. I will also grant the declarations sought as to Mr Khan's liability pursuant to section 213 of the 1986 Act and as to breach of duty.

63. I will hear counsel as to the form of order and the principle and calculation of interest, which was not addressed at the hearing.