Neutral Citation Number: [2017] EWCA Civ 956

Case No: C1/2017/0385 & C1/2017/0332

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Andrew Baker; Mr Justice William Davies
CO202017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2017

Before:

LORD JUSTICE PATTEN
LADY JUSTICE KING
and
LORD JUSTICE BURNETT

- -

Between:

ABC Limited	**First Appellant**
X Limited & Y Limited	**Second and Third Appellants**
- and -	
The Commissioners for Her Majesty's Revenue and Customs	**Respondent**

- -
- -

Philip Coppel QC & David Bedenham (instructed by **Rainer Hughes for the First Appellant and Bark & Co Solicitors**) for the Second **Appellant**

James Eadie QC & Amy Mannion (instructed by **HMRC's Solicitors Office**) for the **Respondent**

Hearing dates: 10th May & 11th May 2017

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Approved Judgment

Lord Justice Burnett:

1. In April 2016 a new regulatory scheme ("the Scheme") was introduced which requires a wholesaler of duty-paid alcohol to be registered and approved as a "fit and proper" person for that purpose by the Commissioners of Her Majesty's Revenue and Customs ("HMRC"). A wholesaler commits a criminal offence if it sells alcohol after a determination by HMRC that it is not fit and proper. Those approved appear on a register which is accessible to the public. From 1 April 2017 anyone purchasing alcohol from a wholesaler who is not approved commits a criminal offence if he knows or ought to have known of the lack of approval. There is an appeal to the First-tier Tribunal ("F-tT") on limited grounds against an adverse decision by HMRC, but there is no power in the F-tT to grant any interim relief to enable the wholesaler to continue to trade lawfully pending the appeal. The Scheme applies to new entrants to the wholesale duty-paid alcohol business and also to those who had been operating as wholesalers before the Scheme's introduction.

2. The claimants seek to locate a power in HMRC equivalent to a stay, namely temporary approval and registration, or alternatively for the High Court to grant an injunction on those terms either as an adjunct to judicial review proceedings or on a free-standing basis.

3. New entrants to the wholesale market who fail to satisfy HMRC that they are fit and proper persons must simply wait until their appeal is heard. If they succeed they will be able to enter the market. No question of being eligible for what amounts to an interim approval could arise. The problem, which these judicial review claims raise, concerns those who were in business before the Scheme came into operation and were then refused approval. Given the inevitable delay between any decision of HMRC and the hearing of an appeal in the F-tT, during which period the appellant cannot trade in wholesale alcohol, there is at least a possibility of many wholesalers going out of business. That would have serious consequences not only for the owners of the business but also its employees.

4. The issues in these two judicial review claims are:

    i) Do HMRC have power to allow a wholesaler to continue to trade lawfully pending appeal, and if so in what circumstances?

    ii) What are the powers of the High Court to grant interim relief to enable a wholesaler to continue trading pending the appeal in the F-tT?

5. In the cases before us Andrew Baker J and William Davies J both concluded that HMRC had no power to allow the wholesalers to trade lawfully pending their appeals to the F-tT. Each also applied the decision of this court in *CC & C v HMRC* [2014] EWCA Civ 1653; [2015] 1 WLR 4043 to the question whether the High Court should grant injunctive relief and concluded that it was not available. They were unimpressed by the evidence suggesting that the companies were immediately doomed if they could not trade pending appeal.

6. The decisions under challenge in these proceedings are not those by which HMRC determined that the wholesalers were not fit and proper persons under the Scheme, but

rather the decisions to refuse to provide a temporary approval to enable trading to continue pending appeal.

The Facts

7. X Ltd and Y Ltd are corporate vehicles of a single businessman. Y Ltd owns the trademark of a brand of wines produced in Europe. That wine is sold to another company under the same control and ownership. That company sells its products to X Ltd in bond. X Ltd then sells the wine duty paid to Y Ltd which sells it on wholesale. There is an associated company which sells the wine online. The evidence suggests that the group turnover is between £10 million and £15 million a year, with profits of over £500,000. It employs 37 people. The owner estimates the brand to be worth £25 million. He says that the group has no significant reserves and is heavily mortgaged. He asserts that if the companies cannot engage in wholesale trade in alcohol they would not be able to meet their immediate liabilities. They would become insolvent within about a month. He would have to dismiss the staff and close the doors of the businesses. The companies are said to have only a small income stream outside wholesaling (less than £400,000 a year). Moreover, without its distribution network, the brand would become worth very little.

8. Y Ltd applied for approval on 18 December 2015 and X Ltd on 29 February 2016. On 11 November 2016 each was issued with a minded to refuse letter which gave reasons and invited a response. On 25 November 2016 representations were made on behalf of the companies in support of the grant of approval. The applications for approval were then refused on 19 December 2016. The refusal letters indicated that the companies could continue to trade for a month. The letters explained why HMRC were not satisfied that the companies were fit and proper persons to conduct wholesale alcohol sales.

9. On 23 December 2016 the companies' advisers explained the consequences of a lack of temporary approval pending an appeal to the F-tT (which was expected to take at least eight months, even with expedition). It was said that "unless HMRC puts some remedial arrangement in place, the statutory right of appeal will be rendered worthless." That was because the companies would cease to exist and, in any event, a successful appeal could not make good the substantial losses that would result from a cessation of trading. They asked to be placed on the approved register *pro tem.* They referred to the property rights of the companies protected by Article 1 Protocol 1 ("A1P1") of the European Convention on Human Rights ("ECHR") and contended that the goodwill of the companies built up over many years was being destroyed. Such interference pending appeal, given the irremediable nature of the loss, would be disproportionate. That argument was not advanced in relation to the impact of the eventual appeal if it was unsuccessful. It was said that it would be disproportionate in A1P1 terms to put the companies out of business pending their appeals.

10. HMRC replied on 29 December 2016. The decision to refuse approval was maintained and the argument pursuant to A1P1 rejected.

11. ABC Ltd is a substantial cash and carry business trading not only in wholesale duty paid alcohol but also in a wide range of other goods. Sales of alcohol to retailers and traders are said to account for between 65% and 70% of the turnover of the business. ABC Ltd has ten employees.

12. ABC Ltd applied for approval under the Scheme on 11 March 2016. On 29 November 2016 HMRC sent a minded to refuse letter setting out the nature of the concerns, and inviting representations by 9 December. ABC Ltd's sole director says that the letter was not received until 9 December. ABC Ltd's advisers telephoned HMRC and were given a short extension to make representations, which they did on 12 December. ABC Ltd's application was refused by HMRC on 14 December 2016; but it was allowed a month to continue trading as a wholesaler. Solicitors acting for ABC Ltd wrote to HMRC on 19 December asking that trading be permitted until 31 March 2017 or until the F-tT decision if sooner. The request was couched in terms of a request for an extension of the month's grace already granted. There was about £1m worth of stock which would become liable to seizure even though, as was contended, all duty had been paid on it. An argument relying upon A1P1 was also set out.

13. On 20 December an HMRC officer offered to visit to inspect the stock and records relating to its purchase. The purpose was to ensure that the one month grace period was "reasonable and proportionate". The implication was that it might be extended. Following the visit by its officer, HMRC did extend the period during which ABC Ltd could continue to trade as a wholesaler to 14 February 2017, that is another month. HMRC considered that this period should be used to wind down the duty-paid wholesale part of the business. ABC Ltd's case continued to be that it should be allowed to trade in wholesale alcohol pending its appeal to the F-tT.

14. HMRC considered that it had no power to grant a temporary approval, as opposed to allowing a period to wind down that wholesale business. That was the position it maintained against each of the claimants in these proceedings.

History of Proceedings

15. X Ltd and Y Ltd issued proceedings for judicial review on 4 January 2017. Permission to apply for judicial review and interim relief was refused on the papers on 16 January but interim relief was granted the following day pending an oral renewal of the applications. The wind-down period allowed by HMRC came to an end on 18 January 2017. The oral renewal followed on 2 February with judgment being given the next day. Whilst permission to apply for judicial review was refused the judge granted interim relief pending an application for permission to appeal to the Court of Appeal.

16. On the 28 March 2017, the papers came before me and the following orders were made:

    (i) X Ltd and Y Ltd were given permission to apply for judicial review, with a direction that the matter remain in the Court of Appeal.

    (ii) X Ltd and Y Ltd were granted permission to appeal against the refusal to grant a free-standing injunction requiring the HMRC to approve the claimants *pro tem* for duty-paid alcohol wholesaling.

    (iii) An interim injunction was granted to preserve their trading positions until the earlier of the conclusion of these proceedings or the appeal in the F-tT.

17. On the 29 March 2017, Thirlwall LJ granted ABC Ltd permission to apply for judicial review and directed that the matter be kept in the Court of Appeal. She also granted an interim injunction to preserve ABC Ltd's trading position in similar terms. The matter had come before Thirlwall LJ as an application for permission to appeal against the order of the High Court (William Davis J) of the 14 February 2017 refusing ABC Ltd permission to apply for judicial review and refusing to grant interim injunctive relief.

The Statutory Scheme

18. Alcoholic drinks sold in the United Kingdom are subject to excise duty under the Alcoholic Liquor Duties Act 1979 ["the 1979 Act"], as well as Value Added Tax. Alcohol tax fraud is a significant problem which deprives the taxpayer of a sum estimated by HMRC at about £1.8 billion a year. One significant area of fraud results from alcoholic drinks being sold without duty having been paid. Duty can be evaded by importing alcoholic drinks into the United Kingdom in large quantities without paying the duty and then selling them on through wholesale retailers. With neither duty nor the associated VAT having been paid, the price at which the goods are sold on by wholesalers may be artificially depressed enabling the ultimate retailers, in shops or bars and restaurants, unfairly to undercut their competitors. Whilst there has long been in place a regulated duty-suspense scheme for the producers of alcoholic drinks in the United Kingdom (e.g the Scotch Whisky industry) and the operators of bonded warehouses, the duty paid wholesale trade had been unregulated.

19. In 2012 and 2013 HMRC consulted on proposed measures to combat alcohol fraud in the wholesale and retail sector. Amongst the proposals was a registration scheme for wholesalers. The Chancellor of the Exchequer announced the introduction of the Scheme in his Autumn Statement of 2013.

20. Amendments were made to the 1979 Act by the Finance Act 2015 by insertion of a new Part 6A. Transitional provisions enabled existing wholesalers to continue to trade until their application was "disposed of": see section 54(12) and (13). Amendments were also made to the Finance Act 1994 to enable appeals against adverse decisions made by HMRC to the F-tT.

21. Section 88A of the 1979 Act defines "controlled liquor", "wholesale" and "controlled activity" in terms which sets the parameters of the Scheme. The claimants fall within the Scheme because they sell alcoholic drinks wholesale to buyers themselves carrying on a business. Section 88C introduced the requirement that wholesalers must be approved by HMRC:

> "Approval to carry on controlled activity
>
> (1) A UK person may not carry on a controlled activity otherwise than in accordance with an approval given by the Commissioners under this section.
>
> (2) The Commissioners may approve a person under this section to carry on a controlled activity only if they are

> satisfied that the person is a fit and proper person to carry on the activity.
>
> (3) The Commissioners may approve a person under this section to carry on a controlled activity for such periods and subject to such conditions or restrictions as they may think fit or as they may by or under regulations made by them prescribe.
>
> (4) The conditions or restrictions may include conditions or restrictions requiring the controlled activity to be carried on only at or from premises specified or approved by the Commissioners.
>
> (5) The Commissioners may at any time for reasonable cause revoke or vary the terms of an approval under this section.
>
> (6) In this Part *"approved person"* means a person approved under this section to carry on a controlled activity."

Section 88D requires HMRC to maintain a register of approved persons which is accessible to the public and by subsection 3 provides:

> "The Commissioners may make publicly available such information contained in the register as they consider necessary to enable those who deal with a person who carries on a controlled activity to determine whether the person in question is an approved person in relation to the activity."

22. Section 88F provides:

> "A person may not buy controlled liquor wholesale from a UK person unless the UK person is an approved person in relation to the sale."

Section 88G creates criminal offences for contravention of sections 88C and 88F:

> "Offences
>
> (1) A person who contravenes section 88C(1) by selling controlled liquor wholesale is guilty of an offence if the person knows or has reasonable grounds to suspect that—
>
> (a) the buyer is carrying on a trade or business, and
>
> (b) the liquor is for sale or supply in the course of that trade or business.
>
> (2) A person who contravenes section 88C(1) by offering or exposing controlled liquor for sale in circumstances in which the sale (if made) would be a wholesale sale is guilty of an

> offence if the person intends to make a wholesale sale of the liquor.
>
> (3) A person who contravenes section 88C(1) by arranging in the course of a trade or business for controlled liquor to be sold wholesale, or offered or exposed for sale in circumstances in which the sale (if made) would be a wholesale sale, is guilty of an offence if the person intends to arrange for the liquor to be sold wholesale.
>
> (4) A person who contravenes section 88F is guilty of an offence if the person knows or has reasonable grounds to suspect that the UK person from whom the controlled liquor is bought is not an approved person in relation to the sale.
>
> (5) A person guilty of an offence under this section is liable on summary conviction—
>
> (a) in England and Wales to—
>
> (i) imprisonment for a term not exceeding 12 months,
>
> (ii) a fine, or
>
> (iii) both …
>
> (6) A person guilty of an offence under this section is liable on conviction on indictment to—
>
> (a) imprisonment for a period not exceeding 7 years,
>
> (b) a fine, or
>
> (c) both. …"

23. Part 6A of the 1979 Act came into force on 26 March 2015, save for section 88C(1) and section 88F which came into force respectively on 1 January 2016 and 1 April 2017. Regulations made under the 1979 Act, the Wholesaling of Controlled Liquor Regulations 2015 ("the 2015 Regulations"), require by regulation 4(4) that HMRC must notify a person that an application for registration has been refused and give reasons. Regulation 7 empowers HMRC to prescribe conditions of approval in addition to those that may be imposed under section 88C(3). Through Excise Notice 2002 ("EN 2002") HMRC used that power to oblige registered wholesalers to keep specified records and undertake due diligence checks on their supply chains. Regulation 10 provides that:

> "The Commissioners may prescribe descriptions of sales that are excluded sales for the purposes of Part 6A of the [1979] Act."

These regulations also provide that any dutiable liquor in the possession, custody or control of a person who contravenes section 88C(1), whether duty has been paid on it or not, is liable to forfeiture.

24. EN 2002 is an example of an Excise Notice made under the 1979 Act and the 2015 Regulations. Much of its content amounts to guidance or a statement of practice. But other parts have the force of law because regulations empower HMRC to prescribe a wide range of matters. The conditions imposed on registered wholesalers just referred to were prescribed and thus have the force of law. EN 2002 provides that applications for registration from existing wholesalers should be made between 1 January and 31 March 2016, although some had been made earlier. It explains that all applications would be reviewed before 1 April 2017 – the date on which it would become a criminal offence for someone knowingly to deal with an unregistered wholesaler. It confirms that if the application was made in time the applicant could continue to trade pending the determination of the application. That reflected the terms of section 54(12) and (13) of the Finance Act 2015 which provides that section 88C(1) does not apply until an application is "disposed of". That is defined as meaning when it is "determined by [HMRC] or withdrawn or abandoned." EN 2002 warns that HMRC's consideration of applications would take "several months".

25. There has been an unexplained, and before us unexplored, revision in the chronology of the legislation. The amended 1979 Act contemplated that all applications from extant traders should be made by 1 January 2016. As we have seen this was extended in EN 2002 to 31 March 2016.

26. EN 2002 explains that HMRC would refuse the application if there is reasonable cause to do so and a threat to tax revenue. It sets out HMRC's approach to the question whether someone is a fit and proper person. It affirms that refusal would carry with it a prohibition on carrying on a controlled activity. There is a right of review. In practice, as we have seen, HMRC give a warning in a minded to refuse letter if they are considering refusal to enable the applicant to make representations to assuage their concerns. The 1979 Act, the 2015 Regulations and EN 2002 were silent on what a trader was supposed to do with stocks after receipt of a refusal decision. In practice HMRC purported to give such traders a month's grace to dispose of their stocks. There is doubt about whether HMRC have any power to disapply the provisions of primary legislation in this way, something to which it will be necessary to return, but so long as the period of grace expired before 1 April 2017 the additional problem of criminalising potential purchasers would not arise. A recent amendment to paragraph 4.5 of EN 2002 (28 March 2017) now makes explicit provision:

> "**Disposal of stock by businesses whose … application has been refused**
>
> This section has the force of law under Regulation 10 of the Wholesaling of Controlled Liquors Regulations 2015.
>
> Sales made by an alcohol business which was a wholesale trader of alcohol before 1 April 2016, and whose application for approval is refused are excluded sales if they also meet the following criteria:

- They are made on or after 28 March 2017
- They are sales of controlled liquor which the trader makes in the course of winding down their alcohol business
- Where the total retail value of the controlled liquor held by the business on the date of refusal is:
  - £3 million or less, the sales are made in the 30 calendar days immediately following the date of refusal
  - More than £3 million, the sales are made in the 45 calendar days immediately following the date of refusal"

This provision provides no assistance to the claimants in these judicial review proceedings because the refusals long predated 28 March 2017 and the time limits of 30 and 45 days have expired.

27. Paragraph 15.4 of EN 2002 makes explicit provision for HMRC to allow a person whose approval is revoked a reasonable period to wind down the business and dispose of existing stock, but it did not have the force of law.

28. The mechanisms for challenging an adverse decision, including the right of appeal to the F-tT, derive from a combination of provisions in the Finance Act 2015 and the Finance Act 1994, as amended. Section 54(7) of the Finance Act 2015 provides that a decision to refuse an application for registration is a "relevant decision" for the purposes of Schedule 5 of the Finance Act 1994. Persons affected by a relevant decision are entitled to a review of the decision: sections 15A to 15F of that Act. After the review, or instead of a review, the disappointed applicant may appeal to the F-tT under section 16. Time limits, which are not in issue in these cases, are laid out in the statute.

29. The Finance Act 1994 divides appeals to the F-tT into two categories: First, those in respect of payment of sums and, secondly, those that it calls "ancillary matters". A decision to refuse registration (or revoke it, or attach conditions to it) is an ancillary decision for the purposes of the legislative scheme governing appeals. Section 16(4) of the Finance Act 1994 provides:

> "In relation to any decision as to an ancillary matter, or any decision on a review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making the decision could not reasonably have arrived at it, to do one or more of the following, that is to say -

> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
>
> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision;
>
> (c) in the case of a decision which has already been acted upon or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that that repetitions of the unreasonableness do not occur when comparable circumstances occur in the future."

By contrast, the F-tT has full appellate jurisdiction in relation to appeals against a demand to pay tax. Ordinarily in such cases, disputed tax must be paid pending an appeal (or else adequate security given) but the F-tT has limited power under section 16(3) of the Finance Act 1994 to waive those requirements on grounds of hardship. That amounts to a circumscribed power to provide interim relief. There is no such power provided by the Finance Act 1994, or elsewhere, for the F-tT to grant any interim relief pending appeal to a trader denied approval even if the consequences of being prohibited from trading pending appeal may be catastrophic.

30. The F-tT's powers on an appeal can be exercised only if it is satisfied that HMRC could not reasonably have arrived at the decision in question. As Mitting J observed in *R(Ahmad) v HMRC* [2015] EWHC 3954 (Admin) at paragraph 15 questions of proportionality can be considered by the F-tT. If the F-tT concluded that the decision was one which could not reasonably have been arrived at, its powers are limited to three alternatives set out in section 16(4).

31. Section 22 of the Tribunal, Courts and Enforcement Act 2007 ["the 2007 Act"] provides power to the Tribunal Procedure Committee to make rules of practice and procedure for the F-tT. That power is to be exercised with a view to securing "that in proceedings before the [F-tT] … justice is done" (section 22(4)(a)" and that the system is fair (section 22(4)(b)). There is also a requirement for the rule making power to be used to secure that proceedings in the F-tT are handled quickly (section 22(4)(c)). Rule 22 of the Tribunal Procedure (First-tier) (Tax Chamber) Rules 2009 sets out the procedure to be followed when the F-tT is asked to make a hardship order pursuant to section 16(3) of the Finance Act 1994. Schedule 5 paragraph 16 of the 2007 Act allows rules to be made "to confer on the First-tier Tribunal … such ancillary powers as are necessary for the proper discharge of its functions."

32. No rule has been made which provides the F-tT with power to provide interim relief. We were told that in only two instances do rules of the F-tT make such provision, namely in respect of decisions of the Gambling Commission and Immigration Services Commission: see rules 19A – 20 of the General Regulatory Chamber Rules. Of course, in the immigration field, there is a complex web of rules and statutory provisions which, in some circumstances, hold the ring pending an appeal. Mr Eadie QC was not disposed to suggest that such a power could not be conferred through

rules (although identifying the scope of the power might not be free from difficulty) and used to grant interim relief particularly if it were necessary to provide an effective appeal or to safeguard an appellant's rights to peaceful enjoyment of his possessions guaranteed by A1P1 pending such an appeal.

33. The primary argument advanced by Mr Coppel QC is that HMRC have power themselves to grant what amounts to interim relief by virtue of section 9(1) of the Commissioners of Revenue and Customs Act 2005 ("the 2005 Act") which provides:

> "(1) The Commissioners may do anything which they think –
>
> (a) necessary or expedient in connection with the exercise of their functions, or
>
> (b) incidental or conducive to the exercise of their functions."

The definition of "function" is found in section 51(2) of the 2005 Act:

> "In this Act –
>
> (a) "function" means any power or duty (including a power or duty that is ancillary to another power or duty), and
>
> (b) a reference to functions of the Commissioners or officers of Revenue and Customs is a reference to the functions conferred–
>
> (i) by or by virtue of this Act, or
>
> (ii) by or by virtue of any enactment passed or made after the commencement of this Act"

The Grounds

34. In summary, the claimants contend:

(i) HMRC have power pursuant to section 9(1) of the 2005 Act to permit an extant trader to continue selling alcohol wholesale by giving temporary approval pending the outcome of an appeal to the F-tT. Alternatively, HMRC may give time limited approval pursuant to section 88C of the 1979 Act (with or without further conditions). HMRC was wrong as a matter of law to conclude that they had no such power.

(ii) Had HMRC appreciated that they had power, they would necessarily have acceded to the requests made by each of these claimants and granted temporary approval pending the outcome of their appeals.

(iii) Irrespective of whether there is power in HMRC to do what was sought by the claimants, the High Court has power to grant an injunction to like effect pursuant to sections 31 or 37 of the Senior Courts Act 1981 ("the 1981 Act"). To the extent that the decision of this court in *CC & C* decided to the contrary, it should not be followed.

(iv) In any event, *CC & C* contemplated that injunctive relief might issue in exceptional circumstances. Such circumstances exist in respect of each of these claimants. The claim for relief need not be tied to judicial review proceedings of any decision of HMRC but can be granted by the High Court to ensure the effectiveness of the appeals and to vindicate the claimants' ECHR rights.

Summary of Conclusions

35. In my judgment section 9 of the 2005 Act does not provide HMRC with power to approve persons as fit and proper to trade in wholesale alcohol pending appeal to the F-tT, when they have concluded they are not fit and proper persons. Such an action could not be either necessary or expedient in connection with the exercise of their functions; nor would it be incidental or conducive to the exercise of their functions. It would be inconsistent with the statutory scheme.

36. By contrast, in my opinion section 88C of the 1979 Act itself provides a mechanism which would enable HMRC to achieve the same end in appropriate circumstances. It could properly conclude that a person is fit and proper for a limited time, possibly subject to further conditions which mitigate the risks perceived by HMRC in approving the person generally as fit and proper.

37. The jurisdiction of the High Court to grant interim relief, either as an adjunct to judicial review proceedings which exceptionally have been allowed to proceed in tandem with an appeal to the F-tT, or free-standing, under section 37 of the 1981 Act, is not ousted by the Scheme. It was no part of HMRC's case that it was. That said, *CC & C* was not decided *per incuriam* and cannot properly be distinguished. Injunctive relief would issue in rare circumstances, some of which were identified as possibilities in that case. They could include a clear and properly evidenced claim that a failure to grant interim relief (as opposed to the underlying decision) would violate the article 6 rights of the claimant by rendering the appeal illusory.

38. I would quash the decisions of HMRC refusing to entertain the request for temporary approval and remit the questions for redetermination. I would dismiss the appeals relating to the refusal of injunctions because, although the High Court had a wider jurisdiction than accepted by either judge, their factual conclusions on the evidence were such that no injunction would have issued independently of the judicial review proceedings in any event.

39. These appeals and claims for judicial review were expedited and heard over two full days. That did not allow the parties sufficient time to develop their rival factual contentions. Whilst Mr Coppel QC argued that if we found in favour of the claimants in the underlying judicial review claim we should direct HMRC to grant the temporary approval, that is an argument that depends on a detailed examination of the evidence. Having concluded that HMRC have power under section 88C to grant conditional approval, that matter must be returned to them for consideration.

Discussion

HMRC power to grant temporary approval pending appeal

40. Mr Coppel QC submitted that section 9 of the 2005 Act confers wide incidental powers upon HMRC; and the definition of the word "functions" is also broad. He accepted that there could be no question of automatic temporary approval (equivalent to an automatic stay in legal proceedings pending appeal) but that any decision would depend upon the circumstances. Those necessarily would include a consideration of the limited basis upon which the F-tT may allow an appeal and the nature of the reasons and evidence supporting the refusal. The argument then proceeds by the following steps to the conclusion that temporary approval may be granted under this section:

    a) HMRC's functions include granting and refusing approvals and conducting appeals in the F-tT;

    b) Temporary approval pending appeal does not contradict of circumvent the statutory scheme;

    c) Using section 9 to grant temporary approval would support Parliament's intention that there be an effective appeal and, moreover, avoid possible breaches of article 6 ECHR and A1P1;

    d) Accordingly, HMRC may give temporary approval under section 9 of the 2005 Act.

41. Mr Coppel QC was not enthusiastic to explore the alternative of time limited approval under section 88C itself (with or without further conditions) for the simple reason that if it were refused the appeal against that refusal would be to the F-tT under the same statutory provisions as govern the substantive refusal.

42. Mr Eadie QC submitted that the claimants are inviting HMRC, through the use of section 9 of the 2005 Act, to act in a way which is in contradiction to the statutory scheme. Having concluded that persons are not fit and proper for the purpose of wholesaling alcohol, to assert publicly that they are would subvert the statute. He accepted that the section 88C time limited approval route was theoretically open but that in practical terms it would run up against the same objection: HMRC would have concluded that the persons were not fit and proper for an unconditional approval. It would be almost impossible to envisage that a conditional approval could be given.

43. Both Andrew Baker J and William Davis J dealt with the section 9 argument summarily. They accepted the submissions advanced below by Ms Mannion that the temporary approval would undermine the statutory scheme because it would involve HMRC pretending to approve the claimants as fit and proper when that was not their view. They were right to do so.

44. Parliament introduced Part 6A of the 1979 Act to deal with the mischief of loss of revenue in the wholesale alcohol market and to remove unfair competition from those who do not abide by the rules. Wholesale activity became regulated in a way not identical with, but similar to, the regulation of those who are able to trade without the payment of duty. Authorisation by HMRC is akin to being granted a licence to trade. Parliament entrusted the primary judgements of whether a person is a fit and proper person to trade in wholesale alcohol to HMRC. Section 88C is premised on the basis that only those considered by HMRC to be fit and proper persons should be able to

trade in wholesale alcohol. The Scheme was completed by creating mirror image criminal offences. It became an offence to trade as a wholesaler without approval from HMRC and an offence to purchase from a wholesaler who one knows or ought to have known was not approved. This last aspect of the Scheme is underpinned by the public register of approved persons maintained by HMRC which makes it easy for someone buying alcohol from a wholesaler to discover their status. A person will not appear on that register (save following an order of a court) unless HMRC have concluded that the person is fit and proper. It generally contains a statement of the concluded view of HMRC.

45. Parliament made express provision for extant traders to continue to trade lawfully after the introduction of the Scheme pending the disposal of their application. As we have seen, section 54(13) of the 2015 Act provides that "an application is 'disposed of'" when it is determined by HMRC, rather than after any ensuing appeal. No express power was conferred on HMRC to delay the consequences of a failure to gain approval. The only material power identified by the parties is regulation 10 of the 2015 Regulations which enables HMRC to "prescribe descriptions of sales that are excluded sales for the purposes of Part 6A of the Act". That is the power upon which HMRC now rely for paragraph 4.5 of EN 2002 to allow trading to continue after the refusal. It operates by taking out of the Scheme the wholesale trading in question. We were not told how that information is conveyed to the public. A similar mechanism, at least in theory, could have been used to exclude sales by wholesalers pending the outcome of appeals to the F-tT. Yet it is no surprise that no such blanket exclusion has been made. There will be some whose appeals are, in truth, hopeless given the limited basis upon which the F-tT may intervene. What amounts to an automatic stay on the effects of the decision pending appeal would not be justified. Whether something more subtle could have been introduced using this regulation through EN 2002 is not something on which we heard argument. In any event, there is no challenge to a decision of HMRC regarding the use of their powers under this provision, nor is it easy to see how there could be.

46. It is part of the claimants' argument that the 30 days' grace (sometimes with an extension) operated by HMRC before the introduction of this mechanism on 27 March 2017 was a manifestation of their use, albeit without realising it, of a power under section 9 of the 2005 Act. Andrew Baker J doubted whether there was any power in HMRC to disapply the statutory scheme for 30 days (or longer) despite the obvious sense in having some such mechanism. Mr Eadie QC submitted that it certainly cannot be found in section 9. With that I agree.

47. Section 9 of the 2005 is in wide terms and has two components. First HMRC may do anything necessary or expedient in connection with the exercise of their functions. Secondly, they may do anything incidental or conducive to the exercise of their functions. "Functions" means any power or duty, including a power or duty that is ancillary to another power or duty. Mr Coppel QC seeks to expand the material functions in question beyond the grant or refusal of approval for the purposes of the Scheme to include the function of being a party to an appeal.

48. It is common ground that a power to do things incidental to statutory functions must be construed in the context of the statute as a whole: see Lord Templeman in *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1 at 31D to E. Although the Scheme is found in a different statute that does not diminish the need to construe section 9 of the

2005 Act in the context of the statutory scheme in which the function in question is located. *Hazell* was concerned with section 111 of the Local Government Act 1972 which put in statutory form the long-standing common law rule that corporations had implied power to do anything which was ancillary to the discharge of their statutory functions: Lord Templeman at 29 B to F. At first instance in the Divisional Court [1990] 2 WLR 17 at paragraph 36, Woolf LJ (as he then was), in a passage quoted with approval in *McCarthy & Stone (Developments) Ltd v Richmond Upon Thames London Borough Council* [1992] 2 AC 48 by Lord Lowry at 68H – 69A, said:

> "The critical part of the subsection are the words 'calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.' Before the subsection can authorise an activity which is not otherwise authorised there must be some other underlying function which can be authorised, to the discharge of which, the activity will facilitate or be conducive or be incidental."

49. The underlying function engaged in this case is the function of determining applications for approval under the Scheme. The ancillary power contended for by the claimants arises only if the application is refused; and that brings with it a conclusion by HMRC that the applicant is not a fit and proper person to conduct a wholesale alcohol business. It would be contrary to the statutory scheme for HMRC then to pretend that the persons concerned are fit and proper by approving them until the appeal process was over. How could HMRC conclude that it was necessary or expedient in connection with their function of determining applications for approval, to grant approval to a person under the Scheme who they had just determined was not fit and proper? How could it be incidental or conducive to the exercise of that function? The Scheme unequivocally contemplates that those who are not fit and proper should not continue trading. The claimants' case would require HMRC to state on the register something that contradicts the view they have formed. The claimants seek to circumvent this impediment by arguing that the function in question is that of participating in an appeal. I do not accept that HMRC's participation (if they choose to participate) as respondent to a statutory appeal can affect the conclusion. To use the section 9 power in the way suggested by the claimants would be inconsistent with the statutory scheme.

50. I turn to section 88C itself.

51. The question whether HMRC may grant conditional approval pending appeal through section 88C proceeds in the context of a decision that the person concerned is not fit and proper for unconditional approval. The question becomes whether they may approve a person as fit and proper for a limited period with or without further conditions.

52. Section 88C(6) defines an approved person as a person approved under section 88C. Mr Eadie QC readily accepted that subsections (2) and (3) "hang together", as he put it. That is to say that the two subsections do not pose disjunctive questions. It is feasible for persons to fail to satisfy HMRC that they are fit and proper to conduct a wholesale alcohol business without conditions, but to satisfy them that they are fit and proper subject to conditions. It is not a question simply of whether, in the abstract, a person is fit and proper. The question will be considered in the context of the

business run by the applicant. Nonetheless, he submitted that a temporary approval lasting a finite period could not be a proper basis to use the combined operation of the two subsections, because there would have been no relevant change of circumstance relating to fitness since the general decision was made. Mr Eadie QC accepted that the statute envisaged an approval being given for a limited time but only, as he put it, if HMRC were satisfied on day one that the person concerned was fit and proper.

53. We were not provided with any examples of approvals being granted on a time-limited basis or subject to other limitations or conditions. It is possible to envisage that HMRC might have well-founded concerns about the operation of a business at one of is locations, but not others. A condition limiting trading to specified sites might follow. They might consider the involvement of a particular proprietor, director or senior employee as critical to the grant of approval. By contrast, they might consider the involvement of a particular person to be inimical to the grant of approval. They might limit the period of approval to coincide with the known plans for retirement of an individual of significance in the business. They might limit the period to enable systems to be improved about which there is some concern. They might insist on the production of regular information to meet underlying concerns about record keeping and the like.

54. A conclusion that a person is not fit and proper for unconditional approval does not preclude conditional approval of that person. In my view HMRC have power under section 88C(3) to grant a temporary approval pending appeal if they conclude that a person is fit and proper for that limited period, perhaps with additional conditions. That is a possible conclusion thagt might be reached even if a general approval is being denied. In substance, if not in form, that is what HMRC were doing before 27 March when they purported to grant 30 days or more grace. The focus of a decision would remain whether the person was fit and proper but for the more limited purpose. Hardship and the impact on appeal rights would be extraneous considerations. Section 88C does not confer upon HMRC a broad discretionary power of approval but it is possible that they could conclude that a person is fit and proper for a limited time to continue trading. To the extent that HMRC apprehended that they had no power to do what was asked of them by the claimant, in my view they erred.

55. Mr Eadie QC warned that even if this power existed, it is theoretical and unlikely to be exercised in favour of an applicant who has failed to satisfy HMRC on the broader basis. That is as may be, but it is a power which the claimants were entitled to expect HMRC to consider using. This issue only came into focus during the appeal. It was mentioned briefly by Mr Coppel QC before Andrew Baker J who considered that it could not operate after the decision on the wider basis had been made: see paragraph 35(2). But there is nothing in the statutory scheme relied upon by HMRC which excludes the possibility of what amounts to an ancillary application for temporary approval in the face of a refusal of the general application.

56. Mr Eadie QC further warned that were HMRC to accede to a request of this nature all impetus to determine an appeal expeditiously would be lost. He submitted that an appellant would have an incentive to slow things down because the position after the appeal could not improve upon the position in the interim.

57. That is a legitimate concern which the F-tT would be astute to guard against. The timescales involved in the introduction of the scheme have been unfortunate. As I

have indicated, the original intention of Parliament was that the Scheme would operate from 1 January 2016. That slipped to 1 April 2016. Then a year was allowed before the introduction of section 88F prohibiting the purchase of wholesale alcohol save from an approved wholesaler. No doubt the expectation was that HMRC would make their decisions rather more quickly than occurred in these (and some other) cases and that any appeals would be heard quickly. We have no detail of the steps taken to expedite the appeals in these cases, but it is to be hoped that when faced with credible evidence that a business will fail whilst awaiting an appeal, and equally that jobs will be lost, the F-tT would be able to accommodate swift appeals. To the extent that delay in hearing an appeal might render it academic or otherwise ineffective in vindicating the position of the appellant, any appellate body must strive, within the limits of its powers and resources, to resolve the appeal quickly. To the extent that the claimants suggest that delay in the appellate process imperils their A1P1 rights on account of the irreparable damage that will occur whilst waiting for the appeal, or their rights under article 6 ECHR to an effective judicial determination of the question whether they may continue to trade, the procedures in the F-tT itself should generally provide a remedy.

High Court injunctive relief

58. *CC & C* provides the background to this part of the claims. The case concerned the trade in duty-suspended goods. Those who trade in duty-suspended goods must be approved as fit and proper persons and registered by HMRC. Such registration may be revoked. The claimant company had been approved since 2004 with about 95% of its turnover being in duty-suspended goods. In September 2015 its registration was revoked with immediate effect. The claimant appealed to the F-tT. A review option was also available as in the cases before us. The claimant also issued proceedings in the Administrative Court seeking judicial review of the revocation decision, but the real purpose was to seek interim relief pending the appeal to the F-tT. The claimant argued that the High Court had jurisdiction to grant an injunction under section 37(1) of the 1981 Act. That provides:

> "The High Court may by order (whether interlocutory or final) grant an injunction … in all cases in which it appears to the court to be just and convenient to do so."

59. The claimant argued that where registration was revoked with immediate effect the High Court should be able to grant an injunction pending both a review and appeal to avoid the risk of serious injustice, especially if the business would be ruined waiting for an appeal to be heard. On the assumption that there was jurisdiction, the claimant argued that it should be exercised on *Cyanamid* principles (*American Cyanamid Co v Ethicon Ltd* [1975] AC 396). At first instance the judge had accepted that the court had jurisdiction to grant an injunction but refused to grant it. In the appeal the claimant's case was that it had an arguable prospect of success in its appeal and, in consequence, on a straightforward balance of convenience test an injunction should be granted. HMRC did not dispute that the court had jurisdiction to grant an injunction (just as here Mr Eadie QC does not) but contended that it could only be just and convenient to grant an injunction in cases of capriciousness, bad faith or other outrageous behaviour on the part of HMRC.

60. Underhill LJ, with whom Lewison LJ (adding a short judgment of his own) and Arden LJ agreed, gave the lead judgment. His "starting point" (paragraph 39) was that Parliament had enacted a self-contained scheme that included the revocation of registration by HMRC of a duty-suspended trader, with an alternative remedy available in the F-tT. Through citation from the judgment of Lord Jauncey of Tullichettle in *Hartley Development Inc v Commissioner of Inland Revenue* [1996] 1 WLR 727, at 735F-736D he set out the principle that judicial review of a decision for which Parliament had provided a statutory appeal is normally not available. Lord Jauncey recognised exceptions, for example, abuse of power or unfairness which might justify the intervention of the court notwithstanding the alternative remedy. The meaning of "fairness" in this context was taken from the discussion of Lord Templeman in *R v Inland Revenue Commissioners, Ex parte Preston* [1985] AC 835 at pages 862 -867. Having noted that the claimant's aim was to achieve interim relief pending the appeal Underhill LJ continued:

> 41. … Parliament could have provided for the First-tier Tribunal to have power to make suspensory orders pending the outcome of an appeal, but it did not do so. I do not think that it is open to the Court to provide remedies or procedures for which the statute does not provide – particularly so when, as I have pointed out above, care was obviously taken to specify precisely what the Tribunal could and could not do. Where it is intended that the powers of the Court, including the power to grant interim relief, may be deployed "in aid of" (to use Mr Jones's phrase) another tribunal, that is typically done by express provision: see for example section 44 of the Arbitration Act 1996.
>
> 42. The absence of any power under the statute to suspend the effect of a relevant decision pending appeal may be capable of operating harshly in the case of decisions to revoke the registration of registered excise dealers and shippers, but it is not incomprehensible. The statute describes the right to trade in duty-suspended goods as a "privilege", and the nature of the business is such that it is a privilege that should only be accorded to those whom HMRC believe they can trust. There would be an obvious awkwardness in the Tribunal, or indeed the Court, being able to require HMRC to continue, for an indefinite period pending the outcome of an appeal, to confer that privilege on traders who they have ceased to believe are fit and proper persons. Parliament could reasonably have regarded the loss of registration pending an appeal as simply a risk of the business which traders must accept.
>
> 43. I do not therefore believe that the Court is entitled to intervene to grant interim relief where the registration of a trader in duty-suspended goods is revoked simply on the basis that there is a pending appeal with a realistic chance of success. But it does not follow that there are no circumstances in which the Court may grant such relief; and, as noted above, HMRC do

not in fact so contend. The correct principle seems to me to be this. If a relevant decision is challenged only on the basis that it is one to which HMRC could not reasonably have come the case falls squarely within section 16 of the Act, and the Court should not intervene. However, where the challenge to the decision is not simply that it is unreasonable but that it is unlawful on some other ground, then the case falls outside the statutory regime and there is nothing objectionable in the Court entertaining a claim for judicial review or, where appropriate, granting interim relief in connection with that claim. A precise definition of that additional element may be elusive and is unnecessary for present purposes. The authorities cited in *Harley Development* refer to 'abuse of power', 'impropriety' and 'unfairness'. Mr Brennan referred to cases where HMRC had behaved 'capriciously' or 'outrageously' or in bad faith. Those terms sufficiently indicate the territory that we are in, but I would sound a note of caution about 'capricious' and 'unfair'. A decision is sometimes referred to rhetorically as 'capricious' where all that is meant is that it is one which could not reasonably have been reached; but in this context that is not enough, since a challenge on that basis falls within the statutory regime. As for 'unfair', I am not convinced that any allegation of procedural unfairness, however closely connected with the substantive unreasonableness alleged, will always be sufficient to justify the intervention of the Court: Mr Brennan submitted that cases of unfairness would fall within the statutory regime to the extent that the unfairness impugned the reasonableness of the decision. As I have noted above, the types of unfairness contemplated in *Preston* – which is the source of the use of the term in *Harley Development* – were of a fairly fundamental character. But since procedural unfairness is not relied on in this case I need not consider the point further.

44. In short, therefore, I believe that the Court may entertain a claim for judicial review of a decision to revoke the registration of a registered excise dealer and shipper, and may make an order for 'interim re-registration' pending determination of that claim (subject, no doubt, to such conditions as it thinks fit), in cases where it is arguable that the decision was not simply unreasonable but was unlawful on one of the more fundamental bases identified above. Such cases will, of their nature, be exceptional. That approach may seem unfamiliar inasmuch as it involves making a distinction which it is not normally necessary to make between "mere" unreasonableness and other grounds of public law challenge of the type identified above: indeed there are plenty of observations in the authorities to the effect that the various ways of formulating such a challenge tend to blur into one another (including, famously, by Lord Greene MR in *Wednesbury* itself – see *Associated Provincial Picture*

> *Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, at p. 229). But I see no conceptual difficulty about making such a distinction where the circumstances call for it; and here it arises naturally from the way in which the jurisdiction of the Tribunal is defined in section 16 of the 1994 Act."

61. Before turning to Mr Coppel QC's arguments it is as well to seek to distil the *ratio* of this decision. In my view, it has the following components:

(i) The High Court has jurisdiction to grant an injunction maintaining registration pending appeal to the F-tT, which has been revoked by HMRC, when a parallel challenge to that decision is made in judicial review proceedings;

(ii) The jurisdiction should not be exercised simply on the basis that the person concerned has a pending appeal with a realistic chance of success;

(iii) If the decision is challenged only on the basis that HMRC could not reasonably have come to it, the case falls within section 16 of the Finance Act 1994 and the court should not intervene;

(iv) If the challenge to the decision is on some other ground outside the statutory regime the court may entertain judicial review or grant interim relief.

(v) A definition of the additional element needed is elusive but would include "abuse of power", "impropriety" and "unfairness" as envisaged in the *Harley Development* case.

Whilst on one reading, paragraph 44 of *CC&C* might be thought to constrain the grant of relief to the types of case just referred to, I do not consider that could be a correct reading because Underhill LJ was avowedly not attempting an exhaustive definition of the additional element that might suffice.

62. The judgment is striking for the absence of any discussion of the ECHR. That is explained in footnote 3, where Underhill LJ raises the possibility of A1PI and the Human Rights Act 1998 providing another route to the grant of interim relief, but the claimant was not disposed to argue the point because "it was doubtful whether registration would fall within the scope of" A1P1. There was no reference to the possibility that article 6 ECHR might provide a route on the basis that the appeal would be ineffective given the delay.

63. Mr Coppel QC submitted that *CC & C* applies only to decisions relating to revocation of registration to trade in duty-suspended goods and so is distinguishable from decisions relating to registration to trade in duty-paid alcohol. Furthermore, he submits that it was decided *per incuriam* the decisions of the House of Lords in *Channel Tunnel Group v Balfour Beatty Construction* [1993] AC 334 and *The Siskina* [1979] AC 210.

64. In support of the first argument Mr Coppel QC refers to the observation by Underhill LJ in paragraph 42 that trading in duty-suspended alcohol is a "privilege", a description found in the statute itself. That is correct as a matter of language but it does not provide any basis for distinguishing the reasoning in *CC & C* when

considering the Scheme with which these claims are concerned. In material respects, they are the same – to trade in the alcohol concerned a person must be approved as fit and proper and be registered. The review and appeal rights are the same. The potential harsh consequences for a person whose registration is revoked are the same as are the consequences for those who, before the entry into force of the Scheme, traded before approval was required but who fail in their bids for registration. The reasoning, in my opinion, applies with equal force to the Scheme for approval of wholesalers of duty-paid alcohol.

65. A decision of the Court of Appeal is not binding if it was given *per incuriam*: see *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 at 726, 729, 730 per Lord Greene MR. In *Morelle Ltd v Wakeling* [1955] 2 QB 379 at 406 Lord Evershed MR explained what that meant:

> "As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of a decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam* must, in our judgment, consistently with the *stare decisis* rule which is an essential feature of our law, be, in the language of Lord Greene MR, of the rarest occurrence."

66. The claimants' argument is that Underhill LJ neither mentioned, nor was referred to, the two decisions of the House of Lords (*The Siskina* and *Channel Tunnel Group*). The propositions derived from those cases relied upon by the claimants are, first, that the High Court has power to grant an injunction to protect the *status quo* until the rights of the parties are determined by another court: see *The Siskina* at 233 C – D. Secondly, that the existence of a statutory power to grant an interim injunction in support of a tribunal in specified circumstances does not disentitle the High Court from granting an interim injunction in other circumstances.

67. To my mind there are two complete answers to this submission:

i) Whilst Underhill LJ did not cite either of the two decisions of the House of Lords on which the claimants rely, Lewison LJ referred to *Fourie v Le Roux* [2007] UKHL 1, [2007] 1 WLR 320, where Lord Scott had reviewed the authorities "starting from *The Siskina* ... and ending with the *Channel Tunnel Group Ltd* ..." Lewison LJ cited it in support of the proposition that the court had jurisdiction to grant an injunction whilst cautioning against the exercise of that jurisdiction on the basis of the "court's settled practice".

ii) There is nothing inconsistent between the two decisions of the House of Lords and *CC & C*. The jurisdiction of the court to grant relief was not in issue.

68. The *Channel Tunnel Group* case concerned a dispute over payment for part of the work done on the Channel Tunnel which resulted in the defendants threatening to

cease further work unless they were paid. Disputes were subject initially to a reference to a panel of experts and then to arbitration in Brussels. The plaintiffs sought an interim injunction to restrain the defendants from suspending work, without seeking to arbitrate the underlying dispute. The defendants sought a stay of the action in favour of arbitration. The Court of Appeal held that injunctive relief was not available under the Arbitration Act 1950 and that there was no power to do so under section 37 of the 1981 Act either. Moreover, even if there was such power, judicial restraint would tell against the grant of an injunction. The court granted a stay to the defendants. In dismissing the plaintiff's appeal the House of Lords (a) upheld the stay; (b) agreed that the Arbitration Act 1950 contained no power to grant an injunction in respect of foreign arbitration proceedings but (c) there was power under section 37 of the 1981 Act to grant interim relief but because injunctive relief would largely pre-empt any decision ultimately made by the arbitrators it was not appropriate to grant relief.

69. Lord Mustill discussed the application of the Arbitration Act 1950: 357 B and following. Section 12(6) gave power to grant an interim injunction in aid of a domestic but not a foreign arbitration: 360B. He noted that the grant of an injunction under section 12(6) could "not be inconsistent with the spirit of the arbitration agreement or with the policy of the court to enforce such agreements" and that "the court must be careful not to meddle unduly in matters which properly belong to the arbitrator": 360E. The power to grant an injunction in aid of a foreign arbitration absent from the Arbitration Act 1950 was expressly contemplated by section 25(3) of the Civil Jurisdiction and Judgments Act 1982. But the power had not been exercised. It was submitted that the court could not, under the cloak of section 37 of the 1981 Act, do something for which Parliament had provided but which had not yet been introduced. At 363H to 364C Lord Mustill explained why he did not agree. The fact that Parliament was contemplating the specific grant of specific powers should not deprive the court of jurisdiction under section 37. He said:

> "It may be that if and when section 25 is made applicable to arbitrations, the court will have to be very cautious in the exercise of its general powers under section 37 so as not to conflict with any restraint which the legislature may have imposed in the exercise of the new and specialised powers. Meanwhile, although the existence of these new powers in reserve may well be one of the factors which lead the court to be very cautious about granting relief in the cases of the present kind, it is another thing to hold that the court should cut itself altogether off from the possibility of a remedy, and I would not be prepared to go that far."

He added at 365B:

> "The purpose of interim measures of protection … is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute."

70. The approach of the Court of Appeal in *CC & C* is not at odds with the ratio of the *Channel Tunnel Group* case. The court recognised a jurisdiction under section 37 of the 1981 but that it should be exercised cautiously given the statutory context governing the regulation of the wholesale alcohol trade and the appeal mechanism provided for by Parliament.

71. A recent example of a broadly similar approach to interim injunctive relief may be found in *The National Crime Agency v N and the Royal Bank of Scotland* [2017] EWCA Civ 253. N, a foreign exchange dealer, held accounts with the bank. The bank suspected that the content of some of the accounts of N constituted criminal property. In consequence, the bank froze the accounts pursuant to provisions of the Proceeds of Crime Act 2002. The bank would have been open to the possibility of prosecution had it not frozen the accounts. The statutory scheme provided a mechanism by which the bank could seek the consent of the NCA to unfreeze the accounts subject to express time scales. N disputed that the accounts contained criminal property and sought interim relief in the form of an order that the bank continue to operate the accounts. As Hamblen LJ noted (paragraph 1), that would "cut across and in effect disapply the consent regime". Nonetheless, the court rejected a submission that it lacked jurisdiction to make such an order but accepted that the statutory procedure was highly relevant to the exercise of the court's discretion. In paragraph 60 Hamblen LJ said:

> "The public interest in the prevention of money laundering as reflected in the statutory procedure has to be weighed in the balance and in most cases is likely to be decisive. Cases justifying such intervention are likely to be exceptional, although the test is not one of exceptionality. One possible example given in argument might be demonstrable bad faith by the bank."

He continued by explaining that the balance of convenience would almost always fall in favour of the bank, given that it would be compelled by the order to risk committing a criminal offence. That might be overcome if the court could be satisfied at the interim application stage that there was no real prospect of criminal liability: paragraph 62.

72. That case provides another example of the application of the same broad principles.

The Exceptions

73. The claimants do not suggest that HMRC have abused their power, or are guilty of impropriety or acted with unfairness in the sense discussed in *CC & C.* The claimants are appealing to the F-tT on the basis that HMRC could not reasonably have come to the conclusions they did. They accept that they do not fall within any of the exceptions identified as examples in that case. Mr Coppel QC submitted that if a claimant were able to establish that in the absence of interim relief there would be a risk of a violation of its convention rights, then to avoid a breach of the ECHR interim relief should issue in an appropriate case.

74. The convention rights relied upon by the claimants are article 6 ECHR and A1P1.

75. The essence of the argument under article 6 is that without interim relief the claimants can demonstrate that they will not survive to pursue an appeal given the immediate and destructive consequences for their businesses. For the purposes of A1P1, Mr Coppel QC recognised that the Strasbourg jurisprudence suggests that if a business is shut down, or ceases to be viable, in the public interest for reasons of regulation and control an argument that the regulatory action is disproportionate is unlikely to prosper. In any event, the substance of that point can be taken in the appeal: *R (Ahmad) v HMRC* [2015] EWHC 3954 (Admin) per Mitting J at paragraph 15. The argument he advances is different. It is not the decision to refuse approval that is in issue but the lack interim relief which is said to be a disproportionate interference with the A1P1 rights of the claimants. Whether under article 6 or A1P1 the basis of the argument is the same. By the time the appeal comes on the claimants will have ceased to be viable.

76. Mr Eadie QC accepted that the High Court may grant an interim injunction to vindicate the convention rights of an appellant (article 6 or A1P1) but emphasised that the first port of call must be the F-tT itself which could be expected, if at all possible, to expedite an appeal to avoid the very mischief which would be relied upon in support of injunctive relief. That must be right. Whilst accepting the possibility of injunctive relief of this nature, Mr Eadie QC was also at pains to emphasise the need for proper evidential support for an argument based upon the ECHR.

77. The first question when considering article 6 ECHR is whether the subject matter of the dispute concerns "civil rights and obligations". It is not suggested on behalf of HMRC in these cases that it does not. So much is clear from *Tre Traktorer Aktiebolag v Sweden* (1991) 13 EHRR 309.

78. In that case, the applicant company had its licence to sell alcohol revoked. It complained of a violation of both article 6 and A1P1. The violation of article 6 was based upon the contention that the decision could not be reviewed by a court. There had been a background of regulatory difficulty and a prosecution of its owner for tax offences, of which she was acquitted on 27 May 1983. In the meantime, in the face of official opposition the licence had been renewed, with conditions, by an administrative board on 14 January 1983. The local Social Council appealed to the National Board of Health and Welfare ("the Welfare Board") which quashed the decision to grant a licence and referred it back for redetermination. The administrative board then revoked the licence with immediate effect. The company shut the restaurant it ran the next day. The company nonetheless appealed asking that the revocation decision be delayed for about seven months, but the Welfare Board saw no reason to depart from the usual practice of immediate revocation. It made its decision within a month. The company then sought compensation from the Government of Sweden for the consequences of the revocation and a declaration that the administrative board had violated its convention rights.

79. The Strasbourg Court concluded that the dispute concerned a civil right for the purposes of article 6(1): paragraph 44. There was a violation of article 6 because neither the administrative board nor the Welfare Board on appeal was a court or tribunal. In that regard the remedy did not meet the requirements of article 6. The claimants before us have their appeals to the F-tT which satisfies this aspect of article 6. The complaint advanced by Mr Coppel QC is that the judicial proceedings in the F-tT will be ineffective.

80. The ECHR "is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective": see *Airey v Ireland* (1979) 2 EHRR 305 at paragraph 24, in the context of article 6(1) referring to a series of foundational decisions of the Strasbourg Court. That principle has been considered in a range of different contexts including *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWCA Civ 1622 at paragraph 46 (availability of legal aid) and *R (Kiarie) v Secretary of State for the Home Department* [2015] EWCA Civ 1020; [2017] UKSC between paragraphs 48 -51 (effectiveness of out of country appeal in an article 8 case).

81. In my opinion, a statutory appeal against a refusal of approval which is unable to provide a remedy before an appellant has been forced out of business, rendering the appeal entirely academic (or theoretical or illusory in the language of the Strasbourg Court) is capable of giving rise to a violation of article 6 which the High Court would be entitled to prevent by the grant of appropriate injunctive relief under section 37 of the 1981 Act. To that extent, the exceptions enumerated by Underhill LJ in *CC&C* can be expanded to include cases in which a claimant can demonstrate, to a high degree of probability, that the absence of interim relief would violate its ECHR rights. Moreover, such an injunction need not be ancillary to a claim for judicial review of any decision of HMRC, although it might be.

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

83. It was no part of Mr Coppel's case that interim relief should issue automatically even if a claimant could demonstrate that it would not be able to survive the wait for the appeal to be heard. He recognised that factors such as the strength of the appeal and the nature of the concern that led to the refusal to approve would be factors to weigh when considering whether to grant an injunction, itself a reflection of the fact that the Scheme exists to protect the public purse and legitimate traders.

84. In cases of this sort, the hierarchy of a claimant's attempts to safeguard its position pending appeal should be:

    i) Seek temporary approval from HMRC under section 88C of the 1979 Act;

    ii) Seek expedition from the F-tT;

    iii) Consider an application for an injunction in the High Court.

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

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

The judgments below

86. In the ABC Ltd case William Davis J considered himself bound by *CC & C* to refuse injunctive relief even if the claimants could show that the appeal would be rendered "nugatory". However, at paragraph 48 he concluded that the evidence did not suggest that was inevitable. The evidence demonstrated that there was a prospect that the appeal would be rendered nugatory, no more. In the X Ltd and Y Ltd case, Andrew Baker J dealt with the strength of the evidence relating to the business prospects of the claimants in paragraphs 39 and 40. He was unpersuaded by the assertions that they would not survive the appeal process. In those circumstances, even if either judge had considered a free-standing injunction by reference to rights guaranteed by article 6 ECHR, it would have been refused.

Result

87. I would quash the decisions of HMRC by which they concluded that they had no power to grant temporary approval to the claimants to trade in wholesale alcohol pending appeal and remit the question for reconsideration. I would maintain the interim relief currently in place pending reconsideration.

Lady Justice King

88. I agree.

Lord Justice Patten

89. I also agree.