[2014] UKUT 0498 (TCC)

Case No: FTC/88/2012

IN THE HIGH COURT OF JUSTICE
UPPER TRIBUNAL, TAX & CHANCERY CHAMBER

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: Thursday, 7 November 2013

BEFORE:

THE HONOURABLE MR JUSTICE NUGEE

BETWEEN:

HER MAJESTY'S REVENUE AND CUSTOMS

Claimant/Respondent

- and -

IA ASSOCIATES LIMITED

Defendant/Appellant

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MR V MANDALLA (instructed by Howes Percival LLP) appeared on behalf of the Claimant

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Judgment

1. **MR JUSTICE NUGEE**: I will say in advance this is not a particularly well crafted or polished decision but I will make a decision now.

2. I have before me sitting in the Upper Tribunal, Tax and Chancery Chamber, an appeal by Her Majesty's Revenue and Customs Commissioners, HMRC, against a direction made by the First Tier Tribunal, Judge Demack, on 27 January 2012 following a hearing on 13 January in which he directed that the witness statement of John Fletcher dated 13 February 2009 be redacted in accordance with a redacted version which was attached to his directions.

3. I have heard counsel for HMRC, Mr Mandalla. The respondent to this appeal who is the appellant below, IA Associates Limited who I will call IA, was not present or represented before me having been barred from taking any further part in these Upper Tribunal proceedings by reason of failing to comply with directions released by the Upper Tribunal on 17 May 2013 and in consequence of notification released by the Upper Tribunal on 17 June 2013 that IA had been so debarred with effect from 31 May 2013.

4. Because this is not an appeal which (in the words of Rule 40(2) of the Tribunal Procedures, Upper Tribunal Rules 2008/2698) finally disposes of all issues in the proceedings or of the preliminary issues, it is open to me to give a decision orally at a hearing rather than give written reasons and Mr Mandalla has confirmed that his clients are content for me to give an oral decision this afternoon rather than wait for a written decision. For the reasons that follow, I propose to allow this appeal.

5. The procedural history of this matter is as follows. IA is a company that before it ceased trading used to trade in mobile phones. It claimed a deduction of input tax in respect of the VAT period June 2006. That claim was rejected by HMRC in a letter dated 28 September 2007 on the basis of the Community Law doctrine of Abuse of right. HMRC expressed themselves satisfied that the transactions set out in the appendix to the letter formed part of an overall scheme to defraud the Revenue and that there were features of the transactions and conduct on the part of IA which demonstrated that they knew or should have known that that was the case.

6. In short, HMRC contend that this is an example of what is known as MTIC fraud. It is not necessary for the purpose of this decision for me to give any description of MTIC fraud which is well known to HMRC, to those who practise and, indeed, those who trade in this area.

7. On 11 October 2007, IA appealed that decision to the First Tier Tribunal in relation to the sum of money which HMRC had disallowed, the sum of £628,000. In the course of the proceedings in the tribunal, HMRC served a witness statement from Mr Fletcher. That was served on 13 February 2009.

8. Mr Fletcher is a principal advisor in KPMG and his witness statement which runs to 40 pages (but is, I am told, accompanied by three lever arch files running to several hundred pages, documents that I have not myself seen) gives what has been described as generic evidence as to the existence, of and opportunities available in, the grey market for mobile telephone handsets.

9. It is generic evidence in the sense that it looks at the market as a whole and it does not attempt to say anything about the facts of this particular case and it is apparent from the material that has been placed before me that HMRC have used

Mr Fletcher to give evidence of that type in very many similar cases and before that used another individual at KPMG in a similar way.

10. On 23 July 2009, the First Tier Tribunal, or FTT as I will refer to it, directed the appeal be allocated to the complex category, and gave various directions leading up to the hearing of the appeal. Sometime later, on 30 September 2010, the (FTT Judge Colin Bishop) again gave further directions including a direction that the appellant, that is, IA, should serve a schedule of issues identifying whether it accepts that a tax loss has been identified by the respondents, HMRC, whether it accepts that the tax loss is fraudulent, and whether it accepts that there is a connection between the appellant's trades and any fraudulent tax loss.

11. IA complied with that direction on 4 November 2010. The appellant's listed issues listed four issues. Issue 1 is not in contention. The appellant does not take issue with the contention that there has been a tax loss. The £628,000 input tax related to five trades in each of which HMRC have identified a chain leading back to an individual trader who has either gone missing or otherwise defaulted on payment of the output tax which it was liable for. As I say, issue 1 is not in issue.

12. Issue 2, 3 and 4 are. IA took issue with each of these; the contention that the tax loss was fraudulent, the contention that its trades connected back to a fraudulent tax loss and the contention that it knew or ought to have known that its trades connected back to a fraudulent tax loss. That formulation of the issues sufficiently identifies what will be in issue at the hearing of this substantive appeal in the FTT. It follows the Court of Appeal decision in a case called Mobilx Ltd, Blue Sphere Global Ltd and Calltel Telecom Limited v HMRC [2010] EWCA Civ 517, which itself followed the decision of the European Court of Justice in a case called Axel Kittel v Belgium State C439/04 and another case which was joined with it, case C-440/04, reported in 2006, ECL 16161. There does not appear to be any dispute between the parties that it is HMRC which has the burden of proof to establish that IA knew or should have known that it was participating in transactions connected with fraudulent regulation of VAT.

13. On 7 December 2010, the FTT, in this case Judge John Dent, gave directions with a view to the appeal being listed for hearing. At that stage, it was envisaged that the listing of the appeal would be at some time in the six months between 1 April 2011 and 1 October 2011. However, on 12 May 2011, IA applied to exclude the statements of two of HRMC's witnesses, Officer Stone and Mr Fletcher and parts of other witnesses' statements on the grounds that these generic witness statements were irrelevant or if not irrelevant, unfairly prejudicial.

14. Directions were given by the FTT (Judge David Demack) in July requiring the appellant, IA, to suggest redactions to the witness statement of Mr Fletcher. That was done on 19 August 2011, the substantive objection being to parts of Mr Fletcher's witness statement dealing with what are called negative indicators. HMRC gave notice of its objections to the redactions. That came before Judge Demack sitting on 13 January 2012 and as already said by written directions given on 27 January following that hearing, he directed that the witness statement of Mr Fletcher be redacted in accordance with the redacted version attached. The redacted version attached, in effect, took out of his witness statement references to negative indicators, that is, those characteristics of a particular trade in mobile phones which Mr Fletcher, in his opinion, thought were indicative that the trades were not of a genuine type of the four types of legitimate trading opportunities that he had identified in the grey market, as I will refer to later.

15. The directions were followed by written reasons given by Judge Demack on 23 May 2012. HMRC appealed that decision to the Upper Tribunal and permission for that appeal was granted by Judge Demack himself. On 31 October 2012, he is saying that he considered whether to review the decision in accordance with Rule 40 of the First Tier Tribunal Rules but decided not to undertake a review because I was not satisfied that there was an error of law. I am satisfied however that it is reasonably arguable there is no withdrawing that decision and, in those circumstances, I grant the respondent's permission to appeal to the Upper Tribunal. Under the governing Act, which is the Tribunals Courts Enforcement Act 2007, an appeal to the Upper Tribunal lies on any point of law arising from a decision made by the First Tier Tribunal and that is(?) by exception 11(1) and by exception 12(1)(i) applies to the Upper Tribunal in deciding the appeal under section 11 finds that making a decision concerned involved in making an error in a point of law; (ii) the Upper Tribunal may but need to set aside the decision of the First Tier Tribunal and if it does can either remit the case to the First Tier Tribunal's directions through consideration or remake the decision; (iv) in acting under 2(b)(ii), that is the remaking of the decision, the Upper Tribunal may make any decision which the First Tier Tribunal could make as the First Tier Tribunal will be making the decision and may make such findings of fact as it considers appropriate.

16. Guidance on the exercise of the appellate jurisdiction for the Upper Tribunal in relation to case management decisions has been given recently by the Court of Appeal in a case called Atlantic Electronics Limited v HMRC [2013] EWC Civ 651 and all three members of the court gave judgments; Lord Justice Ryder, Lord Justice Beatson and Lady Justice Arden. I should refer to some of the things that they say.

17. In Lord Justice Ryder's judgment he said at paragraph [18]:

> "An appeal from the FTT to the UT is governed by section 12 of the 2007 Act and lies on a point of law alone. It is settled law that appeals concerning case management decisions should not be interfered with by an appellate court when made by a judge who has, 'applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of discretion entrusted to the judge'. See, for example, Wallbrook Trustee v Fattal & Ors [2008] EWCA Civ 427 per Lawrence Collins LJ at 33. Before the UT it was for HMRC to demonstrate that the FTT had applied the wrong approach in principle or that in applying the correct approach, the FTT had reached a decision that no Tribunal, properly directed, could have reached on the facts."

18. There is reference to another decision, Connect Global Limited v HMRC [2010] UK UT 372 at [48] by Mr Justice Warren.

19. At paragraph [20], Lord Justice Ryder said:

> "The first question is whether an error of law was identified which enabled the UT to interfere with the FTT's decision."

20. At paragraph [31], he said that:

> "The UT adopted the correct approach to the admission of the materials in question. It assessed whether the evidence was relevant and applied the presumption that all relevant evidence should be admitted unless there is a compelling reason to the contrary: Mobile Export 365 Ltd v Commissioners for HMRC [2007] EWHC 2664 (Admin) per Lightman J at [20].

21. Lord Justice Beatson referred in paragraph [48] to the fact that there is only a right to appeal to the UT from the FTT on a point of law. At paragraph 49 he said:

> "... the margin accorded to the primary decision-maker in a case management decision, here the FTT, is particularly wide. Ryder LJ has set out the well-known statement of Lawrence Collins LJ (as he then was) in Walbrook Trustee v Fattal and others [2008] EWCA Civ 427 at [33] and has summarised the similar statement in the UT(TCC) by Warren J in Connect Global Ltd v Revenue and Customs Commissioners [2010] UKUT 377 (TCC) at [48] at [18] of his judgment."

22. At paragraph [5]1, he said:

> "... since the UT may only set aside a decision where it finds that it involved making an error on a point in law, it is incumbent on it to identify the error of law and to do so clearly in its decision. The Upper Tribunal Judge did not, in my judgment do so in this case."

23. At paragraph [53] he referred also to the decision in Goldman Sachs International v Revenue Customs Commissioners [2009] UKUT 290 (TCC) where:

> "Norris J, sitting in the UT (TCC), stated (at [23]) that, 'The Upper Tribunal should exercise extreme caution in entertaining appeals on case management issues'. He considered that Lawrence Collins LJ's statement in Walbrook Trustee applied with, 'at least as great, if not greater, force in the tribunals' jurisdiction as it does in the court system'."

24. Then at paragraph 56 he referred to what Lord Hope had said in Jones Cordwell v FTT and CICA where Lord Hope stated at [25]:

> "... that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined."

25. He also stated that:

> "The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it."

26. Finally, Lady Justice Arden said at paragraph [84]:

> "Because the FTT wrongly considered that the evidence was stale, it did not go on to consider the prejudice to HMRC that would be caused by the exclusion of the prosecution's opening. Thus, if

> HMRC's application is rejected, it inevitably followed that HMRC would be prejudiced by its exclusion. It follows that the First Tier Tribunal erred in failing to take this consideration into consideration. Case management decisions are reviewable on appeal only in limited circumstances, but, contrary to the appellant's submissions, those circumstances are not limited to perversity. It may include the inclusion or exclusion of relevant considerations. This includes the erroneous evaluation of relevant considerations."

27. She then cited from Lord Justice Chadwick's judgment in Royal Sun Alliance Insurance v T and M Limited [2002] EWCA Civ 1964 at 38:

> "... that this Court should not interfere with case management decisions made by a judge who has applied the correct principles, and who has taken into account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge. It is pertinent to have in mind, in the present case, that the judge was well aware of the need for caution when considering whether to direct a trial of issues on assumed facts; and was well aware that there were dangers on the course which he decided to take. The judge appreciated that there was a risk that his decision would lead to delay and wasted costs. If his approach to the evaluation of the risk was correct, I would not think it right to substitute my own view for the conclusion that he reached."

28. She said that she came to the same view in that case, and said at paragraph [87]:

> "This test as set out by Chadwick LJ does mean that, whenever a relevant consideration is wrongly excluded, the judge's exercise of discretion must be set aside. In my judgment, this case shows that there needs to be added to that test a requirement that the considerations which were wrongful must, alone or in aggregate, constitute considerations that were material in the exercise of the discretion in question."

29. I have in mind those principles, in particular that if the Upper Tribunal is to interfere with a case management decision of the First Tier Tribunal, it has to identify the error of law concerned; secondly, that judicial restraint should be exercised in interfering with case management decisions; and, thirdly, that the appellate court should not assume too readily that the Tribunal misdirected itself just because not every step in its reasoning is fully set out in it; but, fourthly, that if a material consideration can be shown to have been left out of account, that is sufficient to enable the Upper Tribunal to intervene or, alternatively, if there is a decision which is perverse in the sense that no reasonable Tribunal properly directed could properly have come to that decision.

30. The tribunal's powers in relation to evidence are set out in rule 15 of the First Tier Tribunal rules. My attention was drawn to 15(2)(a) in which the tribunal is given power to admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom and 15(2)(b) under which the tribunal may exclude evidence that would otherwise be admissible where; (i) the evidence was not provided within the time allowed by a direction or the practice direction; (ii) the evidence was otherwise provided in a manner that did not comply with a

direction or the practice direction; or (iii) it would otherwise be unfair to admit the evidence.

31. (i) and (ii) do not apply in the circumstances of this case which means that the tribunal's power to disallow evidence if it were otherwise admissible is limited to the circumstances in which it would be otherwise be unfair to admit the evidence.

32. The principles that are applicable in excluding evidence that would otherwise be admissible are, it seems to me, those stated by Mr Justice Lightman in the statement which was approved by Lord Justice Ryder in the Court of Appeal (which I have already read but will repeat) in paragraph [31] of his judgment in the Atlantic Electronics case where Lord Justice Ryder said:

> "The UT adopted the correct approach to the admission of the materials in question. It assessed whether the evidence was relevant and applied the presumption that all relevant evidence should be admitted unless there is a compelling reason to the contrary."

33. That, having been approved by Lord Justice Ryder and neither of the other two judges in the Court of Appeal dissenting from that approval, I take to be the principle which now ought to guide me. It does not seem to be very different from the statement made by Lord Justice Brookes in a case called JP Morgan Chase Bank v Springwell Navigation Corporation [2005] EWCA Civ 1602 at 67, a two-stage test. (1) is the proposed evidence potentially probative of one or more issues in the current litigation and hence legally admissible? (2) if it is legally admissible, are there good grounds why a court should decline to admit it in the exercise of its case management powers?

34. Nor is it different from the much fuller exposition in the House of Lords, in O'Brien v Chief Constable of South Wales, at least where Lord Bingham said at paragraph [5]:

> "The second stage of the enquiry requires the case management judge or the trial judge to make what will often be a very difficult and sometimes a finely balanced judgment: whether evidence or some of it (and if so which parts of it), which ex hypothesi are legally admissible, should be admitted. For the party seeking admission, the argument will always be that justice requires the evidence to be admitted; if it is excluded, a wrong result may be reached. The importance of doing justice in the particular case is a factor the judge will always respect. The strength of the argument for admitting the evidence will always depend primarily on the judge's assessment of the potential significance of the evidence, assuming it to be true, in the context of the case as a whole ... some objections which were likely to occur."

35. There is perhaps a slight tension between the way in which Mr Justice Lightman expressed it as a compelling reason to the contrary, the way in which Lord Justice Brules expressed it as good reasons to the contrary, and the fuller explanation given by Lord Bingham. But they all, in my judgment, amount to the same thing, that one starts with asking the question whether the evidence is admissible. It is admissible if it is relevant. It is relevant if it is potentially probative of one of the issues in the case. One then asks, notwithstanding that it is admissible evidence, whether are good reasons why the court (or tribunal in this case) should

nevertheless direct that it be excluded. As I have said in relation to the FTT's powers, that is found in rule 15 which requires the FTT to find that it is unfair to admit the evidence.

36. With these being the principles for Judge Demack, one can now look at the reasons for his direction, where the reasons are quite short. I will not read them out but in paragraph [5], he said he referred to the earlier decision of Judge Wallace in another reported case in the Atlantic litigation, namely Atlantic Electronics and Fake RC [2011] UK FTT 314 TC where Judge Wallace set out at length general principles as to exclusion of evidence at paragraph [14] to [27].

37. Judge Demack said that he would not repeat his observations but proceed on the basis of them. Those principles have not been criticised by Mr Mandalla as set out by Judge Wallace although one of the things that Judge Wallace said at paragraph [27] is:

> "I have no doubt that Lightman J would not have expressed himself as he did in Mobile Export 365 Ltd if O'Brien had been cited to him. In particular he would not have used the word 'compelling' given the reference at (5) of O'Brien to "what will often be a very difficult and finely balanced judgment."

38. As I have said, since then the Court of Appeal has approved the statement by Mr Justice Lightman. So to that extent I think that Judge Wallace's expression of what Mr Justice Lightman would have said had he had cited O'Brien may not be right.

39. Nevertheless, it seems to me that I must proceed on the basis that Judge Demack had in mind the relevant principles as set out in paragraph [5] and the fact that he does not set them out at length does not invalidate his citation of them.

40. The substantive decision is in paragraphs [6] and [7] of his written reasons. Paragraph [6] reads as follows:

> "Judge Wallace then dealt with the statement of one Mr Stone and that of Mr Fletcher. As to that of the latter he refused the appellant's application to have it excluded from the evidence."

41. Again, I will not repeat his observations. It is apparent from the observations of Judge Wallace in the Atlantic Electronics case that, as he said at paragraph [40]:

> "I am satisfied that it is of some potential relevance to the issues in this appeal both as to whether there were fraudulent defaults regardless of the Appellant's knowledge and if so whether the Appellant had the requisite knowledge."

42. The Atlantic Electronics case was another missing trader fraud case and those two matters which Judge Wallace refers to in paragraph [40] equate to issues 2 and 4 in our case. Judge Wallace said at paragraph [47] and [48]:

> "Speaking for myself I would not derive great assistance from a generic statement such as this much of which is based on economic theory as to how traders might be expected to behave in the grey market rather than how traders do in fact behave. This is not so much a criticism of Mr Fletcher as a reflection of the fact

> that trading on the grey market based on online platforms such as IPT is not inherently structured. Traders may well react to price movements without knowing why they occur. This is an inevitable problem in analysing the grey market.
> However notwithstanding my own reservations of the value of Mr Fletcher's evidence, I recognise that others may take a different view. This is an important and complex appeal. It is inevitable that the Tribunal will have to consider the grey market if only because the Appellant relies on it. Mr Fletcher's evidence was served in 2009 without any objection until this year. I do not grant the application that it be excluded."

43. When Judge Demack says that he need not repeat Judge Wallace's observations in refusing the appellant's application to have the evidence excluded, I take that as encompassing his decision in paragraph [40] that it was of some potential relevance to the issues in the appeal. His statement in paragraph [47] that he himself had not derived great assistance from it and his statement in paragraph [48] that notwithstanding his own reservations of the value of Mr Fletcher's evidence, he recognised that others might take a different view and the other statements he make in paragraph [48] all apply to the current case. This, too, is an important and complex appeal. It is inevitable that the tribunal will have to consider the grey market if only because the appellant, in this case IA, relies on it. Mr Fletcher's evidence was served in 2009 without any objection until in the current case, May 2011.

44. So Mr Mandalla invites me to infer from that that Judge Demack found on the first stage of the application to exclude parts of the evidence that the evidence was relevant. I accept that is the correct way to interpret the reasons given by Judge Demack and I will therefore proceed on the assumption that he found that Mr Fletcher's evidence was of potential probative value and was potentially relevant to the issues in the appeal and is, therefore, prima facie admissible. It seems to me that was plainly right.

45. Issues 2 and 4 which I referred to earlier are matters which will necessarily require the FTT, when hearing the substantive appeal, to form views as to whether the circumstances of this case are such that they can infer both that the transactions at the beginning of the chain were fraudulent and that the tax loss which is admitted in this case was fraudulent. Whether IA behalf had the knowledge, or means of knowledge, that its trades connected back to a fraudulent tax loss.

46. Mr Mandalla suggested to me that Mr Fletcher's evidence would also be relevant to issue 3 which is whether the trades did connect back to a fraudulent tax loss. I am not persuaded of that because it seems to me issue 3 is primarily a question of the specific facts in this case whether HMRC can demonstrate the chain which links IA's trades with the trades by the missing or defaulting trader which is a factual matter specific to the facts of this case rather than a matter of generic evidence, but whether I am right on that or not, it seems to me plain that Mr Fletcher's evidence is potentially relevant to issues 2 and 4.

47. Mr Mandalla showed me the decision of Sir Andrew Park in Mobile Exports 365 Limited v Revenue and Customs Commissioners in which he expressed the view that evidence given by Mr Fletcher's predecessor was potentially helpful and relevant and he also showed me a long list of FTT decisions in which Mr Fletcher's evidence had been relied upon by HMRC. He told me, although I have

not been shown the particular passages in the cases concerned that in those cases the FTT expressed the view that he was both a relevant expert and that his evidence was helpful and was accepted by the FTT in whole or in part.

48. It is fair to say that Mr Mandalla also showed me two decisions where judges have expressed less glowing views of Mr Fletcher in addition to Judge Wallace who has said that he did not find Mr Fletcher's generic statements particularly helpful. He referred me to what Judge Cornwall-Kelly said in a case called HG Purser Limited v Revenue and Customs where on the substantive hearing, indeed, the FTT said at in its conclusions at paragraph [154]:

> "... that there has been no adequate evidence before us of what was normal commercial practice in this type of trade by a small trader in the grey market. Mr Fletcher's evidence, valuable up to a point, does not on his own admission fill this gap and we are lacking direct evidence except from Mr Purser of the matter." (Mr Purser being a director of the trader in that case)

49. At paragraph [170] he said that:

> "Mr Fletcher's evidence tending to the contrary is not convincing because he is not properly an 'expert witness', being through his firm committed to a major manufacturer/distributor in the white market; and his reports are, moreover, lacking direct evidence or experience in trading on the grey market - a market which, in principle, it is not in the interest of his firm's client to encourage. Mr Fletcher's perception of the position is thus necessarily partial."

50. I was also shown what Judge Brookes said in JDI Trading Limited [2012] UK FTT 642. In that case, Judge Brookes and the tribunal dealt with Mr Fletcher's evidence and decided it should be excluded although they did consider at paragraph 62 that his evidence was expert in nature:

> "We have already, at paragraph 34 above, referred to Mr Fletcher's evidence giving a generic view, with his opinions and conclusions in relation to the grey market in mobile telephones during 2006 rather than dealing with the specific issues and facts of this appeal. Having considered this evidence we find, as did Judge Wallace in Excel RTI Solutions v HMRC, that 'his conclusions seem to us to be a matter for submission by counsel rather than evidence by an expert witness' and, as such, it does not materially assist the Tribunal in the determination of this appeal. For that reason, we find that Mr Fletcher's evidence should be excluded."

51. It seems to me, as I have said, that Judge Demack did find that Mr Fletcher's evidence was at the first stage relevant, potentially probative and admissible and that his evidence was expert evidence. Even if he was not technically qualified to be an expert, the tribunal had powers to admit his evidence under rule 15(2)(a).

52. The question, therefore, is on what basis did Judge Demack decide nevertheless that parts of his evidence should be excluded? Here the reasons for his directions are brief in the extreme. They are found in paragraph [7] of his written reasons as follows:

> "Having considered carefully the redactions to Mr Fletcher's statement suggested by the Appellant, I take a similar view to his evidence as did Judge Wallace."

53. I take that to be a reference to him not finding them particularly helpful.

> "However, I do consider the suggested redactions to be such that in fairness to the Appellant in the overall scheme of things they ought to be excluded from the statement, and I direct accordingly. The excluded material is not central to the appeal, and in my judgment does not take any of the force from the remainder of the statement."

54. That is the entirety of the reasoning given by Judge Wallace. He does not explain why it is that, in fairness to the appellant, the redactions ought to be excluded apart from the fact that the excluded material is not central to the appeal. In one sense it is clear that the excluded evidence is not central to the appeal. The appeal is concerned with the specific trades that IA engaged in, whether they were fraudulent and whether IA knew or should have known they were fraudulent. It is not suggested that Mr Fletcher is proposing to give any evidence at all directed to these particular trades, let alone to any knowledge or means of knowledge that IA had in relation to the particular trades that are put forward as generic background evidence.

55. As Mr Mandalla explained to me, there are two reasons why it is sensible for there to be nevertheless generic evidence before the tribunal rather than specific evidence. Therefore reason, and a practical one is that it would not be proportionate for Mr Fletcher to give evidence directed to the facts of a particular case in every one of these appeals and, secondly, there is a danger in an expert seeking to usurp the function of a tribunal. It is for the tribunal to decide whether the evidence before it is such that it is persuaded that the trades were fraudulent and that IA knew or should have known that they were fraudulent.

56. Nevertheless, as generic evidence that does not by itself mean that it is not potentially helpful and should be admitted and by itself it is difficult to see that the fact that it is generic evidence and not tied to the particular facts of this case means that there is good reason for it to be excluded.

57. In any event, the difficulty with the idea that it is the generic nature of the evidence which persuaded Judge Demack to exclude it is that the redactions only form a part; an important but nevertheless only a part of his evidence, and the entirety of his evidence is equally generic. So that cannot by itself explain why it is the negative indications in his evidence which have been redacted rather than the entirety of his report.

58. As I say, there is no other indication in paragraph [7] of why it is that fairness to the appellant requires that the potential redaction should be excluded. That makes it difficult to understand the reasoning. The best one can do is to look at. IA's skeleton argument, in relation to why they said that it would be unfair. That skeleton argument put forward a number of grounds why it would be unfair, although these grounds were directed to a submission which, by the time of the hearing had been abandoned, that Mr Fletcher's statement should be excluded in its entirety.

59. The first ground is that it is generic; such a general statement cannot lend the tribunal any assistance in determining what the appellant knew or ought to have known. That does not seem to me to be of any assistance in identifying why the particular redactions have been made. It is a reason for excluding his evidence in its entirety, which has obviously been rejected by Judge Demack.

60. Secondly, it is said that Mr Fletcher's evidence is irrelevant and that it was said that Mr Fletcher had not been asked to give his opinion on any matter relevant to the tribunal's task. Again, Judge Demack must have formed the view that his opinion was relevant to the tribunal's task.

61. Thirdly, it is time wasting:

> "...the tribunal does not need to be burdened with needless consideration, hundreds of pages of the most peripheral relevance. That is a reference to the hundreds of pages of exhibits that I was told by Mr Mandalla and I accept that the redactions only relate to the text of Mr Fletcher's witness statement and will have no impact on the number of pages exhibited which will remain exhibited."

62. Fourthly, it was said that it was unfair:

> "The appellant's contented generic expert evidence such as this is almost impossible and certainly a very costly task. Of course, there are telecommunications experts who could consider Hawkeye's trading pattern."

63. That appears to be a reference to a trader in a different case but, presumably, it is a standard form of objection put forward by counsel for IA:

> "It is hardly fair that the respondent should be permitted to repeatedly serve Mr Fletcher's statement in appeal after appeal when those bringing the appeals have to commission a bespoke response."

64. Again, this particular objection does not seem to me to provide any grounds for justifying the particular redactions that have been made. It might have been an argument for excluding Mr Fletcher's evidence in its entirety but given that Mr Fletcher was going to give evidence of the characteristics of the trades, it was difficult to see that excluding the negative considerations will make any difference to the desirability or otherwise of IA instructing its own expert, if it can afford to do so.

65. Then the fifth ground relied on was that it had been disapproved of and reference is made to what Judge Wallace had said in Excel RTI Solutions. The answer to that is that Judge Wallace himself despite having made his own views of Mr Fletcher's evidence in the Excel case clear, decided in the Atlantic case that it should, nevertheless, go forward for the tribunal to make what it could of it.

66. Then finally, it was said it was not a question of weight, as the appellant will say that no weight can attach to Mr Fletcher's statement, but again that must have been rejected by Judge Demack.

67. I am unable to discern from a combination of the written reasons and the skeleton argument put forward on behalf of IA the particular considerations which led Judge Demack to conclude that it was unfair to the appellants, so unfair as to require exclusion of evidence that was prima facie admissible and potentially helpful.

68. So the next consideration is whether one can discern a rational basis in the redactions themselves for cutting out that part of Mr Fletcher's report. One can well see that if an expert deals with two or more entirely discrete areas, a court or tribunal may take a view that while his evidence is helpful and should be admitted on area 1, it was of peripheral relevance on area 2 and should be excluded because it would require the appellant to divert time and resources to a new point that would increase the complexity and length of time and cost of a hearing.

69. The difficulty I have in this case is that looking at the passages that have been left in and the passages which have been excluded, I do not see them as dealing with two discrete areas. I see them as being the two sides of the same coin; the negative indicators which Mr Fletcher identifies in his report are the counterpart of the positive characteristics that he identifies in his report. What he does, having described the mobile telephone market in general terms, is to identify four particular trades which, in his opinion and, of course, his opinion may or may not be accepted by the FTT when he comes to give evidence, are legitimate opportunities for trading on the grey market which can give rise to legitimate problems and he identifies them under the names, box breaking, arbitrage, volume shortages, and dumping.

70. He then, in the body of his report, in relation to each of those four types of trade, identifies the characteristics, the positive characteristics, that successful and legitimate trades of that type will have, and then identifies, in the parts which have been redacted, the negative indicators which would tend to suggest that a trade does not fall within that particular category of legitimate trade.

71. I will give a few examples. This is not exhaustive but it will illustrate the point. At paragraph 4.3 in a passage which is not redacted, he identifies as one of the characteristics of box breaking that it requires the following:

> "Access to a large pool of labour. To exploit box-breaking successfully, a trader needs access to hundreds of staff to procure handsets and break each handset box on a scale necessary to make material profits."

72. The counterpart of that, and this is noted in the next paragraph, which is redacted, is that a trader is extremely unlikely to be exploiting profitable box breaking opportunities in the presence of any of the following negative indicators, and one of them is too few employees, no access to a significant workforce. That seems to me to say no more than the counterpart of the characteristic of having access to a large pool of labour which is to be left in.

73. Similarly, under the heading Arbitrage, one of the items which is redacted, paragraph 4.4(18), is that:

> "Trading in Nokia stock excludes traders from pursuing arbitrage opportunities as Nokia sets homogenous pricing for its customers across all territories. The absence of price differences between

> these territories fails to meet the basic criteria for arbitrage. As discussed in Sections 4.4.8 to 4.4.12, currency arbitrage is theoretically possible but unlikely to be worthwhile in 2006."

74. As I say, that has been taken out but what has been left in are various statements explaining, firstly at 3.4.2:

> "Nokia is also the only major OEM to set identical prices for its wholesale customers in all geographical markets. Sony Ericson (and other OEMs) does not employ such a practice, giving rise to international 'arbitrage' trading."

75. Then again at 4.4.1:

> "OEMs (with the exception of Nokia) usually differentiate their product-pricing between different geographical markets. Some, such as Samsung, have adopted an explicit policy of differential pricing to help them build market share in certain territories. This will inevitably lead to traders attempting arbitrage trades between low and high price markets. Arbitrage can occur where differential handset-pricing is in place. The distributor takes advantage of this difference by buying handsets in one country and exporting them for sale to countries where they can be sold at a higher price."

76. There is a diagrammatic explanation. At 4.4.8 under the heading Nokia and Currency Arbitrage, it is again repeated that Nokia is the only OEM that sets identical prices to its wholesale customers in all geographical markets and then deals with the availability of currency-driven arbitrage.

77. All of that, with its explanation of the positive characteristics of arbitrage, to be the counterpart of the statement that has been redacted which noted that trading in Nokia stock excludes traders from pursuing arbitrage opportunities because Nokia sets homogenous pricing for its customers across all territories and that currency arbitrage, although theoretically possible, is unlikely to be worthwhile.

78. I will give one more example under the heading of volume shortage. In 4.5.12, one of the negative indicators of volume shortage that Mr Fletcher identifies is that:

> "... a volume shortage requires a very specific type of handset to address the market opportunity. Descriptions of handsets are required on order forms and/or invoices. Anything less than the detail shows at Figure 13 would indicate that the transaction is unlikely to be dealing with a volume shortage."

79. That has been excluded but what has been left in at 4.5.11 is the second bullet point where he refers to the defining characteristic of volume shortage and says that:

> "The RFP is invariably for a small number of very specific handsets in a very specific configuration (models, colour, frequency, etc) that dealers must be able to deliver in a matter of days."

80. He then provides a figure, in fact figure 12 which provides an illustration of it.

81. If his evidence will be, even in its redacted form, that volume shortage trades require a very specific request for proposal, it does not seem to me to be saying anything more when saying that a description of a handset which is very general and does not meet that level of detail is a negative indicator which suggests that the trader is unlikely to be exploiting profitable volume shortage opportunities.

82. This is a case, it is not necessary for me to give further examples, where it is clear that the evidence that has been allowed in by Judge Demack's direction and the evidence which has been excluded by his redactions do not deal with two discrete and separate areas of evidence. They are, in my judgment, evidence which go directly to the same point, namely, whether the characteristics of trades in this particular case are or are not indicative of legitimate trades in the grey market or whether they tend to suggest that the transactions are fraudulent transactions. That is issue 2.

83. The evidence also goes secondly to the issue whether Mr Ali, who is proposing to give evidence on behalf of IA, is to be believed when he says that he was exploiting legitimate arbitrage opportunities and other opportunities in the grey market, or whether the characteristics of the particular trades in this case indicate that his evidence should be rejected.

84. Now, of course, Mr Fletcher's evidence may or may not be accepted. The tribunal may, as many tribunals appear to have done, find in helpful in assessing those issues. The tribunal, and some tribunals clearly have done, may find it partial and uninformed by actual experience of trades in the grey market and unhelpful.

85. But it is difficult to see how allowing him to give evidence on the positive characteristics but refusing to allow him to give evidence of the negative characteristics achieves anything of any value at all to the appellant, IA, because it does not seem to me that it makes the preparation for the hearing any different or the nature of the issues or the nature of the evidence in the end that IA has to face of any significant difference.

86. In those circumstances, I do find it difficult to see that there is any rational basis which has been put forward by Judge Demack for his decision, or any rational basis that can be identified for his decision.

87. The grounds of appeal which were relied on by HMRC are three-fold. The first one, expressed in rather general terms, is that the tribunal erred in directing that the statement be redacted. Some of what is argued under that ground to the effect that it is wrong for the tribunal to interfere with evidence an expert wishes to give seems to me to go too far. As I have previously said, I take the view that it is entirely open in an appropriate case for a court or tribunal to direct that an expert witness or any other witness gives evidence limited to certain topics and not to other topics. My difficulty is that I do not see the negative characteristics as being a separate topic from the positive characteristics but as being, as I have sought to explain, the counterpart of the positive characteristics.

88. I do, therefore, accept that no rational basis has been shown for the particular redactions which have been put forward. Even giving every weight that I can to Lord Hope's statement that:

> ‘judicial restraint should be exercised when reasons that a Tribunal gives for its decision are being examined’ [and] ‘the appellate court should not assume too readily that the Tribunal misdirected itself just because not every step in its reasoning is fully set out in it.”

I have great difficulty, notwithstanding that guidance from Lord Hope, as picked up by Lord Justice Beatson in the Atlantic Electronics case, in seeing what it is that formed the unfairness in leaving the negative indicators in the report or in what sense taking the negative indicators out of the report is of any practical utility or benefit either to the appellant IA or to the tribunal or as something that will shorten or make less expensive the resolution of this appeal.

89. I therefore do find that there is an error of law in the First Tier Tribunal having reached a perverse decision in the technical sense of one which no reasonable tribunal properly directing itself could come to, a decision that must be regarded outside the generous ambit of the discretion entrusted to the First Tier Tribunal.

90. That makes it unnecessary to reach a conclusion on the other grounds. I will briefly say however that ground 2 was that the tribunal erred in directing that it be redacted because it was not central to the appeal. As I have explained, I take the view that in one sense Mr Fletcher’s evidence is not central to the appeal but it is, nevertheless, potentially probative and potentially helpful and the fact that it is not directed to the facts of this particular case but is generic background material cannot by itself in my judgment amount to a good reason for excluding it.

91. Ground 3 is that the FTT failed to follow a decision of Judge Wallace in the Atlantic case without any reason for taking a contrary course but again, I agree that although one tribunal is not bound by a decision, even a substantive decision, let alone a case management decision by another tribunal, it is important in this area of law where there are a number of these appeals and the same points recur that practitioners should be able, and their clients should be able, to predict with reasonable certainty how particular applications will be dealt with and it does seem to me undesirable that in circumstances where Judge Wallace had refused to exclude Mr Fletcher’s evidence that Judge Demack in this case having said that he took the same view of the evidence that Judge Wallace did, should have come to a different outcome.

92. Nevertheless, the reasons that I give for allowing the appeal are that those that I have set out under ground 1. I have not found it possible to discern any rational basis on which, having permitted the bulk of the evidence, including all the positive characteristics in relation to the four types of trade that Mr Fletcher thinks are all that is available, can assist anybody to exclude negative characteristics which are, as I have sought to explain, merely the counterparts of the positive characteristics which he has identified.

93. I will therefore allow this appeal. In relation to section 12, I do not think it necessary to remit the case to the First Tier Tribunal. I will make a decision under rule 12(2)(b)(ii) which is to remake the decision and the decision I make is to permit Mr Fletcher’s evidence to be produced in its entirety without any redactions.