Neutral Citation: **[2026] UKUT 00092 (TCC)**

Case Number: UT-2024-000130

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing venue: The Rolls Building
Fetter Lane
London
EC4A 1NL

Heard on: 5 and 8 December 2025
Judgment date: 26 February 2026

VAT – penalties – director's liability notice (DLN) – section 60 and 61 VATA 1994 – Kittel appeal in 2020 – HMRC expressly not pleading dishonesty – found that the Appellant's company, through the Appellant, knew or should have known that its transactions were connected with the fraudulent evasion of VAT – the Kittel test – the findings of the 2020 Tribunal used by the FTT in 2024 in penalty proceedings under section 61 VATA against the Appellant on the grounds of his alleged dishonesty – whether an abuse of process – whether appellant's appeal against issuing of the DLN should be allowed – appeal allowed

Before

MR JUSTICE RAJAH
JUDGE GUY BRANNAN

Between

ASHLEY CHARLES TREES

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr James Pickup KC, instructed by Keystone Law, Solicitors

For the Respondent: Mr Ben Hayhurst, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal against the decision of the First-tier Tribunal ("**FTT**") (Judge Chapman KC and Ms Stott) handed down on 6 June 2024 (the "**2024 Decision**"). The 2024 Decision concerned a director's liability notice issued by HMRC to the Appellant ("Mr Trees") on 7 July 2021 (the "**DLN**") pursuant to section 61(1) Value Added Tax Act 1994 ("**VATA 1994**"), in the sum of £1,974,850. In this decision, the FTT had:

> (1) refused Mr Tree's application pursuant to Rule 5(3)(j) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("**the Rules**"[1]) for a stay and/or pursuant to Rule 8(3)(c) and 8(7)(a) for a direction barring the Respondents from taking further part in proceedings on the ground that issuing the DLN was an abuse of process of the Tribunal; and
>
> (2) dismissed Mr Trees' appeal against the DLN.

2. The DLN notified Mr Trees that HMRC intended to recover the full amount of a civil evasion penalty which had been issued to CCA Distribution Ltd ("**CCA**") on the same day in the same amount pursuant to section 60(1) of VATA 1994. HMRC's basis for the DLN was an allegation that (on HMRC's case) dishonest conduct of CCA was wholly attributable to dishonesty of Mr Trees whilst he was a director of CCA.

3. Permission to appeal to the Upper Tribunal was granted on all grounds by this Tribunal (Judge Raghavan) on 25 April 2025.

4. We allow this appeal for the reasons set out below.

BACKGROUND

5. The matters underlying this appeal have a long history.

6. CCA was incorporated in November 2001 and went into administration on 21 August 2009. It was dissolved on 16 November 2022. Throughout its trading activities, Mr Trees was CCA's sole director and shareholder.

7. In 2003, CCA began trading in the grey market for mobile phones, with Mr Trees having prior experience of mobile phone trading through a separate company. Mr Trees undertook all CCA's transactions during the relevant periods, being April 2006, May 2006 and June 2006 (the "**VAT Periods**").

8. On 13 July 2007 and 13 August 2007, HMRC issued decisions denying CCA the right to deduct input tax to the value of £9,874,254.54 in relation to transactions in the VAT Periods. This was on the basis that HMRC considered that CCA's transactions were connected to fraud, and that CCA knew or ought to have known that its transactions were connected with the fraudulent evasion of VAT as part of a Missing Trader Intra-Community fraud (an "**MTIC fraud**").[2]

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[1] and references to a "Rule" are to be construed accordingly.

[2] For reference, see Hallett LJ's description of an MTIC fraud in *Citibank*/*E Buyer* at [101], paragraph 34 below.

9. CCA appealed against the decisions to the FTT. The FTT (Judge Cornwell-Kelly and Mr Agboola) allowed the appeal (Mr Agboola dissenting) in a decision released on 22 April 2013 ([2013] UKFTT 253 (TC)). HMRC appealed to the Upper Tribunal, which allowed the appeal, set aside the FTT decision, and remitted the appeal to a differently constituted FTT. The Upper Tribunal's decision was released on 24 September 2015 ([2015] UKUT 513 (TCC)). CCA appealed against the Upper Tribunal's decision to the Court of Appeal, which dismissed the appeal by a judgment dated 23 November 2017 ([2017] EWCA Civ 1899).

10. The FTT (Judge Mosedale and Mrs Hunter) (the "**2020 Tribunal**") subsequently reheard and dismissed CCA's remitted appeal (the "**Kittel appeal**") following a twelve-day hearing (the "**2020 Hearing**"). In a decision released on 14 May 2020 ([2020] UKFTT 222 (TC)), the FTT found that CCA's claim for input tax deduction on the transactions was correctly denied by HMRC on the basis that (i) all of CCA's transactions during the VAT Periods were connected with the fraudulent evasion of VAT, and (ii) Mr Trees (acting on behalf of CCA) knew that all of the transactions were connected to such fraudulent evasion (the "**2020 Decision**"). CCA did not appeal the 2020 Decision.

11. As noted at [12] of the 2024 Decision, it is significant that HMRC had not alleged dishonesty against Mr Trees before the FTT in 2020, and had only put its case on the basis that Mr Trees (acting on behalf of CCA) knew, or ought to have known, that the transactions were connected with fraud[3]. HMRC confirmed this to Mr Trees by way of correspondence on 11 January 2019:

> "For the avoidance of doubt, we confirm that HMRC do not seek to allege dishonesty or fraud against CCA or Mr Trees. HMRC's case is based on the *Kittel* test of knew or should have known."

12. On 7 July 2021, HMRC issued CCA with a £1,974,850 civil evasion penalty pursuant to section 60 (1) VATA 1994, on the basis that the conduct of CCA which led to the evasion of VAT involved dishonesty. Also on 7 July 2021, HMRC issued a DLN pursuant to section 61 (1) VATA 1994 notifying Mr Trees that it was the intention of HMRC to recover the full amount of the company penalty from him on the basis that the penalty issued to CCA was wholly attributable to his dishonesty. Mr Trees requested a review of the DLN, which HMRC upheld on 17 November 2021. Mr Trees subsequently issued a notice of appeal in respect of the DLN on 13 December 2021 (being the appeal underlying this decision).

13. On 20 February 2023, Judge Redston heard three applications by HMRC: (i) first, to strike out the parts of Mr Trees' grounds of appeal which sought to relitigate the findings in the 2020 Decision that Mr Trees knew that the transactions were connected to fraud, (ii) second, for the 2020 Decision to stand as evidence in the present appeal, and (iii) third, for case management directions. By a decision released on 23 March 2023, Judge Redston granted all three of HMRC's applications (the "**2023 Decision**"). In respect of Mr Trees' ability to defend HMRC's allegation of dishonesty, the 2023 Decision included the following:

> "[73] It is true, as Mr Trees says, that the issue to be decided in his appeal is different: the FTT hearing his appeal will have to decide whether he was dishonest, not whether he knew the transactions were connected with fraud. But that does not give him an unfettered right to put forward any grounds of

[3] The requisite knowledge is referred to as "**Kittel knowledge**" within the *Kittel* principle (see the decision of the European Court of Justice in *Axel Kittel v Belgian State* (C-439/04) [2008] STC 1537).

> appeal. In *Gore Wood*[4], Lord Bingham approved the dictum that it would be an abuse of process to allow a person "to litigate a second time what has already been decided between himself and the other party to the litigation". Litigation between HMRC and CCA, of which Mr Trees was the controlling mind, has already been concluded on the basis that Mr Trees knew the transactions were connected to fraud. Allowing him to reargue that point would be to permit him to litigate it a second time.
>
> [74] That does not mean that Mr Trees cannot argue, at the hearing of his appeal, that he was not dishonest: that is a new point and the burden of proving it will rest with HMRC. But in deciding whether or not he was dishonest, the parties and the FTT hearing his appeal must start from the position that he knew the transactions were connected with fraud."

14. Mr Trees did not appeal the 2023 Decision. It should perhaps be noted that Mr Trees was not legally represented at the hearing leading to the 2023 Decision.

15. As a result of the 2023 Decision, Mr Trees' grounds of appeal against the DLN were essentially restricted to a plea that he was not dishonest, notwithstanding the findings of the 2020 Decision that he knew that CCA's transactions in the VAT Periods were connected to the fraudulent evasion of VAT.

16. Judge Redston made further case management directions released on 24 March 2023 and 28 July 2023. By a decision released on 25 August 2023 (the "**2023 Disclosure Decision**"), Judge Redston refused an application by Mr Trees for specific disclosure of any documents relating to fraudulent traders which mentioned his name or CCA's name. This refusal was upon the basis that disclosure equivalent to CPR standard disclosure had already been given.

17. The appeal was subsequently heard before Judge Chapman KC and Ms Stott between 8 and 14 March 2024 (the **"2024 Hearing"**), leading to the 2024 Decision. Alongside the appeal of the DLN, the Appellant brought an application seeking to strike-out / debar HMRC from the proceeding on the ground that it was abusive for HMRC to rely on dishonesty in the DLN appeal when it "*could and should"* have raised this issue as part of the 2020 Appeal. In the 2024 Decision, the Tribunal dismissed the application, finding that whilst the issue of dishonesty "*could*" have been raised in the 2020 Appeal, it could not be said that it "*should*" have been so raised. The FTT went on to find, based on the conclusions of the 2020 Decision in relation to *Kittel* knowledge, that the Appellant's conduct was dishonest and dismissed the appeal, upholding the DLN. Essentially, the FTT in the 2024 Decision simply rehearsed the various findings of fact contained in the 2020 Decision – no further evidence was placed before the 2024 Hearing to prove Mr Tree's alleged dishonesty. In other words, the 2024 Decision simply relied on the findings of fact made in the 2020 Decision.

THE LEGAL FRAMEWORK

18. There was common ground between the parties as to the relevant legal framework, as set out below.

VATA 1994

19. Civil evasion penalties under VATA 1994 are governed by section 60(1), as follows:

[4] *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 – see paragraph 26 below.

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

20. Subsections 2 and 3 specify that claims for input tax repayments are within the scope of the section where the amount was "falsely claimed".

21. Section 61 then governs penalties in respect of a director's liability. Subsection (1) sets out:

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

22. Section 76 provides for, *inter alia*, assessments of amounts due by way of penalty under sections 60 and 61, and section 77 sets out the time limit in which a penalty can be issued:

> "(2) […] an assessment under section 76 of an amount due by way of any penalty […] may be made at any time before the expiry of the period of 2 years beginning –
>
> (a) in the case of a penalty under section 65 or 66, […]; and
>
> (b) in any other case,
>
> with the time when the amount of VAT due for the prescribed accounting period concerned has been finally determined."

Article 6 ECHR

23. It was not disputed that the DLN constitutes a criminal charge within the autonomous meaning of Article 6 ECHR (*Customs Excise Commissioners v Han* [2001] EWCA Civ 1048), and Mr Trees is therefore entitled to the protections provided by this provision, including a right to a fair hearing in a reasonable time.

Abuse of process – the authorities

24. The doctrine of abuse of process derives from the well-known judgment of Sir James Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100 as follows:

> "115. In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not

> (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time... Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and prima facie, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule."

25. This rule was further considered by the Supreme Court in *Virgin Atlantic Airways Limited v Zodiac Seats UK Ltd* [2013] UKSC 46, where Lord Sumption stated that the rule in *Henderson v Henderson* applies where a party seeks to raise "in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones." He compared this with matters of estoppel as follows:

> "[17] Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see *King v Hoare* (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see Civil Jurisdiction and Judgments Act 1982, section 34. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197-198. Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against

> abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

26. In *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 ("**Gore Wood**"), Lord Bingham further set out that the fact that a matter *could* have been raised in previous proceedings does not necessarily make the later proceedings abusive. Instead, the real question was whether a matter *should* have been raised. A broad, merits-based judgment was required. Both parties in the present appeal placed great emphasis on Lord Bingham's judgment. Lord Bingham stated as follows at 31B to 31F:

> "But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

27. In *Gore Wood*, Lord Bingham also rejected the argument that the rule in *Henderson v Henderson* could not apply where the parties in the two sets of proceedings were different, where the parties are sufficiently connected, stating at 32C to 32G:

> "Two subsidiary arguments were advanced by Mr ter Haar in the courts below and rejected by each. The first was that the rule in *Henderson v Henderson* 3 Hare 100 did not apply to Mr Johnson since he had not been the plaintiff in the first action against GW. In my judgment this argument

was rightly rejected. A formulaic approach to application of the rule would be mistaken. WWH was the corporate embodiment of Mr Johnson. He made decisions and gave instructions on its behalf. If he had wished to include his personal claim in the company's action, or to issue proceedings in tandem with those of the company, he had power to do so. The correct approach is that formulated by Sir Robert Megarry V-C in *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510 where he said, at p 515:

> "Second, 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.'"..."

28. The justification for the rule in *Henderson v Henderson* is to achieve finality. In *Barrow v Bankside* [1996] 1 WLR 257, Sir Thomas Bingham MR stated as follows at 260:

> "... The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

29. As regards the tax tribunals, the FTT's jurisdiction to strike out or debar a party to litigation can include doing so for abuse of process: *Shiner v HMRC* [2018] EWCA Civ 31 and *CF Booth v HMRC* [2020] UKFTT 0035(TC) at [63] and [64] ("***CF Booth***").

Dishonesty and the role of the "fact-finding tribunal"

30. The applicable test for dishonesty is set out by Lord Hughes in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67 ("***Ivey***"). In *Ivey*, the Supreme Court considered whether the High Court and Court of Appeal had been correct in whether a professional gambler had cheated (for the purposes of section 42 of the Gambling Act 2005) in a card game (Punto Banco) in a casino. It will be noted that the judgment in *Ivey* was delivered a few weeks *after* the Court of Appeal's judgment in *Citibank/Ebuyer* (see below at paragraph 34 *et seq*).

31. Lord Hughes said:

> "54. A significant refinement to the test for dishonesty was introduced by *R v Ghosh* [1982] QB 1053. Since then, in criminal cases, the judge has been required to direct the jury, if the point arises, to apply a two-stage test. Firstly, it must ask whether in its judgment the conduct complained of was dishonest by the lay objective standards of ordinary reasonable and honest people. If the answer is no, that disposes of the case in favour of the defendant. But if the answer is yes, it must ask, secondly, whether the

> defendant must have realised that ordinary honest people would so regard his behaviour, and he is to be convicted only if the answer to that second question is yes.
>
> …
>
> [74] These several considerations provide convincing grounds for holding that the second leg of the test propounded in *Ghosh* does not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* and by Lord Hoffmann in *Barlow Clowes*: see para 62 above. When dishonesty is in question the fact-finding tribunal must first 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. When once his actual state of mind as to knowledge or belief as to 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."

32. In considering the assessment of the "fact-finding tribunal", *Edwards (H.M. Inspector of Taxes) v Bairstow & Harrison* [1956] AC 14 sets out the high bar for an appellate court to overturn a factual finding by the first instance court at [72]:

> "But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination."

Consideration of VAT fraud – dishonesty and the *Kittel* test

33. The Court of Justice of the European Union held in *Kittel* that input VAT recovery could be denied:

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

34. In seeking to prove the state of the taxable person's knowledge, the Court of Appeal considered the interaction between *Kittel* knowledge and dishonesty in *HMRC v Citibank NA and E Buyer UK Limited* [2017] EWCA Civ 1416 (***"Citibank/E Buyer***"):

35. In *Citibank/ E Buyer* Vos C said:

> "78. Finally in this regard, 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.*

79. There was, in my judgment, on the basis of these allegations, *no foundation for either the F-tT or the UT to have required HMRC to plead dishonesty against Citibank in order to be allowed to allege that Citibank knew that its transactions (a) were contrived, (b) facilitated fraud by others, or (c) were connected to fraud*.

85. 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. … 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." (Emphasis added)

36. Hallett 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.

…

106. It follows that an order requiring HMRC to plead dishonesty, on the basis it alleges actual knowledge of participation in a fraud, would have the effect of significantly and unnecessarily raising the bar, in terms of what it must prove to deny the taxpayers' claims and the cogency of the evidence called.

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. None the less, there is a line and entering into a transaction knowing that it is connected with fraud does not necessarily equate to dishonest conduct in either the objective or the subjective sense*.

…

109. In summary, in my view, if HMRC do not wish and do not need to plead dishonesty, the concept of dishonesty should not be raising its head. As Sir Geoffrey Vos C has observed, an analysis of whether the allegations

> amounted to dishonesty was unnecessary and inappropriate in litigation of this kind. Traders should not have to face a plea of dishonesty, HMRC should not be obliged to take on the burden of proving dishonesty, and judges should not have to address the added unnecessary complication of dishonesty simply on the basis HMRC seeks to prove actual knowledge of a fraud, in accordance with the *Kittel* test, and relies on facts and or inferences from facts that could support a finding of dishonesty. (Emphasis added)

37. Sir Terence Etherton MR said:

> "118. …The principal issue in each appeal is whether or not the allegations made by HMRC in its original statements of case for denying the taxpayers the right to reclaim input tax were sufficiently particularised. Particulars had to be sufficient to enable the taxpayers fully to understand the case against them and to enable the F-tT to achieve the overriding objective of dealing with the cases fairly and justly (in accordance with the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 2).
>
> 119. The complexity has arisen through entanglement over the extent to which the first limb of the *Kittel* test necessarily or ordinarily will involve an allegation of dishonesty and, if so, the implications of that on the extent to which particulars must be given of that dishonesty. *The issue of dishonesty in this context is, however, a digression from the critical issue, which is one of actual or constructive knowledge, namely that the trader will not be able to reclaim input tax 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.*
>
> 120. *It was common ground before the UT and is common ground before us that the Kittel test does not require dishonesty. Unless dishonesty is expressly alleged, the only question is whether the pleaded allegations are relevant to the issue of actual or constructive knowledge for the purposes of the Kittel test: if not, they are irrelevant and should be struck out or at least ignored, and, if they are, the only question is whether they are sufficiently particularised to enable the taxpayers fully to understand the case against them and to enable the F-tT to achieve the overriding objective of dealing with the case fairly and justly. For that reason, it is entirely irrelevant whether dishonesty is implicitly alleged in HMRC's statements of case.* (Emphasis added)

38. In addition to consideration of the knowledge test under *Kittel*, the courts have analysed various specific circumstances in which *Kittel* proceedings have interacted with a subsequently issued DLN:

> (1) In *HMRC v Kishore* [2021] EWCA Civ 1565 ("*Kishore*"), it was found *not* to have been an abuse of process for HMRC to impose a mis-declaration penalty on Mr Kishore subsequently to refusing his claim to deduct input tax on the basis that this bifurcated process is specifically catered for in VATA. The Court of Appeal held that section 77 (2) VATA 1994 allowed HMRC a two-year period in which to issue a penalty after the final determination of the amount of tax due.
>
> (2) In *C F Booth*, the Upper Tribunal held that a finding of "*deliberate inaccuracy*" for the purpose of VATA 1994 tax penalties under Schedule 24 FA 2007 does not require HMRC to prove dishonesty.

(3) In *Hackett v HMRC* [2020] UKUT 212 (TCC), it was confirmed that HMRC has a wide discretion as to whether to pursue a case against an individual director through civil penalty procedures or criminal prosecution.

THE FTT'S 2024 DECISION

39. In the 2024 Decision, the FTT determined both the Appellant's application in respect of abuse of process and the substantive appeal in respect of the DLN.

40. In respect of abuse of process, the FTT concluded at [58] that:

> "Applying a broad merits-based judgment, the failure to rely upon dishonesty at the CCA Appeal does not cause HMRC's defence of the present appeal to be an abuse of process pursuant to the rule in *Henderson v Henderson*. Whilst dishonesty could have been raised in the CCA Appeal, it cannot be said that it should have been raised."

41. So far as *Kishore* and the VATA 1994 statutory framework was concerned, whilst the FTT agreed with the Appellant that the specific issue regarding the timing of the penalty issue could be distinguished, it found the reasoning to be applicable to the issue of abuse in this case:

> "40. […] Once it is accepted that there is no obligation to issue a penalty prior to the two-year period in section 77 of VATA 1994 (as we must in the light of *Kishore*) it cannot be said that HMRC has an obligation to treat the *Kittel* proceedings as if a penalty had been issued. To do so would have the same effect as saying that HMRC could issue a penalty but not rely on dishonesty in any appeal, despite that being central to upholding a notice pursuant to section 60 or section 61. Even if that were strictly correct, this is a strong reason for rejecting the submission that dishonesty should have been raised in *Kittel* proceedings. This is because it is artificial to distinguish between attacking the issuing of the penalty and attacking the reliance upon dishonesty. In reality, they are the same complaint and would amount to saying that whilst HMRC had the power to issue a penalty or director's liability notice, they are under an obligation not to do so if they have not laid the groundwork first by alleging dishonesty in any previous *Kittel* appeal."

42. The FTT then went on to reject the submissions of Mr Pickup KC (who appeared for Mr Trees both before the FTT and before us) that Mr Trees was prejudiced by HMRC not having pleaded dishonesty earlier, such that it was an abuse for it to seek to do so in this later appeal. The following reasons bear particular emphasis:

> "44. We agree with Mr Pickup that the reason for not pleading dishonesty earlier does not matter. However, we do not accept that Mr Trees is prejudiced such that it is an abuse for HMRC to rely upon dishonesty in this appeal. This is for the following reasons.
>
> 45. First, we agree with Mr Hayhurst that Mr Trees' complaint about his inability to explore all facts at the same time as a consideration of dishonesty is really a complaint about his inability to relitigate the matters in the 2020 Decision as a result of the 2023 Decision. Given that it has already been held to be an abuse of process for him to reopen the 2020 Decision, it follows that it is not an abuse of process for him not to be able to do so.
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> 46. Secondly, we do not accept that Mr Trees has been denied the ability to challenge or examine the evidence. He (through the CCA Appeal)

had the ability to do this in the CCA Appeal in respect of knowledge and means of knowledge and is able to do so within this appeal as regards dishonesty. As noted by Judge Redston in the 2023 Decision, CCA was expertly represented in the CCA Appeal and it took place before a very experienced tribunal. Judge Redston found at [76] that, "It would thus be extremely surprising if there had been any unfairness in the cross-examination process, and I do not accept that this was the case."

47. Thirdly, we do not accept that paragraph 114 of the 2020 Decision disposes of issues of dishonesty. Indeed, the combination of the 2020 Decision and the 2023 Decision expressly leaves open the question of dishonesty. Mr Pickup particularly relies upon the words in paragraph 114 "even if the allegations were consistent with a state of dishonesty on the part of the appellant and/or its director, the allegations were not allegations of dishonesty." This is not saying (or at least does not have the effect) that Judge Mosedale and Mrs Hunter were making findings of or equivalent to dishonesty. Indeed, they expressly say that they would, "reach no conclusion about whether the appellant's and/or its director's behaviour was dishonest or fraudulent." We also have in mind paragraph 74 of the 2023 Decision, which we quoted earlier and which again marks the dividing line between Mr Trees' knowledge that the transactions were connected to fraud (which was decided in the 2023 Decision and cannot be relitigated) and whether or not he was dishonest, which is a matter for this appeal.

48. Fourthly, the whole context of the present appeal is that the CCA Appeal did not deal with dishonesty and that HMRC must now establish dishonesty in the present appeal. Mr Trees is entitled to submit that he was not dishonest (and expressly does so). This is the answer to Mr Pickup's question as to what more Mr Trees can do. He can present evidence that he was not dishonest insofar as doing so does not reopen matters decided in the 2020 Decision, he can challenge HMRC's position that he was dishonest, and he can submit that HMRC have not proved their case. The extent to which the evidence is available to do this and the extent to which such challenge or submission is possible or successful are matters for the substantive appeal rather than the Application.

49. Fifthly, Mr Trees has had CPR disclosure on matters relating to dishonesty. Whilst it is common ground that HMRC was not required to give CPR disclosure in the CCA Appeal, there may well be a dispute as to whether it was given anyway. We do not descend into that dispute and, for the purposes of this Application, assume that it was not upon the basis that there was no order for HMRC to do so. Importantly, however, Judge Redston has already made a determination in the 2023 Disclosure Decision that Mr Trees has had within this appeal all the disclosure to which he is entitled in respect of dishonesty. The failure to plead dishonesty in the CCA Appeal, therefore, has not deprived Mr Trees of CPR standard disclosure relating to dishonesty in this appeal."

43. As regards *Ivey,* the FTT rejected Mr Pickup's submissions that dishonesty had to be determined by the *Kittel* Tribunal (i.e. the 2020 Tribunal) as the fact-finding Tribunal, noting at [50] that *"it is reading too much into that wording to say that this precludes the present situation."* It goes on to record that it will itself undertake a fact-finding role in respect of both elements of the *Ivey* test, and that:

"The difference between this appeal and a case where dishonesty is to be considered in circumstances where knowledge has not already been the subject of a concluded *Kittel* appeal is that the 2020 Decision will provide

> evidence (which cannot be relitigated) that Mr Trees knew that the transactions were connected with fraud. Indeed, the 2020 Decision has been admitted into evidence by virtue of the 2023 Decision for precisely that purpose."

44. The FTT also determined that its conclusion on abuse of process was not affected by Article 6 considerations:

> "56. […] As regards unreasonable delay, Mr Trees has not suffered sufficient (or any) prejudice for the purposes of this appeal as regards his ability to challenge the DLN or to have a fair trial. There was no suggestion that CCA did not have a fair trial in the course of the CCA Appeal (which, again, has already been dealt with by Judge Redston in the 2023 Decision). Given Mr Pickup's rhetorical question as to what more Mr Trees can do in this appeal, no category of evidence has been identified that is not available to Mr Trees now than would have been available at an earlier stage."

45. Having made those findings, the FTT proceeded to apply the two-stage dishonesty test in *Ivey*. Further to the ruling in the 2023 Decision on issue estoppel, the FTT had to start from "*the position that he* [Mr Trees] *knew these transactions were connected with fraud"*, i.e. accepting the findings in the 2020 Decision. Accordingly, *"the only issue in dispute […] was whether Mr Trees was acting dishonestly in such conduct."*

46. From this starting position, the FTT considered in turn twelve findings from the 2020 Decision alleged by HMRC to establish dishonesty, either individually or together. In each case, the FTT adopted the 2020 Decision's findings for the purpose of the first limb of *Ivey*, and proceeded to conclude that the conduct was dishonest by the objective standard of ordinary decent people for the purpose of the second limb.

47. Although the FTT treated the findings in the 2020 Decision as "evidence", it is well established that the findings of fact of one decision maker are not to be admitted as evidence in a subsequent fact finding hearing because the decision at that hearing must be made by the judges appointed to hear it, and not another; *Hoyle v Rogers* [2014] EWCA Civ 257, [2015] 1 QB 265, at [39]. The effect of the 2023 Decision was that Judge Redstone determined that there was an issue estoppel in relation to the findings of fact in the 2020 Decision as to Mr Trees' knowledge. That decision has not been appealed.

GROUNDS OF APPEAL

48. On 25 April 2025, the Upper Tribunal granted the Appellant permission to appeal on the following grounds:

> (1) Ground 1: that the FTT erred in law by dismissing the Mr Trees' application to stay/debar HMRC from taking further part in the proceedings. The basis of the application was that to permit HMRC to raise the issue of dishonesty in subsequent penalty/DLN proceedings was an issue which could and should have been raised in the earlier substantive "*Kittel*" appeal and was abusive following the principle in *Henderson v Henderson*;
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> (2) Ground 2: that in dismissing the Mr Trees' application to stay/debar HMRC on the grounds of *Henderson v Henderson* abuse of process at [58] the FTT reached a decision which no reasonable tribunal could have reached (per *Edwards v Bairstow*);

(3) Ground 3: that the FTT at [40] erred in law and fact and wrongly conflated two separate and distinct matters, namely the issuing of penalties with the raising of the issue of dishonesty, when it was conceded that the issuing of any penalty had to await the outcome of any substantive *Kittel* appeal and thereby knowledge of culpability, whilst the issue of dishonesty required a penalty raised pursuant to ss60/61 VATA 1994 could and should have been determined by the FTT hearing the substantive *Kittel* appeal;

(4) Ground 4: that the FTT erred in law in its application of the test in *Ivey* (to determine dishonesty) since the test expressly required the "*fact-finding tribunal*" to determine both stages of the test and it was therefore implicit that the issue of dishonesty should be raised and determined before the "*fact-finding tribunal*", namely the substantive *Kittel* tribunal;

(5) Ground 5: that the FTT erred in law in wrongly deciding that it was "a fact-finding tribunal" as contemplated by *Ivey* and could as such satisfy itself as to both stages of the *Ivey* test relying on the facts found by the substantive *Kittel* tribunal and itself judging those facts by the objective standards of ordinary decent people;

(6) Ground 6: that the FTT erred in law at [50] in determining that the test in *Ivey* did not preclude separate tribunals conducting the separate stages of the two-stage test and further that in tax cases it was or might be permissible for a separately constituted tribunal at a later date to conduct the second stage of the test by reference to the findings of fact made by an earlier tribunal; and

(7) Ground 7: that the FTT wrongly applied the objective second stage of the *Ivey* test against "*the knowledge or belief as to the facts*" as found by the original substantive *Kittel* tribunal without hearing or considering (save for the decision of the substantive tribunal itself) any evidence as to the state of mind of Mr Trees.

49. Within these seven grounds, there are three core contentions raised by Mr Trees for resolution by the Upper Tribunal, as follows:

(1) First, that HMRC "*could and should"* have litigated the issue of dishonesty, as the principal element of the DLN, during the 2020 Hearing, and its failure to do so amounts to an abuse pursuant to the rule in *Henderson v Henderson*;

(2) Second, that the FTT erred in its approach to the *Ivey* dishonesty test as a matter of law, because it did not act as "the fact-finder" and instead relied upon the factual findings in the 2020 Decision for the purpose of assessing the first (subjective) limb; and

(3) Third, that the FTT erred in its application of the *Ivey* dishonesty test, because the findings upon which it relied from the 2020 Decision were not based upon a pleaded and evidenced case of dishonesty from HMRC; and

DISCUSSION

Grounds 1, 2 and 3

50. It is convenient to take Grounds 1, 2 and 3 together.

51. Mr Trees gave evidence before the FTT at the 2020 Hearing and was cross-examined. His evidence was given on the basis that HMRC was not alleging dishonesty. The purpose of the hearing was to determine whether his company CCA, of which he was the sole director and shareholder, knew or should have known that its transactions were connected with the fraudulent evasion of VAT (*Kittel* knowledge).The FTT concluded that Mr Trees knew that the transactions were connected with fraud.

52. Prior to that hearing, HMRC confirmed to CCA that they were not seeking to plead dishonesty on the part of Mr Trees or CCA. Relying on the judgment of the Court of Appeal in *Citibank/ E Buyer* (see paragraphs 35-37 above), HMRC knew that they did not need to allege dishonesty in order to establish *Kittel* knowledge.

53. However, in the 2024 Hearing and the 2024 Decision the facts found by the FTT in the 2020 Decision, which included Mr Tree's evidence given at the 2020 Hearing, were used in the section 61 VATA 1994 penalty proceedings against Mr Trees based on his alleged dishonesty. HMRC produced no further evidence at the 2024 Hearing beyond that of the 2020 Decision (and a witness statement from Mr Vincent D'Rozario on behalf of HMRC, which did not appear to influence the 2024 Decision). At [69] of the 2024 Decision the FTT stated:

> "The parties agreed that the evidence of Stage One of the *Ivey* test for dishonesty was to be found in the 2020 Decision. They also agreed that it was then a matter for this tribunal as to whether such conduct was objectively dishonest when considered in accordance with Stage Two of the *Ivey* test."

54. Allegations of dishonesty or fraud are treated very seriously in civil proceedings and give rise to specific protections.

55. The position has recently been set out by this Tribunal in *Elphysic Ltd & Ors* v HMRC [2025] UKUT 236 (TCC) (Rajah J and Judge Andrew Scott)("*Elphysic*") at [62]-[68] as follows:

> "62. The purpose of pleadings and particulars within pleadings is to ensure that the opposing party knows the case it has to meet: *see British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 45 Con LR at pages 4-5; and *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at 792j to 793b. This is a principle of fairness and natural justice.
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> 63. Where allegations of misconduct are made, it is particularly important that the opposing party knows what is being alleged and can prepare for trial accordingly. This is so whether the allegations relied upon as part of the claim are of misconduct by the opposing party or by a non-party. The more serious the allegation of misconduct, the greater is the need for particulars of the basis for the allegation. There is ample authority for higher vigilance in relation to particularisation of allegations of dishonesty, bad faith or fraud: see, for example, *Re H* (sexual abuse, standard of proof) [1996] AC 563 at 586 (Lord Nicholls); *Three Rivers DC v Bank of England* (No.3) [2001] UKHL 16; [2003] 2 AC 1 at [51] (Lord Hope), [184] - [187] (Lord Millet); *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250 at 268 (Buckley LJ); *Armitage v Nurse* [1998] Ch 241, 256-257 (Millet LJ); and *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 (Millet LJ).

64. Part 16 of the Civil Procedure Rules ("CPR") requires a claimant to set out any allegation of fraud in the particulars of claim. The Chancery Guide at paragraph 4.8 requires a party who alleges fraud, dishonesty, malice or illegality to state it in a Statement of Case and give full particulars, including the primary facts from which any alleged fraud or dishonesty is to be inferred. An identical provision can be found in the Commercial Court Guide: see C.1.3(c). As paragraph 4.9 of the Chancery Guide says, a party must not make allegations of fraud or dishonesty unless there is credible evidence in support. These statements of well-established principles, conveniently summarised in those guides, are applicable to all proceedings, including those in the FTT: see *Ingenious Games LLP v HMRC* [2015] UKUT 105 at [63]; and *Citibank NA v HMRC* at [90(iii)], [103].

65. Most of the authorities are concerned with fairness to a party to the litigation but there also needs to be fairness to non-parties. In *Vogon International Ltd v Serious Fraud Office* [2004] EWCA Civ 104 the Court of Appeal held that a judge was not entitled to make findings of fraud against a witness appearing for the defendant when fraud had neither been pleaded nor put to the witness in cross-examination. May LJ (with whom Lord Phillips MR and Jonathan Parker LJ agreed) said:

> "It is, I regret to say, elementary common fairness that neither parties to the litigation, their counsel nor judges should make serious imputations or findings in any litigation when the person concerned against whom such imputations or findings are made have not been given a proper opportunity of dealing with the imputations and defending themselves."

66. In *MRH Solicitors* [2015] EWHC 1795 (Admin), Nicol J said;

> "…[I]n the absence of good reason a Judge ought to be extremely cautious before making conclusive findings of fraud unless the person concerned has at least had the opportunity to rebut the allegations."

67. The issue of whether a judge should make such findings against a non-party, however, is simply one of fairness and depends on the facts of the case. In *HMRC v Katib* [2019] UKUT 189, where no fraud or dishonesty was pleaded, the Upper Tribunal was satisfied that HMRC had been given sufficient notice of Mr Katib's allegations of fraud on the part of a non-party in Mr Katib's witness statement, and, in the circumstances of that case, it was fair for the FTT to have made findings of dishonesty against the non-party in his absence.

68. Where the non-party is a witness, fairness to both the defendant and the witness dictates that a witness is not ambushed with allegations of impropriety. That is usually not the way in which that witness can give their best evidence as the overriding objective requires: see rule 1.1(a) of the CPR and the corresponding rule in the FTT's procedural rules. It has been said that specific allegations of dishonesty which are going to be put to a witness should be pleaded even where the allegations are not part of the claim being made: this is to ensure that the defendant has a proper opportunity to consider the allegations and decide how he may wish to defend himself (see *Alta Trading UK Ltd v Bosworth* [2025] EWHC 91 (Comm)).”

56. Both parties accepted that under section 77(2) VATA 1994 HMRC had two years from the release of the 2020 Decision on 14 May 2020, that being “the time when the amount of VAT due for the prescribed accounting period concerned has been finally determined” to issue a DLN.

57. However, Mr Pickup's argument was not that the penalty assessment should have been issued prior to the two-year period but rather that, if HMRC envisaged circumstances in which a DLN might be issued under section 61VATA 1994, dishonesty should have been pleaded in the *Kittel* appeal. It was, in Mr Pickup's submission, fundamentally unfair and an abuse of process that Mr Trees should have been induced to give evidence in the *Kittel* appeal, and indeed that the whole of that hearing proceeded, on the basis of the assurance that no allegation of dishonesty was being made only for that evidence, and for the findings of fact based on that evidence, to be used subsequently to justify the imposition of a section 61 penalty on the grounds of dishonesty. The 2020 Tribunal was the fact-finding tribunal and the allegation of dishonesty should have been pleaded and particularised at that hearing so that Mr Trees could be given the opportunity to respond to the allegations.

58. We accept Mr Pickup's submission. We regard it as inherently unjust that Mr Trees was assured, in HMRC's letter of 11 January 2019, that HMRC would not be pleading dishonesty or fraud before the 2020 Tribunal only for the evidence and findings of fact arising from that hearing to be used against him in penalty proceedings in the 2024 Tribunal where dishonesty was the primary issue.

59. Both parties relied on the judgments of Wigram VC in *Henderson v Henderson* and of Lord Bingham in *Gore Wood* quoted above at paragraphs 24and 26-27 respectively. In particular, much of the argument on these grounds of appeal focused on the words of Lord Bingham in *Gore Wood* where he stated that the fact that a matter *could* have been raised in previous proceedings does not necessarily make the later proceedings abusive; the question was whether the matter *should* have been raised. It was accepted that although the 2020 Hearing and Decision concerned CCA, this company was "the corporate embodiment" of Mr Trees (see *per* Lord Bingham quoted at paragraph 27 above).

60. In our view, HMRC not only *could* but *should* have raised the allegation of dishonesty in the *Kittel* appeal. The failure to do so resulted in findings of fact against CCA and Mr Trees which have been used as *prima facie* evidence of his dishonesty in the section 61 DLN proceedings culminating in the 2024 Decision. This effectively circumvented the principle that a defendant should only face allegations of dishonesty when those allegations are clearly pleaded and particularised and where an opportunity is given to the defendant to answer those allegations.

61. It is clear from *Citibank/E Buyer*, as Mr Hayhurst (who appeared for HMRC before the FTT and before us) submitted, that HMRC did not *need* to plead dishonesty in order to prove *Kittel* knowledge. Based on *Citibank/E Buyer* there was, he contended, a distinction between actual *Kittel* knowledge and dishonesty. We accept both submissions. However, there was nothing to prevent HMRC from pleading dishonesty. In our view, HMRC *should* have pleaded dishonesty in order subsequently to bring section 61 penalty proceedings based on the findings of fact in the Kittel appeal. As the present appeal demonstrates, the "fine line" between *Kittel* knowledge and dishonesty is vanishingly small, as the fact that HMRC effectively produced no new evidence at the 2020 Hearing indicates.

62. In the 2020 Hearing the burden of proof to prove *Kittel* knowledge was on HMRC[5]. HMRC had substantial quantities of evidence which they deployed in persuading the 2020 Tribunal that Mr Trees (and, therefore, CCA) knew that its transactions were connected with

[5] *Mobilx Ltd & Ors v HMRC* [2010] EWCA Civ 517 at [81].

fraud. It should have been possible, prior to the 2020 Hearing for HMRC, to form a view whether they would be able to put forward a prima facie case of dishonesty with a view to the subsequent issue of a section 61 DLN.

63. In the 2023 Decision the FTT referred to *Hackett v HMRC* [2016] UKFTT 781 (TC). In that case HMRC notified Intekx Limited, the company of which Mr Hackett was the sole director, of a deliberate inaccuracy penalty assessment[6] in the sum of £12,833,984.49 on the basis that it knew that its transactions were connected to fraud. At the same time HMRC sent Mr Hackett a personal liability notice under paragraph 19 of Schedule 24 to the Finance Act 2007 ("FA 2007") specifying the whole of that sum as the amount payable by Mr Hackett on the basis that the deliberate inaccuracy was attributable to Mr Hackett as an officer of the company. The FTT in the 2023 Decision stated:

> "88. HMRC also applied for the judgment in CCA 2020 to be "admitted as evidence" in the DLN proceedings. Mr Kerr [Counsel for HMRC] relied on *Hackett*, where having decided that it would be an abuse of process to allow the appellant to challenge the facts or issues decided in period 09/01 because they had already been finally determined in *Intekx 2014*, Judge Berner said at [75]:
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> > "It follows from my conclusion that there can be no dispute as to the facts and issues determined by the tribunal in *Intekx 2014* that, in relation to period 09/06, the decision of the tribunal in that appeal is admissible."
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> 89. In *Hackett*, HMRC had also applied for the *Intekx 2014* judgment to stand as evidence in relation to periods 07/09 to 10/12 and 01/13 to 07/13, on the basis that the circumstances were similar. Judge Berner allowed that application, holding at [48] that relevant evidence should be admitted unless there is a compelling reason to the contrary, and continued at [49]:
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> > "This is a case where, although questions of input tax recovery are necessarily viewed by reference to individual accounting periods, transactions must be examined not in isolation but having regard to their attendant circumstances and context, the relevance of 'similar fact' evidence and the fact that the tribunal, in examining the state of knowledge of the company and Mr Hackett, is entitled to look at the totality of the deals effected by Intekx, and their characteristics…It will be for the tribunal that hears Mr Hackett's appeal to determine what weight, if any, is to be accorded to the *Intekx 2014* decision outside the confines of its own facts and circumstances. It cannot, however, in the circumstances of this appeal, be regarded as irrelevant, nor have I been able to identify any compelling reason why the decision should not be admitted."
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> 90. When *Hackett* reached the UT, there was no challenge Judge Berner's decision to admit *Intekx 2014* as evidence in relation to period 09/06. In relation to the later periods, the UT upheld Judge Berner's decision, saying at [95]:
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> > "The FTT decided that the decision in *Intekx 2014* was relevant for the reasons it gave at [49] of the Decision. We can detect no error of law in the FTT's approach. The FTT made the point that it will be for the tribunal that hears Mr Hackett's appeal to determine what weight, if any,

[6] See paragraph 70 below to the effect that a deliberate inaccuracy penalty does not necessarily involve an allegation of dishonesty.

> is to be accorded to *Intekx 2014* outside the confines of its own facts and circumstances. In those circumstances, there is no basis on which we can interfere with the FTT's decision on this point and indeed we agree entirely with the FTT's reasoning."
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> 91. In response to Mr Kerr, Mr Trees reiterated that he did not agree with the conclusions of the FTT in CCA 2020 and wanted to dispute various findings of fact.
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> The Tribunal's view
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> 92. HMRC's application is that CCA 2020 be admitted as relevant evidence in relation to Mr Trees' appeal against a DLN issued in relation to exactly the same VAT periods as already had been considered by the FTT.
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> 93. *Hackett* provides a helpful parallel. Mr Hackett did not seek to challenge Judge Berner's decision that *Intekx 2014* be admitted as relevant evidence in his appeal against the part of the PLN which related to period 09/06, in other words, the self-same period considered and decided in *Intekx 2014*. CCA 2020 likewise provides highly relevant evidence in relation to Mr Trees' DLN appeal. Indeed, the UT in *Hackett* went further, upholding Judge Berner's decision that *Intekx 2014* was also to be admitted as relevant evidence in Mr Hackett's appeal against the parts of the PLN which related to other VAT periods not considered in Intekx 2014.
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> 94. I also considered Rule 15(2) of the Tribunal Rules, which allows relevant evidence to be excluded if it would be "unfair" to admit it. Although not put in those terms by Mr Trees, in essence he was arguing that it would be unfair to admit CCA 2020 because he wanted to submit at the hearing of his appeal that he did not "know" about the connection to fraud, and also to rely on the related factual points set out earlier in this decision, see §78ff.
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> 95. I have already decided it would be an abuse of process for Mr Trees to advance those grounds at the FTT hearing of his appeal against the DLN. Consistently with that conclusion, I find that it is fair for the judgment itself to be admitted as relevant evidence in the hearing of his appeal."

64. Mr Hayhurst submitted that it was open to Mr Trees to produce further evidence at the 2024 Hearing in relation to the DLN to indicate that he had not been dishonest. Based on *Citibank/E Buyer* there was, he contended, a distinction between actual *Kittel* knowledge and dishonesty. We accept that it would have been open to Mr Trees to produce evidence at the 2024 Hearing to the effect that he was not dishonest. That, however, ignores the fundamental issue that in relation to the DLN the evidence and findings in the 2020 Decision, on which the 2024 Decision was based, were procured on the basis that HMRC were not alleging dishonesty. Therefore, those findings were based on an examination of the evidence in circumstances where dishonesty was not in issue and where, if it had been, all the procedural protections in relation to allegations of dishonesty would have applied. At the 2024 Hearing there was effectively placed on Mr Trees an evidential burden to rebut allegations of dishonesty where the primary legal burden of proof, which lay on HMRC in respect of the DLN, was said to be discharged by evidence that was obtained in circumstances where dishonesty was not alleged and where there was no compliance with the ordinary procedural rules (see *Elphysic* at paragraph 55 above) concerning allegations of dishonesty. In our judgment, that was unfair. Fairness involved looking at both the 2020 Hearing and the 2024 Hearing as a whole – fairness cannot be compartmentalised in the way that has occurred.

65. Mr Hayhurst also contended that section 77(2) VATA 1994 expressly provided a two-year period from the date on which CCA's liability was determined by the 2020 Decision in

which HMRC were entitled to issue a penalty under section 60 and a DLN under section 61. The scheme of the legislation was, he said, one which allowed the substantive liability to tax to be determined before a penalty was issued. Requiring HMRC to plead dishonesty in the 2020 Hearing would have constituted a fetter on HMRC's power to issue a civil evasion penalty during this two year window.

66. We accept, of course, that HMRC have a two-year window in which to issue a civil evasion penalty and a DLN. That does not, however, allow HMRC to use the *Kittel* appeal, i.e. the 2020 Hearing, in a way which is fundamentally unfair and which offends against the principles of natural justice, viz by establishing findings of knowledge, whilst disavowing any intention to allege dishonesty, but then using those findings (and only those findings) to allege dishonesty in subsequent proceedings.

67. In this context, we reject Mr Hayhurst's submission that to require HMRC to plead dishonesty in the 2020 Hearing would contradict the substance of the decision of the Court of Appeal in *HMRC v Kishore* [2021] EWCA Civ 1565. The cross-appeal in that case involved a mis-declaration penalty under section 63 VATA 1994, a penalty which did not involve an allegation of dishonesty. In his cross-appeal, the taxpayer argued that it was an abuse of process for HMRC not to issue the penalty at the same time as they denied the underlying right to deduct input tax on the basis of *Kittel* knowledge. In that case, unlike the present appeal, the taxpayer's *Kittel* appeal had been struck out for non-compliance and therefore did not proceed to a full hearing. Newey LJ said:

> "I have not been persuaded. *Johnson v Gore Wood & Co* confirms that the "bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all". In the present case, however, Mr Kishore is complaining of HMRC's failure to do something other than make a claim or advance a defence in proceedings, viz. issue penalty assessments. Any proceedings were always going to be initiated by Mr Kishore; HMRC could never have invoked the penalties by way of defence to the Kittel appeals; and the penalties could not have been put in issue before the FTT, whether in conjunction with the Kittel appeals or otherwise, until after they had been raised. In any event, it is "wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive", as Lord Bingham explained in *Johnson v Gore Wood & Co*. For a party to be held to be acting abusively, it must be the case that he should have raised a claim or defence in previous proceedings, not just that he could have done so. In this context, paragraph 91 of the UT's decision is in point. The UT there said this:
>
> > 'ѕ77 [of the VATA] clearly permits HMRC a two-year period after the conclusion of the underlying tax appeal within which to issue a penalty assessment. The section is unambiguous and there is no basis for reading it down in reliance on Article 6. We consider, in agreement with HMRC, that there is in any event a sound basis for this extended limitation period, given that HMRC has a choice of penalties (a s63 VATA misdeclaration penalty or a s60 dishonest evasion penalty) depending on the degree of culpability of the taxpayer. At least in some cases (the present case being one) that degree of culpability is not established until after the underlying tax appeal has been concluded. Mr McGurk's contention that s60 (dishonest evasion) cannot have been in issue in this

> case because the penalty notices specifically disavowed dishonesty is beside the point, because this says nothing about whether a dishonest penalty might have been a possibility prior to the conclusion of the Kittel appeals. We note that HMRC's decisions dated 13 July 2007 and 28 March 2008 contended in the alternative that Mr Kishore knew or that he ought to have known of the fraudulent nature of the fraudulent scheme to defraud the revenue. At that stage, therefore, both options in terms of penalty remained open.'
>
> I agree with these comments and, in all the circumstances, do not consider that the rule in *Henderson v Henderson* assists Mr Kishore. For completeness, I should record that section 77(2) of the VATA provides that a penalty assessment "may be made at any time before the expiry of the period of 2 years beginning with the time when the amount of VAT due for the prescribed accounting period concerned has been finally determined".

68. As already noted, it is important that the penalty in *Kishore* did not involve an allegation of dishonesty. Moreover, unlike *Kishore*, Mr Trees' argument is not that the penalty should have been issued before the two-year period prescribed by section 77(2) VATA 1994, but rather that dishonesty should, as matter of fairness, have been pleaded in the 2020 Hearing. We agree and, accordingly, we consider that *Kishore* can be distinguished from the present appeal.

69. Our analysis is based on domestic law. However, we consider that the safeguards provided by Article 6 of the European Convention on Human Rights in relation to a "criminal charge" would lead to the same result.

70. For completeness, we should note that sections 60 and 61 VATA 1994 were repealed (subject to certain transitional provisions) in so far as those provisions relate to conduct involving dishonesty which gives rise to a penalty under Schedule 24 to the Finance Act 2007 or Schedule 41 to the Finance Act 2008. In broad terms, in relation to conduct involving dishonesty which gives rise to a penalty under Schedule 24 or Schedule 41, the dishonesty test in sections 60/61 VATA 1994 has been replaced by the test of "deliberate inaccuracy" or "deliberate failure to notify" (either concealed or not concealed) introduced by the Finance Acts 2007 and 2008. In *CF Booth* at [33]-[41] and *Campbell v HMRC* [2023] STC 1967 at [115] it was held that the test of "deliberate inaccuracy" of itself did not require the pleading of dishonesty but merely that the inaccuracy was intentional.[7]

71. For the reasons given above, we allow the appeal on Grounds 1, 2 and 3. We consider that the 2024 Decision was based on a material procedural unfairness. We therefore set aside the Decision and re-make it by setting aside the DLN.

Grounds 4, 5, 6 and 7

72. Again, we consider it convenient to deal with these four Grounds together. In the light of our conclusion on Grounds 1-3, we can deal with the four Grounds relatively briefly.

73. Mr Pickup's main submission was that the Supreme Court in *Ivey* made it clear that the two-stage test for dishonesty was to be applied by *the* fact-finding tribunal. Both stages of the *Ivey* test, subjective and objective, were to be carried out by one fact-finder. These stages, he

[7] see also *Delphi Derivatives Ltd v HMRC* [2026] UKUT 21 at [168]-[172].

submitted, could not be carried out by different fact-finders. Mr Pickup noted that the Supreme Court had used the definite article when referring to *the* fact-finder.

74. We reject Mr Pickup's submission to the extent that it is based on *Ivey*. In our view, the Supreme Court in *Ivey* was focused on the test for dishonesty and not on the composition of the tribunal charged with determining that question. Mr Pickup's emphasis on the use of the definite article attaches a weight to its use which the Supreme Court did not intend.

75. Nonetheless, we consider that, except in exceptional cases, it will be desirable for the same tribunal to determine both stages of the *Ivey* test.

76. We therefore dismiss the appeal on Grounds 4, 5, 6 and 7.

CONCLUSION

77. We allow the appeal on Grounds 1, 2 and 3. We set aside the 2024 Decision and remake it by setting aside the DLN. We dismiss the appeal on Grounds 4, 5, 6 and 7.

COSTS

78. Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is made within one month after the date of release of this decision as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

MR JUSTICE RAJAH
JUDGE GUY BRANNAN

UPPER TRIBUNAL JUDGES

Release date: 26 February 2026