[2017] UKUT 0159 (TCC)

Appeal number: UT/2016/0015

VAT - input tax - MTIC appeals-whether First-tier Tribunal made errors of law in concluding that taxpayer knew that its transactions were connected with fraud - yes - nevertheless there was a sufficient basis for the tribunal's conclusions - appeals dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

(1) BTS SPECIALISED EQUIPMENT LIMITED **Appellants**
(In liquidation)

(2) NTS SPECIALISED EQUIPMENT LIMITED
- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: Mr Justice Warren
Judge Timothy Herrington

Sitting in public at the Rolls Building, Fetter Lane, London EC4A 1NL on 18, 19 and 20 January 2017

James Pickup QC and Simon Gurney, Counsel, instructed by Freeths LLP, for the Appellants

Mark Cunningham QC, and Joshua Shields, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. These are appeals against a decision of the First-tier Tribunal (Judge Demack and Mr Holden) (the "FTT") released on 24 March 2015 (the "Decision"). The FTT dismissed the conjoined appeals by BTS Specialised Equipment Limited ("BTS") and NTS Specialised Equipment Limited ("NTS") (together the "Appellants") against decisions of the Respondents ("HMRC") to deny the Appellants the right to deduct input tax in excess of £15 million in relation to purchases of mobile phones made in three VAT periods, namely 04/06, 05/06 and 06/06.

2. HMRC denied the Appellants their claimed right to deduct input tax in relation to 114 purchase transactions effected by the Appellants in those VAT periods. The grounds on which HMRC refused the credit of input tax were that they were satisfied that the transactions concerned formed part of an overall scheme to defraud the revenue and that the director of both Appellants, Mr Nigel Christopher Tomlinson ("Mr Tomlinson") knew their transactions were connected with fraud, or should have known that be the case. It will be apparent from this short introduction these were what are commonly known as MTIC appeals. We will not set out in this decision a full description of what is typically involved in this type of case but we will assume that the reader is familiar with the concept, and the conventional terms used, in such appeals. For a description of the concept, see *Revenue and Customs Commissioners v Livewire Telecom Ltd* [2009] STC 643 at [1] and *Red 12 Trading Ltd v HMRC* [2009] 2563, cited by the FTT at [10] of the Decision.

3. It is helpful, however, as further background to note that in respect of a number of the transactions with which this appeal is concerned the Appellants acquired goods in a deal chain which included what is known as a "contra-trader". This is a term coined by HMRC to describe a fraudulent trader which (a) acquires goods from a UK trader as a participant in a chain of transactions which includes a defaulting trader (known as the "dirty chain") and exports them to an EU trader claiming a credit for input tax (" the dirty input tax") on the purchase and (b) in a chain which includes no defaulter (known as the "clean chain"), imports goods from an EU trader and sells them to another UK trader and then offsets the dirty input tax against the clean output tax he is liable to pay HMRC in respect of the sale to the second UK trader. The purpose of this is to attempt to turn the dirty input tax into clean input tax in the hands of the second UK trader (who himself exports the goods to an EU trader) and to distance the second UK trader from the default in the dirty chain so that he could not know of his connection to the default. It also means that it is more difficult for HMRC to discover the connection.

4. In their notices of appeal to the FTT the Appellants broadly claimed that their transactions did not form part of a scheme or scheme to defraud the public revenue, nor were there features of the transactions that they entered into, and conduct on their part, which demonstrated that they knew, or should have known, that the transactions formed part of such scheme or schemes.

5. In the course of the proceedings, however, the Appellants made a number of concessions as recorded at [59] to [62] of the Decision.

6. The Appellants accepted, with the benefit of hindsight, that there had been a loss of tax to HMRC. They admitted that in their direct tax loss transaction chains the UK traders acquiring the goods from the EU failed to account for the VAT collected on the sale of the goods on selling them within the UK and that in the clean chains involving contra-traders, those traders engaged in different, unconnected transactions in which they dispatched goods to the EU, which goods had been acquired by traders who had themselves defaulted in accounting to HMRC for the output tax due.

7. The Appellants also admitted that there had been fraudulent evasion of VAT in their direct tax loss chains (except in one instance) and in the broker chains of the alleged contra-traders.

8. The Appellants accepted that in their direct tax loss chains their transactions were connected with the fraudulent evasion of VAT but did not admit, where HMRC alleged that the Appellants' transactions were connected with a tax loss by way of a contra-trader, such a connection was established on the evidence and put HMRC to proof of connection. That issue, and the question as to whether the Appellants knew or should have known that their transactions were connected with the fraudulent evasion of VAT were therefore the issues to be determined by the FTT.

9. It was common ground that, in determining whether the Appellants knew, or should have known, of the connection between their transactions and the fraudulent evasion of VAT, the relevant state of mind is that of Mr Tomlinson, as director of both Appellants.

The Decision

10. The Decision followed a hearing extending over 23 days and is extremely lengthy, consisting of 915 paragraphs over 187 pages. We deal with the findings in the Decision in more detail when dealing with the ground of appeal to which the relevant findings relate but after referring to the relevant legal framework for the Decision we summarise at [11] to [56] below the FTT's conclusions on the various issues it had to determine. We believe such a summary to be helpful, although of itself of considerable length. References to numbered paragraphs in parentheses, [xx], are references to paragraphs in the Decision.

11. The FTT correctly dealt with the relevant law at [22] to [35]. In particular, it identified and set out the legal principles that govern the circumstances in which the right to claim credit for input tax can be denied. It will suffice to refer here to the two main authorities which are relevant. The FTT referred to the findings of the European Court of Justice in *Axel Kittel v Belgium; Belgium v Recolta Recycling Sprl* [2006] ECR1-6161. This judgment was analysed by Moses LJ in his judgment in the Court of Appeal in *Mobilx Limited (in administration) v HMRC & Ors.* [2010] EWCA Civ 517 where Moses LJ said at [41] and [42]:

"[41] In *Kittel* after §55 the [European] Court developed its established principles in relation to fraudulent evasion. It extended the principle, that the objective criteria are not met where tax is evaded, beyond evasion by the taxable person himself to the position of those who knew or should have known that by their purchase they were taking part in a transaction connected with fraudulent evasion of VAT: -

> "56. *In the same way*, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.
> 57. That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.
> 58. In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them."
> 59. *Therefore*, it is for the referring court to refuse entitlement to the right to deduct 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, and to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity'. [emphasis added]"

The words I have emphasised "in the same way" and "therefore" link those paragraphs to the earlier paragraphs between 53-55. They demonstrate the basis for the development of the Court's approach. It extended the category of participants who fall outwith the objective criteria to those who knew or should have known of the connection between their purchase and fraudulent evasion. *Kittel* did represent a development of the law because it enlarged the category of participants to those who themselves had no intention of committing fraud but who, by virtue of the fact that they knew or should have known that the transaction was connected with fraud, were to be treated as participants. Once such traders were treated as participants their transactions did not meet the objective criteria determining the scope of the right to deduct.

[42] By the concluding words of §59 the Court must be taken to mean that even where the *transaction in question* would otherwise meet the objective criteria which the Court identified, it will not do so in a case where a person is to be regarded, by reason of his state of knowledge, as a participant."

12. The FTT correctly observed at [27] that paragraphs 56 and 57 of the judgment in *Kittel* showed that it was not the trader's transaction that was the fraudulent one referred to in the former paragraph, but rather the transaction with which his transaction was ultimately connected, however many times further removed. It also observed that actual participation in the relevant transaction was unnecessary; participation was a matter of deeming.

13. At [28] to [31] the FTT set out further well-known passages from *Mobilx* which formulated the test and approach for the purposes of the application of the principle in Kittel as follows:

> "56. It must be remembered that the approach of the Court in Kittel was to enlarge the category of participants. A trader who should have known that he was running the risk that by his purchase he might be taking part in a transaction connected with fraudulent evasion of VAT cannot be regarded as a participant in that fraud. The highest it could be put is that he was running the risk that he might be a participant. That is not the approach of the Court in Kittel. In those circumstances I am of the view that it must be established that the trader knew or should have known that by his purchase he was taking part in such a transaction.
>
> ….
>
> 59. The test in Kittel is simple and should not be over-refined. It embraces not only those who knew of the connection [with fraudulent evasion of VAT] but those who 'should have known'. Thus it includes those who should have known from the circumstances which surround their transactions that they were connected with fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in Kittel.
>
> 60. The true principle to be derived from Kittel does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion.
>
> ….
>
> 62. The principle of legal certainty provides no warrant for restricting the connection, which must be established, to a fraudulent evasion which immediately precedes a trader's purchase. If the circumstances of that purchase are such that a person knows or should have known that his purchase is or will be connected with fraudulent evasion it cannot matter a jot that that evasion precedes or follows the purchase. That trader's knowledge brings him within the category of participant. He is a participant whatever the stage at which the evasion occurs."

14. The FTT correctly observed at [29] that HMRC did not have to show that the Appellants were actual participants in the fraudulent evasion of VAT. The FTT also referred to the following later passages in *Mobilx* dealing with the role of due diligence and the need to avoid examining individual transactions in isolation without regard to the surrounding circumstances:

> "75. The ultimate question is not whether the trader exercised due diligence but rather whether he should have known that the only reasonable explanation for the circumstances in which his transaction took place was that it was connected with fraudulent evasion of VAT…
>
> . . .

82. But that is far from saying that the surrounding circumstances cannot establish sufficient knowledge to treat the trader as a participant. As I indicated in relation to the BSG [Blue Sphere Global] Appeals, tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected with fraud. The danger in focussing on the question of due diligence is that it may deflect a tribunal from asking the essential question posed in *Kittel* namely whether the trader should have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT the circumstances may well establish that he was."

83. The questions posed in BSG by the Tribunal were important questions which may often need to be asked in relation to the issue of the trader's state of knowledge. I can do no better than repeat the words of Christopher Clarke J in Red 12 v HMRC (2009) EWHC 2563:

> '109. Examining individual transactions on their merits does not, however, require them to be regarded in isolation without regard to their attendant circumstances and context. Nor does it require the tribunal to ignore compelling similarities between one transaction and another or preclude the drawing of inferences, where appropriate, from a pattern of transactions of which the individual transaction in question forms part, as to its true nature e.g. that it is part of a fraudulent scheme. The character of an individual transaction may be discerned from material other than the bare facts of the transaction itself, including circumstantial and "similar fact" evidence. That is not to alter its character by reference to earlier or later transactions but to discern it.
>
> 110. To look only at the purchase in respect of which input tax was sought to be deducted would be wholly artificial. A sale of 1,000 mobile telephones may be entirely regular, or entirely regular so far as the taxpayer is (or ought to be) aware. If so, the fact that there is fraud somewhere else in the chain cannot disentitle the taxpayer to a return of input tax. The same transaction may be viewed differently if it is the fourth in line of a chain of transactions all of which have identical percentage mark ups, made by a trader who has practically no capital as part of a huge and unexplained turnover with no left over stock, and mirrored by over 40 other similar chains in all of which the taxpayer has participated and in each of which there has been a defaulting trader. A tribunal could legitimately think it unlikely that the fact that all 46 of the transactions in issue can be traced to tax losses to HMRC is a result of innocent coincidence. Similarly, three suspicious involvements may pale into insignificance if the trader has been obviously honest in thousands.
>
> 111. Further in determining what it was that the taxpayer knew or ought to have known the tribunal is entitled to look at the totality of the deals effected by the taxpayer (and their characteristics), and at what the taxpayer did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them.'"

15. At [89] to [129] the FTT made some general findings regarding the Appellants' background based on evidence given by Mr Tomlinson and Mr Edmonds, the latter being an accountant who was responsible for carrying out most of the Appellants' due diligence. In particular, the FTT found that Mr Tomlinson has been engaged in the telecommunications industry throughout his business life, latterly setting up business on his own account trading in the wholesale distribution of mobile handsets, establishing BTS in 1993 for that purpose.

16. At [98] the FTT made the following findings:

> "Between 1996 and 2002 Mr Tomlinson claimed to have developed a wide range of contacts in the mobile phone market. He said his method of trading in those years was exactly the same as it was between 2003 and 2006, and as it substantially remains for NTS today, save for the introduction of the reverse charge in 2007. He also claimed the phones he currently trades not only to have a market within the UK and the EU, but also in the middle and far east. He did not further develop his claim to continue to trade as he did in earlier years, nor did he produce any corroborative evidence as to that matter. In those circumstances, we are unwilling to accept his evidence."

17. At [110] the FTT found that Mr Tomlinson had, through his earlier dealings with HMRC, acquired knowledge as to what MTIC fraud was, how fraudsters operated and the steps necessary for HMRC to prevent it occurring. It went on at [154] to find that throughout the periods with which the appeal is concerned the Appellants through Mr Tomlinson knew that there was fraud in the wholesale mobile phone industry, and that the fraud involved an importer of phones defaulting on its VAT liability on selling the phones to another UK trader. Further, it found that Mr Tomlinson knew that the fraud was fed by the sale of phones in a chain of transactions within the UK and by the export by brokers such as the Appellants and was further aware of the possibility that the Appellants' purchases could be connected with a fraud committed by a trader who was not the Appellants' immediate supplier. The FTT also found that Mr Tomlinson had been informed that the fraud was widespread, involved very large sums of money and that HMRC were extremely concerned about it.

18. At [156] the FTT found:

> "Whilst Mr Tomlinson could claim that the information he had was insufficient for him to conclude that every transaction the Appellants entered into was connected with fraud, he must have known that the information he had indicated that fraud might be present in each one, and that he should consider that possibility in the forefront of any unusual factors that might emerge in their transactions."

19. The FTT found at [111] that NTS was established in 2003 to follow the same trading pattern as that for the BTS, i.e. to purchase mobile phones from UK suppliers and to export them to EU customers. The FTT found at [121] that NTS has continued to trade in the wholesale mobile phone market, albeit on a much smaller scale than 2006, to the present day.

20. The FTT made a number of findings regarding the trading model of the Appellants at [130] to [142]. At [132] the FTT noted that Mr Tomlinson raised his own honesty as central to the Appellants' case, his primary contention being that in relation to the transactions for which claims for input tax have been denied he had been "a victim" in that he had been duped. The essence of the Appellants' trading was that it undertook "back-to-back trades", including not only consignments disposed of as a whole but also those split on sale but sold on a single day, carried out in such a way that there was no possibility of the Appellants being left with stock on a deal being completed: see [136].

21. At [158] to [300] the FTT sets out a detailed analysis of the transactions which are the subject of the appeals and the "deal chains" within which they occurred. In relation to transactions said to be connected with deal chains involving contra-trading the FTT referred at [179] to evidence from HMRC identifying what it claimed to be four contra-trading cells and HMRC's contention that the overall scheme included all of the acquisition and dispatch transactions flowing through the contra-traders involved.

22. At [301] to [316] the FTT considers the Appellants' contentions that the alleged contra-traders "did not act as such" and rejects those contentions. Having considered further evidence as to the extent of the contra-traders' knowledge that the transactions in which they participated at the foot of "dirty" chains were connected with fraud the FTT concluded at [476] that they were satisfied that each contra-trader was aware of the connection of its broker deals to fraud. The FTT were satisfied that there were fraudulent VAT losses in the contra-traders' deal chains and were further satisfied that the Appellants' transactions, the subject of their appeals, were connected with the fraudulent evasion of VAT: see [477] and [478].

23. At [483] to [530] the FTT deals with the Appellants' submission that an aspect of the behaviour of individual traders, including BTS, did not appear consistent with HMRC's evidence as to the existence of an overall contrived scheme. This was the fact that 63 of a total of 75 of BTS's broker transactions in one of the Cells were said by HMRC to be "split deals", that is where a purchase transaction received from a supplier was split for onward sale to a number of EU customers. The Appellants submitted that if those transactions were part of an overall contrived scheme it made no sense for a broker to split the deal as it would have made managing the scheme considerably more difficult without any real advantage: see [483].

24. Having carried out its own analysis of the "split deals" from BTS's own documents made available to it as part of the evidence in the appeals the FTT concluded at [523] that the material provided the "clearest possible evidence of orchestration and contrivance." Its findings were set out at [523] to [527] as follows:

> "523. Within each individual group of "split deals" we have created for analysis purposes, except what we consider to have been the minor error deals of June 5 and 6, the price BTS obtained per handset from its customers was the same irrespective of the quantity dealt in; the date the goods were despatched abroad was the same; the EU freight forwarder used was the same; and, with a handful of exceptions, which in our judgment are all accounted for in the FCIB

> evidence, all payments were made on the same date. Further, the aggregate percentage profits obtained by BTS and NTS in all the split deals fell within the narrow range established by HMRC for Cell 5. Those are hard facts, drawn from BTS's own deal documentation: they cannot be disputed. In our judgment, the facts provide the clearest possible evidence of orchestration and contrivance.
>
> 524. No evidence was adduced to corroborate Mr Tomlinson's claim to have negotiated purchase and sale prices for the split deals. Coupled with the facts set out in the last preceding paragraph we consider that absence of evidence to give the lie in the clearest possible way to his claim to have negotiated individual purchase and sale prices within a highly volatile market. We infer that BTS was told when and from whom to buy, when and to whom to sell, in each case at what price, and acted on the instructions given to it. We also infer that Mr Tomlinson knew from his own documentation that the "split deals" were not genuine commercial sales. It follows that we further infer that he is dishonest.
>
> 525. Far from supporting Mr Pickup's claim that the "splitting" of deals was inconsistent with Mr Humphries' contention that traders operated in schemes, in our judgment the analysis we have carried out proves just the opposite.
>
> 526. From the present tribunal's own experience of MTIC fraud, we can say that in most MTIC cases there is usually little or no direct documentary evidence of a connection with fraud. In the present case BTS's own documents relating to its split deals provide that evidence in abundance.
>
> 527. We note that the 63 split deals represent over 55% of all the deals concerned in the appeal."

25. The FTT made similar findings at [530] in relation to 12 single deals in the same Cell additional to the 63 "split deals".

26. At [536] to [615] the FTT dealt with the evidence provided from the records of First Curacao International Bank ("FCIB") as to the money flows in the Appellants' transaction chains. At [573] the FTT found that the money flows in the transaction chains of BTS were circular and that the time BTS logged into and out of its account with the FCIB was indicative of orchestration which, when coupled with the money chain evidence, indicates contrivance and orchestration. Having reviewed the evidence given by Miss Parikh, Mr Birchfield and Mr Humphries of HMRC the FTT then found the following at [613] to [615]:

> "613. Mr Pickup admitted that the analysis of data from the FCIB showed what appeared to be, at least in part, contrived money chains. They showed that the Appellants' transactions formed part of those chains, but he submitted that they did not prove circularity, or that the Appellants were controlled, or knowingly participated in fraud. Miss Parikh conceded that much of her analysis, specifically concerning the movement of money between European traders, was based on what she initially termed "best judgment", but which she later conceded was no more than "guesswork." Mr Birchfield agreed that his analysis could not exclude the presence of an innocent dupe in the chains. Further, he conceded that the "place to put" that dupe would have been as broker in the clean chain. The FCIB data showed no more than the Appellants receiving money from their

customers and paying money to their suppliers, those transactions happening within a short space of time. Mr Pickup claimed that was exactly what one would have expected to find of a legitimate trader engaged in 'back to back' transactions.

614. Coupling the evidence in this subsection, which is all documented, with our own analysis of the "split deals" (see the following subsection relating thereto), reinforces our rejection of a claim by Mr Pickup that the splitting of deals was inconsistent with Mr Humphries' claim that the traders with which we are concerned operated in schemes. Mr Tomlinson may not have known to whom his customers sold or from where they obtained the necessary finance for their purchases, but he did know that payments for each group leading to a split deal were nearly all made on the same day.

615. What our own analysis of BTS's split deals, coupled with that of Miss Parikh of the FCIB material, clearly reveals is that the deals were split at the point of acquisition by BTS and the phones comprised in them were subsequently returned to the main Cell 5 scheme in the original deal form as identified by Mr Humphries. That in each chain the split occurred on the phones being acquired by BTS, in our judgment provides yet further evidence that Mr Tomlinson knew that the deals were orchestrated and contrived."

27. At [616] to [637] the FTT considers the evidence relating to the mark-ups achieved by the Appellants in respect of their transactions. It made the following finding at [633]:

"In our judgment the fact that in every deal in Cell 10 BTS obtained a percentage profit of 8%, or a figure within a whisker of that percentage, whereas in every deal in Cell 5 it made profits between 2% and 2.7% indicates clearly that Mr Tomlinson was told at what price to buy and what to sell. They confirm our earlier inferences that there was a total absence of negotiations in the Appellants' transactions, and that Mr Tomlinson is dishonest."

28. At [640] to [667] the FTT dealt with what it concluded were five further factors pointing to Mr Tomlinson's dishonesty.

29. The first factor was the position regarding the supplier declarations provided by Mr Campbell of BTS to its purchasers all of which declared that BTS were the legal owner of the goods that will be supplied. In fact, the evidence showed that the Appellants obtained ownership of phones they purchased only when they paid for them and Mr Tomlinson admitted that when the declarations were made BTS was not the legal owner of the goods to which the declarations related. In his evidence Mr Tomlinson said it was a mistake to have made the declaration in that form. However, the FTT found the following at [647]:

"Every supplier declaration made by Mr Campbell before us was false: each one untruthfully stated that the appellant company concerned owned goods and/or that they had been paid for in full and/or that certain specified checks had been carried out on them. We are unable to accept Mr Tomlinson's claim that the statements made by the Appellants' in their supplier declarations as to the ownership of goods were "mistakes" and nothing more. To do so we should also

> have to accept that he is unable to distinguish between a mistake i.e. an unintentional error, and a deliberate lie. We believe he is able to do so. His claim confirms our view that he is dishonest."

30. The second factor was the quality of the Appellants' due diligence on the traders with whom they traded. Mr Tomlinson's evidence was that the Appellants had made proper checks, albeit admitting that certain of the records did not exist when the Appellants traded with the companies concerned. The Appellants placed considerable reliance on HMRC's failure to check the Appellants' due diligence on traders with whom they had not traded. It was put to Mr Tomlinson in cross examination that such due diligence was "entirely spurious" and that the Appellants "got it wrong" every single time in relation to those traders whom they had accepted.

31. The FTT's findings on this evidence were expressed shortly at [652] as follows:

> "We regard the replies of Mr Tomlinson to the questions put to him about due diligence to speak for themselves as clearly further demonstrating his dishonesty."

32. The third factor was the declaration that the Appellants made to FCIB on opening their bank accounts. In the application process Mr Tomlinson was required to "certify and covenant" that he "was not aware and had no reasonable grounds to suspect" that in relation to any previous supply of goods there was a problem with unpaid VAT. Mr Tomlinson was challenged in cross examination whether that was a truthful statement in the light of the fact that at the time the declaration was made the Appellants were appealing against decisions of HMRC refusing input tax repayment claims they had made. Mr Tomlinson's answer was that he had not taken into consideration the outcome of the appeal (which in the end was favourable to the Appellants). The FTT's finding on this evidence was expressed shortly at [655] as follows:

> "Once more the facts speak for themselves as showing Mr Tomlinson's evidence to be untrue. Mr Tomlinson's declarations were false and further confirm his dishonesty."

33. The fourth factor was HMRC's allegation that the failure to obtain any independent insurance for the goods in which the Appellants traded indicated that their trading was contrived. Mr Tomlinson accepted in cross examination that his evidence, that because BTS did not have title to the goods it traded in it would have been difficult to demonstrate an insurable interest, was contradictory with the supplier declarations which stated that BTS had title to the goods in question. He said that the supplier declaration, which stated that BTS had title to the goods in question, was signed incorrectly. The FTT's findings on this evidence was expressed at [658] as follows:

> "Mr Tomlinson admitted that he made false declarations to customers as to the Appellants ownership of the goods in which they dealt. Against that background, we regard his invitation to the tribunal to deal with the ownership question on the basis of the Appellants not owning them as both impudent and dishonest."

34. The fifth factor related to a particular transaction where NTS's supplier gave instructions to the freight forwarder holding the goods to permit NTS to ship those goods "on hold" but not to release the goods until the freight forwarder had written authorisation to do so. The day after this instruction, Mr Campbell gave instructions to the EU warehouse nominated by NTS's customer for the same goods to allocate and release them to the customer. When asked in cross examination whether these instructions were incompatible, Mr Tomlinson said that NTS's supplier would have instructed the freight forwarder by phone to allow NTS to ship the goods, but had no evidence to produce confirming that it had done so. There was further cross-examination on this issue recorded at [662] following which the FTT made these findings at [663] to [666]:

> "663. Mr Tomlinson admitted that the Appellants made no attempt whatsoever to obtain permission of the true owner of the goods for their despatch abroad; indeed, they made no attempt even to identify that person. Such a situation would never have been allowed to arise in a true commercial transaction. Nor did they attempt to find how long the goods had been in the UK, or how long the chains of transactions were. Notwithstanding the absence of title to the goods, since the Appellants adduced no evidence whatsoever to deal with the export on hold point, we find that they obtained no authority to transfer the goods abroad to freight forwarders whose identity would have been unknown not only to the true owners of the goods but also to the Appellants' suppliers. In the absence of any corroborative evidence whatsoever, and against the background of our finding that Mr Tomlinson is dishonest, we reject an uncorroborated claim by him to have obtained by telephone authority for the Appellants to transfer goods abroad, prior to payment for them
>
> 664. As Mr Tomlinson quite correctly observed, in some cases the document issued by the Appellants on a deal being completed simply allocated the goods sold to the customer. In none of those cases did the Appellants adduce any evidence to show that they subsequently issued a document releasing the goods. In the absence of such documents we infer that there was no practical difference between "allocation" and "allocation and release". It mattered not which form was used, the customer was free to deal with the goods concerned as it wished.
>
> 665. We regard the exchange with which we have just dealt as clearly demonstrating contrivance, artificiality and orchestration. We might have referred to the Appellants' allocate and release arrangements as explained by Mr Tomlinson as implausible, but accept Mr Cunningham's use of "preposterous" as more boldly and truly describing them. The system Mr Tomlinson explained was uncommercial, and his evidence was incredible. No genuine trader would have behaved as he did. The section we have cited from Mr Tomlinson's cross-examination contains a number of clear indicators of dishonesty, and we treat them as such.
>
> 666. It defies logic and commercial reality that each trader in the Appellants' transaction chains was able to, and indeed did, relinquish possession of goods of great value without payment having been made for them, or any security for payment having been provided. Equally illogical is Mr Tomlinson's claim that, notwithstanding that a supplier retained title to goods pending payment, the trader allocated stock was permitted to export it. And despite not having title to

> phones, again illogically, each trader continued to trade them until the EU importer behaved atypically and paid his supplier, whereupon payment cascaded down the chain of transactions and title to the phones correspondingly ascended it. The position of the EU importer is equally unbelievable and illogical. For no disclosed reason, that trader unilaterally decided to pay its supplier – a risk that no legitimate trader would have taken."

35. The FTT then summarised its findings on these further factors at [667] as follows:

> "In our judgment, each of the matters to which we have referred in this section of our decision confirms our earlier finding that Mr Tomlinson is dishonest. We consider him to be thoroughly dishonest."

36. At [668] to [670] the FTT dealt with the evidence Mr Edmonds gave in his witness statement concerning the Appellants' due diligence procedures. Mr Edmonds's evidence was that, since HMRC's guidance in Notice 726 made it clear that traders were not expected to "go beyond what was reasonable" in undertaking due diligence, the Appellants could not be expected to know its suppliers' supplier or the full range of selling prices throughout the supply chain. His evidence was that if Mr Tomlinson knew from whom his customers was sourcing the goods, it might suggest to HMRC collusion, price and margin fixing and contrivance. He went on to say that if Mr Tomlinson considered his customer/supplier to be bona fide "he had to believe that these counterparties would conduct their own reasonable due diligence and that this would be repeated by each supplier/customer throughout the chain."

37. The FTT then made the following findings at [671] to [673]:

> "671. We regard the phrasing of the extract from Mr Edmonds' witness statement as particularly revealing. As we read it in the context of the remainder of his evidence, it was tantamount to him saying that the Appellants took care to ensure that they did not obtain information about traders in their transaction chains to prevent HMRC making allegations as to their knowledge in that behalf. (That they could obtain information, at least retrospectively, was shown in relation to transactions involved in the Appellants' earlier appeals).
>
> 672. We also regard it as plain from evidence of Mr Edmonds that he and Mr Tomlinson took the view that if HMRC could not prove that the Appellants were dealing with fraudsters they were free to deal with whomsoever they wished, whether or not they were fraudsters: they could continue trading and make input tax repayment claims. If challenged they could, indeed did, rely on HMRC's inability to prove fraud to justify their behaviour.
>
> 673. Mr Edmonds' conclusion was directly contrary to the advice offered to traders in Notice 726, as he must have known. His conclusion completely ignored the advice in the Notice as to how to ensure the integrity of supply chains. It also sought, quite wrongly, to impose upon HMRC the burden showing that the Appellants transactions were connected with fraud.
>
> 674. Having considered Mr Edmonds' evidence against the background of the whole of that presented to us, and particularly his knowledge of the Appellants'

> earlier appeals and their 2006 trading, we have concluded that he is as dishonest as Mr Tomlinson; that is to say he too is thoroughly dishonest."

38. It was common ground that HMRC had made no pleading in its statement of case that Mr Edmonds was dishonest and that no such allegation been put to him in cross examination.

39. At [680] to [847] the FTT made detailed findings as to what it held to be the uncommerciality of the Appellants' transactions which were the subject of the appeals.

40. After reviewing the due diligence carried out by the Appellants on each of their counterparties the FTT made the following findings at [751] and [752]:

> "751. In our judgment, the due diligence evidence presented showed that the Appellants' transactions were orchestrated and contrived; it was casual and amounted to nothing more than window dressing. Another way of describing it might be as a box ticking exercise. In those circumstances we consider it irrelevant that HMRC failed to consider the due diligence said to have been carried out on 87 traders with whom the Appellants "decided not to trade". In view of our earlier finding that the Appellants were told with whom to trade, it follows that any due diligence carried out on companies with which they did not trade was pointless.
>
> 752. We regard Mr Tomlinson's claim to have been unable to identify anyone in his transaction chains beyond his own suppliers and customers as implicitly saying that he was able to trade with impunity irrespective of whatever was going on in the remainder of the chains – behaviour completely contrary to the recommendations of Notice 726. We regard his claim that he "had to believe" that all the other parties in the chains would do their own due diligence as incredible, particularly when viewed against the background of the various warnings of fraud contained in that Notice."

41. At [756] to [762] the FTT made findings that the Appellants dealt in many mobile phones of non-UK specification but should reasonably have asked what these phones were doing in the UK, why there was a market for them in Europe and why they had chargers designed for use in markets outside the UK. The FTT found that there was no likely explanation for the goods having been imported into the UK other than that they were to be exported, and Mr Tomlinson knew that to be the case.

42. The FTT dealt with the Appellants' practice of back-to-back trading at [763] to [769]. The FTT made these observations and [764] on the Appellants' trading model:

> "In the first of his witness statements made in the NTS appeal, Mr Tomlinson contended that HMRC's criticism of back-to-back trading revealed a misunderstanding of the way in which the wholesale grey marketed operated, and asserted that it had operated in the way it did in 2006 for many years. He claimed the Appellants' trading model to be standard within the industry, and long established: it was one with which he had grown up and understood. He

said that NTS continued to operate in the same way today, but presented no evidence to support the claim. In the absence of any evidence as to NTS's current trading practices, we do not accept the claim, which in any event is irrelevant for present purposes."

43. The FTT then found the following at [769]:

"As was pleaded by HMRC in the statement of case (see para 99.12 thereof) if a trader were contacted first by a customer, there would be a delay between obtaining the order and finding someone able to supply the precise quantities and specifications of goods required by the customer. That no such delay ever occurred in the Appellants' transactions, requirements being instantly matched in every single case, in our judgment, indicates that their deals were artificially contrived."

44. The FTT found that the Appellants did not enter into written trading contracts and their documentation contained no terms or conditions of trade, no provision was made for the payment of goods, the transfer of title in them and their delivery. Nor was there a formal returns/exchange policy in place should the phones traded have proved to be faulty or damaged. It then concluded at [777]:

"The absence of contractual documentation indicates to us that the Appellants did not trade on terms which protected them in the event of dispute with their suppliers or customers. It further indicates, and we find by inference, that the Appellants contracts were not genuine, but rather were contrived. The business of the Appellants was simply document generation."

45. The FTT also regarded the absence of inspection reports as indications of uncommerciality. It rejected Mr Tomlinson's claim that freight forwarders holding goods telephoned the Appellants to say that they had inspected the goods and found them satisfactory. The FTT said at [786] that in the absence of evidence to corroborate Mr Tomlinson's claim "coupled with his dishonesty" that it was not prepared to accept the claim. Furthermore, at [788] the FTT found:

"Even had we been prepared to accept Mr Tomlinson's explanation for the non-production of the 06/06 reports, we should not have been prepared to believe that he attached the importance he claimed to inspection reports. In our judgment, viewed against the background of the whole of the evidence before us, that aspect of the Appellants' due diligence consisting of inspection was nothing more than window dressing."

46. As regards the lack of insurance of goods in transit, Mr Tomlinson's evidence was that he had been informed that as he did not have title to the goods he had no insurable interest but maintained that his manner of trading was industry-standard and accepted as such by HMRC. The FTT found at [792]:

"The evidence clearly showed that the Appellants did not arrange insurance cover for any goods in which they dealt. In our judgment, their lack of insurance, and of any interest in whether cover had been effected, indicates that insurance was a matter of no concern to them, and that the goods in which they dealt were not held in furtherance of legitimate and genuine trading."

47. The FTT made findings that transactions were primarily carried out at the end of the month. Mr Tomlinson's evidence was that it did not occur to him that the trading pattern concerned was indicative of the market being controlled. There were a large number of transactions on 22 June 2006 in the context of the three-week period immediately preceding that date being one in which there were no transactions. Mr Tomlinson's evidence was that there would have been negotiations taking place over a period of time prior to that date. The FTT rejected Mr Tomlinson's evidence and made the following finding at [803]:

> "In our further judgment, the statement of Mr Tomlinson relating to the negotiation of deals carried out on 22 June 2006 set out above is yet another illustration of his dishonesty. Once again we rely on the reasons we gave for rejecting his evidence in relation to the split deals to reject his claim to have entered into detailed, genuine commercial negotiations with suppliers and customers."

48. The FTT found at [811] and [812] that the use of freight forwarders based in a different country from that of the residence of the Appellants' EU customer in a large number of transactions was a further indication of contrivance and orchestration and should have suggested fraud to Mr Tomlinson.

49. The FTT found at [813] and [814] that there were a number of transactions where goods moved prior to receipt of payment which it regarded as indicating the uncommerciality of the deals concerned.

50. The FTT made the following finding at [821] in response to HMRC's submission that another feature of uncommerciality was that the Appellants added no value to a transaction chain in return for their profit margin:

> "As did Mr Cunningham, we ask ourselves why the Appellants were so richly rewarded for so little work, and respond by saying that, viewed in isolation, the facts may be insufficient to indicate knowledge or means of knowledge of fraud on the Appellants' part. But when considered together with other matters, they may, indeed must, be viewed differently. We regard the facts as yet further indicating orchestration and contrivance."

51. Similarly, in response to HMRC's submission that the profits made by the Appellants in the appeal period were unreasonably large when compared with the margins obtained by other traders in their transaction chains amounted to uncommerciality, which was explained by Mr Tomlinson on the basis that liquidity was coming back into the market at the relevant time and his negotiating skills, the FTT found at [830] and [831]:

> "830. In our judgment, we must consider Mr Tomlinson's claim that liquidity was returning to the market in 2005 and early 2006 against the background of the unchallenged witness statement of Mr Stone in which, it will be recalled, he said that there was a great increase in MTIC goods trading "with no apparent commercial or economic explanation for that increase". We have no hesitation in preferring the evidence of Mr Stone to that of Mr Tomlinson, and reject the latter's claim that an increase in liquidity was the basis of the increase in trade.

> 831. We then focus our attention on Mr Tomlinson's statement that negotiations formed a part, an important part, in the Appellants achieving substantial profits in trading. Again in reliance on our holding that in "split deals" Mr Tomlinson's claim to have negotiated prices for purchases and sales was untrue and our inference from his evidence that he is dishonest, we reject his claim that successful negotiations formed the basis of the Appellants' profits. We infer that negotiation played no part in the determination of the Appellants' profits in the appeal period. As Mr Cunningham said, the Appellants' claim that their profits were the result of genuine, arm's length trading was an incredible proposition. Once more, we consider the evidence to indicate orchestration and contrivance."

52. A linked issue was the tripling of NTS's turnover between the period 01/06 and 04/06. The FTT found at [839] that to be the result of HMRC satisfying a large number of input tax repayment claims. The FTT said it was attributable to the judgment of the ECJ in *Optigen* following which "the Appellants took full advantage of HMRC's resultant inability to challenge MTIC trade; their deals were orchestrated and contrived."

53. Finally, the FTT found at [843] that the omission of the colour of the phones in the majority of the invoices in Nokia 8800 deals (the FTT having found that the colour of a phone made a significant difference to its value) suggested that the deal documentation was created purely and simply to provide the traders concerned with evidence sufficient to satisfy HMRC that the deals were genuine, which the FTT inferred they were not.

54. The FTT summarised HMRC's submissions at [851] to [863]. HMRC invited the FTT to find that Mr Tomlinson entered into all the transactions carried out by the Appellants well knowing that they were connected with fraud. If not, he clearly should have known of the connection with fraud.

55. The FTT records the following submissions made by Mr Cunningham on behalf of HMRC:

> (1) Mr Tomlinson's only defence was that he did not know that his deals were connected with fraud and he invited the tribunal to find him honest. His defence was simply a denial and an assertion that he was honest and, save for Mr Edmonds and his expert witness, he had called no evidence;
>
> (2) Mr Tomlinson invited the FTT to accept him as a reliable and honest trader who would do everything he could to assist and cooperate with HMRC to eradicate fraud, but the evidence was such that the FTT must find that he was the opposite of all of those things and his failure to engage with HMRC was particularly striking, the inference being that Mr Tomlinson took the view that due to the judgment in *Optigen*, HMRC were powerless to deny him VAT repayments, however he traded;
>
> (3) The inference must be that Mr Tomlinson was quite happy to turn a blind eye to the fraud to make as much money as he could. Further, he did not find it odd that HMRC pressured high-street banks to prevent traders carrying out

transactions through them, such that he was no longer able to bank in the UK and had to open a bank account in the Dutch Antilles;

(4) In most deals, there was clear evidence that every party involved in the transfer of goods and cash was a knowing party to the fraud. There was a compelling inference to be drawn that such schemes would not realistically have operated without the knowledge of Mr Tomlinson; and

(5) Looked at in context, the transactions were in fact contrived and orchestrated as part of MTIC fraud and the Appellants knew or must have known this.

56. The FTT records at [902] that it accepted these submissions unreservedly. It set out its reasoning as to why it concluded that the appeals must be dismissed at [901] and [903] to [910] as follows:

> "901. We also accept that, with one exception, throughout the appeal period the FCIB presented as a reputable off-shore international bank offering state of the art facilities to its customers. The exception was the bank's requirement that potential customers declare that s.77A VATA had been complied with. That requirement should at least have put the Appellants on notice that all was not as it appeared on the surface.
>
> ….
>
> 903. In our judgment, the Appellants' due diligence procedures after 1 September 2005 speak for themselves as indicating that they were nothing more than window dressing. We see no other way of describing their trading with some companies who were placed in the highest possible risk category by the credit rating agency Experian (David Jacobs and Epinx), and with others for whom Experian was unable to provide any indication of risk, e.g due to their very recent incorporation (Deb Techno). Further, in the case of Sigma Sixty, the evidence clearly showed that the Appellants carried out no due diligence on the company before first dealing with it. But, in our judgment, the factor most indicative of the irrelevance of due diligence to the Appellants was Mr Tomlinson's admission that he would have traded with East Telecom whatever the due diligence exercise on that company showed. In our judgment, looked at in combination, the matters to which we have just referred indicate that the Appellants had actual knowledge that the deals in which they were concerned were connected with fraud.
>
> 904. We appreciate that the Appellants may not have been aware of the circularity of the money flows in their transaction chains. However, for the payment patterns revealed by the analysis of the HMRC officers to have been maintained, the Appellants must have been involved in the chains: they must have been told when to expect to receive payment from their customers and when to make payment to their suppliers. To us, that is a further example of them having actual knowledge of a connection with fraud.
>
> 905. Equally indicative of their having actual knowledge is the fact that in each one of the 16 Cell 10 deals their combined profit was 8% or a figure within 0.1% of 8%. That they achieved such a result could only have been due to a

complete absence of negotiation and of their having been told at what price to buy and at what to sell the phones in which they dealt, and we so infer.

906. On 22 June 2006 the Appellants entered into a number of Cell 10 deals and a number of Cell 5 deals, in each case in the same make, models and not greatly different numbers of handsets. In the former group the Appellants made roughly four times as much profit per phone as in the latter – a fact which we earlier inferred to be indicative of contrivance and orchestration. The clear absence of evidence of negotiation of prices in those deals enables us further to infer that the Appellants were controlled in their deals and had actual knowledge of a connection with fraud; their own documentation and that of their suppliers, all contemporaneous, clearly shows that to have been the case. We might add that the facts referred to in this paragraph and in the last preceding one in large part deal with, and in our judgment largely dispose of, the Appellants' claim to have been duped.

907. Not only was every deal the subject of the appeal completed in a single day, in each case the phones whilst in the UK remained in the possession of the freight forwarder instructed by their UK acquirer. They were then despatched to an EU freight forwarder nominated by the EU customer. The Appellants carried out no due diligence on any of the freight forwarders with which they dealt. Indeed, no evidence was adduced to indicate that they had ever dealt with any of the EU freight forwarders concerned before the transactions with which we are dealing took place. Notwithstanding that the Appellants carried out no due diligence on the UK freight forwarders holding the goods, they entrusted them with the task of inspecting the goods they held. Whether they should have been so entrusted, we cannot say, but we should have expected some checks to have been made on companies advising on the existence and quality of batches of products said to be valued on average at £1 million. Those matters again point to the Appellants having had actual knowledge of fraud.

908. We have considered the uncommercial factors relied on by HMRC to show that the Appellants knew or should have known that their transactions were connected with fraud in some detail. Even viewed individually, a number of them indicate to us that the Appellants had actual knowledge of that connection. As examples, we might cite the ease with which they obtained huge profits at no commercial risk, and the large increase in BTS's turnover in period 06/06. But, taken in combination, we agree with Mr Cunningham's submission that they indicate actual knowledge.

909. However, had we had any doubt as to the answer to the question of the Appellants' knowledge, it was dispelled as the result of our analysis of their split deals. As we earlier inferred (see our discussion following that analysis), in each deal BTS was told when and from to whom to buy, when and to whom to sell, in each case at what price, and acted on instructions given to it. In our judgment, the evidence on which we relied to conclude that the deals were contrived and orchestrated shows equally that the Appellants had direct actual knowledge that their deals were connected with the fraudulent evasion of VAT. As Mr Cunningham suggested we should, we equate Mr Tomlinson's dishonesty with actual knowledge of fraud.

> 910. In our judgment, the evidence as to the result of the split deals finally disposes of the Appellants' duping claim; they knew that their purchases were connected with the fraudulent evasion of VAT. That brought them within the category of participants in the fraud."

The Grounds of Appeal

57. In their application to the FTT for permission to appeal, the Appellants put forward 12 grounds of appeal, which with submissions in support, extended over 109 pages. Permission to appeal was given by the FTT (Judge Bishopp) on 6 January 2016. In granting permission Judge Bishopp observed that there was a considerable overlap between the various grounds and although some of the grounds raised arguable points warranting the grant of permission others, if he were considering them in isolation, would not lead him to grant permission. Nevertheless, understandably, so as to avoid disputes about which arguments may, and which may not, be pursued Judge Bishopp granted permission to appeal on all grounds.

58. It is fair to say that the various grounds can be characterised as contentions that the FTT made errors of law either through committing procedural irregularities or by making findings of fact which were irrational or perverse. The Appellants contend that the irregularities and errors of law were highly material and fundamental to the Decision and invite this Tribunal to set aside the Decision and either remake it or remit the matter to the FTT for reconsideration by a differently constituted tribunal.

59. The grounds of appeal were helpfully summarised in the notice of appeal as follows:

Ground 1: (a) that the FTT wrongly admitted the convictions of Mr Tomlinson when the said convictions were inadmissible pursuant to the Rehabilitation of Offenders Act 1974; and, further, (b) that the FTT failed to give any reasons for admitting the convictions of NT, either at the time that the convictions were admitted or in its final decision;

Ground 2: that the FTT's finding that Mr Edmonds was dishonest constituted a serious procedural irregularity; was a finding which was contrary to the evidence; and one which no reasonable tribunal could have reached; and was therefore an error of law;

Ground 3: that the FTT erred in law in its finding that Mr Tomlinson was dishonest on the basis of an analysis of the documentary evidence (of the "split-deals") carried out by the FTT, which was neither raised nor considered by the parties during the course of the hearing and not put to Mr Tomlinson during the course of his evidence. The finding that Mr Tomlinson was dishonest was highly significant in the context of the appeals, pervaded the FTT's approach to all issues raised and determined its factual findings thereafter;

Ground 4: that the FTT erred in fact and in law in finding that the Appellants had conducted no due diligence on their suppliers when the evidence demonstrated that substantial due diligence had been conducted on those entities;

Ground 5: that the FTT erred in its approach to the due diligence conducted by the Appellants in respect of traders with which they chose not to trade;

Ground 6: that the FTT erred in law in rejecting the highly relevant evidence of Mr Tomlinson as to the on-going trading of NTS, when the same was not in issue in the appeals, was confirmed by the evidence of Sara Evans and Vincent D'Rozario of HMRC and was therefore a finding which was contrary to the evidence and one that no reasonable tribunal was entitled to reach;

Ground 7: that the FTT erred in law and in fact in finding that Mr Tomlinson "ignored the advice offered in PN 726" when in fact on the evidence before the Tribunal Mr Tomlinson had followed the guidance offered. The finding of the Tribunal was irrational and perverse and one which no reasonable tribunal was entitled to reach;

Ground 8: that the FTT's finding that, on the evidence of Mr Humphries of HMRC, those traders alleged by HMRC to be contra-traders behaved as such was contrary to the evidence, wholly irrational and perverse, and one which no reasonable tribunal was entitled to reach.

Ground 9: that the finding of the FTT that the wording of the "Special VAT Certification" of FCIB should have given rise to suspicion on the part of the Appellants as to the bona fides of FCIB, was contrary to the evidence, irrational and perverse, and one which no reasonable tribunal was entitled to reach;

Ground 10: that the FTT's finding that the Respondents had proved a circular flow of money in all but one of the Appellants' transaction chains in Cells 5 and 10 examined by Ms Parikh, and partial circularity in the other, was contrary to the evidence, irrational and perverse, and ignored the detailed submissions as to alleged circularity made on behalf of the Appellants;

Ground 11: that the FTT's findings as to those matters of 'uncommerciality' relied on by the Respondents were, in some respects, contrary to the evidence and/or wholly ignored the unchallenged evidence of expert opinion, and were thereby irrational and perverse; and

Ground 12: that the FTT erred in that it failed to consider relevant evidence given by the expert witnesses as to the size of the wholesale grey market in mobile telephones in 2006.

60. Ground 4 is no longer pursued.

Errors of law and the Upper Tribunal's powers

61. Section 11(1) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") provides that a party to a case before the FTT only has a right of appeal to the Upper Tribunal on a point of law arising from the FTT's decision. There cannot be an appeal on a pure question of fact which is decided by the FTT. However, a tribunal may arrive at a finding of fact in a way which discloses an error of law. That is clear from *Edwards v Bairstow* [1956] AC 14 in which Lord Simonds referred to making a

finding, without any evidence or upon a view of the facts which could not be supported, as involving an error of law: see at page 29. In the same case, Lord Radcliffe, at page 36, regarded cases where there was no evidence to support a finding or where the evidence contradicted the finding or where the only reasonable conclusion contradicted the finding, as cases involving errors of law.

62. In relation to an appeal which is said to involve a point of law of the kind identified in *Edwards v Bairstow*, we were reminded by Mr Cunningham of what was said by Evans LJ in *Georgiou v Customs and Excise Commissioners* [1996] STC 463 at 476, as follows:

> "It is right, in my judgment, to strike two cautionary notes at this stage. There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law. That is well seen in arbitration cases and in many others. It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure to the High Court to be misused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but, was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled."

63. He continued:

> "... For a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make."

64. He concluded:

> "what is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong. A failure to appreciate what is the correct approach accounts for much of the time and expense that was occasioned by this appeal to the High Court."

65. Furthermore, in *Megtian Limited v Revenue and Customers Commissioners* [2010] EWHC 18 (Ch) at [12] Briggs J referred to the need for appellate caution when considering whether to reverse a judge's evaluation of the facts which will have been influenced by the impression made upon him by the primary evidence in the following terms:

> "The restrictions imposed by an appeal limited to points of law are in addition to the well-recognised difficulties facing any appellate court, such as not seeing the

> witnesses giving evidence, being confined to a review of evidence considered in much greater detail by the court below, and being unable to capture from the judgement (however meticulous) every nuance which played an important part of the valuation of the court below: see for example per Lord Hoffmann in *Biogen Inc v Medeva plc* [1997] RPC at 45…"

66. That observation is particularly apposite in relation to the FTT's overall findings that Mr Tomlinson was dishonest. We accept Mr Cunningham's submission that that finding was a finding of fact arrived at not merely by an analysis of the documentary evidence but by the FTT's assessment of Mr Tomlinson's credibility in the witness box.

67. Furthermore, the fact that we may find that one or more of the Appellants' grounds of appeal disclose errors of law on the part of the FTT does not necessarily mean that we should allow the appeal and set aside the Decision. Section 12 TCEA provides that if the Upper Tribunal finds that the making of the relevant decision involved the making of an error on a point of law it "may (but need not) set aside" the decision. That language clearly indicates that we have a discretion in that respect. In our view, we should not exercise our discretion to set aside the Decision if we were satisfied, notwithstanding errors of law in the Decision, that there was a sufficient basis in the findings of the FTT which were fully reasoned and not subject to challenge to justify its conclusions that the Appellants knew that its transactions were connected with fraud. There is authority for this approach in *Megtian*, another MTIC case, where Briggs J said at [73]:

> "If I had concluded that one or more of Mr Patchett-Joyce's criticisms of the specific factors which the tribunal took into account in concluding that *Megtian* have the requisite knowledge of fraud was made out, it might have been necessary for me to consider whether the remainder, taken together with those factors relied upon by the tribunal which were not challenged, nonetheless constituted a sufficient basis for its conclusion."

68. We also bear in mind the passage from *Georgiou* quoted at [62] above: we should not regard any finding of fact as disclosing an error of law where it is not significant in relation to the findings in the Decision with which these appeals are concerned, namely the conclusion that the Appellants knew that the transactions which were the subject of their appeals were connected with the fraudulent evasion of VAT.

69. Were we to conclude that we should set aside the Decision, although the prospect of a further lengthy hearing in the FTT long after the events in question occurred is deeply unattractive, since the question as to whether the Appellants knew or should have known that their transactions were connected with fraud depends entirely on Mr Tomlinson's state of mind, the assessment of which depends to a large degree on an evaluation of the evidence that Mr Tomlinson gave orally and which we have not heard, we cannot see how we could possibly remake the decision. In those circumstances, the only option open for us would be to remit the matter to the FTT for a fresh hearing before a different tribunal, but, as we have said at [67] above, it does

not follow from the fact that we find that there are errors of law in the Decision that we should set it aside.

70. The FTT was obliged to give reasons for its Decision by virtue of rule 35 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The common law test as to the adequacy of reasons for a judicial decision, as expounded in *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 and *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, applies to the requirement to give reasons under rule 35 also. Reasons which do not satisfy this standard of adequacy involve an error of law which can be the subject of an appeal under section 11 of the Tribunals, Courts & Enforcement Act 2007.

The arguments on appeal

71. We mentioned at [8] above that the two issues in dispute at the hearing before the FTT were (i) whether the Appellants' transactions undertaken with an alleged contra-trader were connected with a tax loss and (ii) whether the Appellants knew or should have known that their transactions were connected with the fraudulent evasion of VAT.

72. In relation to the first issue, there was no challenge in the Grounds of Appeal to the FTT's findings at [897] and [899] to the effect that the Appellants' trading with the alleged contra-traders was connected with the tax losses. It is therefore clear that we are only concerned on this appeal with the FTT's findings that the Appellants, through Mr Tomlinson, knew that the transactions which were the subject of the appeal were connected with the fraudulent evasion of VAT.

73. As Mr Cunningham submitted, in this case the knowledge issue was distilled into the issue of whether or not Mr Tomlinson was dishonest. As summarised at [55] above, HMRC submitted that Mr Tomlinson's defence was a denial and an assertion that he was honest. The FTT did not accept that Mr Tomlinson was an honest trader, as demonstrated by its findings at [667] set out at [35] above. Mr Cunningham submitted that this finding of dishonesty was linked to the finding of actual knowledge of the Appellants' trading being connected with fraudulent evasion: see at [909] where the FTT recorded that it equated Mr Tomlinson's dishonesty with actual knowledge of fraud. Mr Cunningham did say at the end of his closing submissions before the FTT that if the FTT were against him on the question of dishonesty, then this was a clear case where the Appellants ought to have known that their transactions were connected with the fraudulent evasion of VAT. It seems to us, bearing in mind the features of the transactions concerned and the circumstances surrounding them that Mr Tomlinson had a serious case to answer on the "ought to have known" issue. However, the FTT did not deal with this issue at all in the Decision and it is not in issue in this appeal. We will therefore say no more about it.

74. As mentioned at [58] above, the Appellants contend that the errors of law made by the FTT, as specified in the Grounds of Appeal, were highly material and fundamental to the Decision and therefore the Decision should be set aside. Mr Pickup accepts that the Grounds of Appeal are not directed at the weight of the

evidence but rather at the lawfulness of the FTT's approach to the evidence and the rationality of its decision-making. In relation to the findings of dishonesty, Mr Pickup contends that Grounds 1 and 3 represent a direct challenge to the manner in which the FTT made its overall finding of dishonesty against Mr Tomlinson.

75. HMRC contend that the linked findings of dishonesty and actual knowledge were findings of fact arrived at by an assessment by the FTT of the credibility of Mr Tomlinson based on his performance and demeanour in cross-examination, an assessment which HMRC contends is virtually unassailable on appeal. Furthermore, there is no challenge by the Appellants either to the FTT's finding that Mr Tomlinson was "thoroughly dishonest" or to the linked and consequential finding that he had actual knowledge of the connection with fraudulent evasion of VAT. HMRC contends that, as a result, the appeal must fail.

76. Alternatively, HMRC contends, the FTT made a large number of further findings of fact as to actual knowledge which individually and cumulatively also make the Decision unassailable. These further findings include the following as summarised at [903] to [909]:

(1) That the Appellants' due diligence procedures were nothing more than window dressing;

(2) That the payment patterns revealed by HMRC's analysis demonstrate that the Appellants must have been involved in the chains and have been told when to expect to receive payment from their customers and when to make payment to their suppliers;

(3) That in each one of the Cell 10 deals the Appellants' combined profit was 8% or a figure within 0.1% of 8% which could only have been achieved due to a complete absence of negotiation and the Appellants' having been told at what price to buy and at what to sell;

(4) That there was a clear absence of evidence of negotiation of prices as regards the transactions entered into on 22 June 2006 from which it can be inferred that the Appellants were controlled in their deals, their own documentation and that of their suppliers, all contemporaneous, clearly showing that to been the case, this fact and the findings described at (3) above largely disposing of the Appellants' claim to have been duped;

(5) That the Appellants carried out no due diligence on any of the freight forwarders with which they dealt when it would have been expected that some checks would have been made on companies advising on the existence and quality of batches of high-value products;

(6) The uncommercial factors present in the Appellants trading as found at [680] to [847], in particular the ease at which they obtained huge profits at no commercial risk, and the large increase in turnover in period 06/06; and

(7) The evidence as to the result of the split deals which the FTT found "finally disposes of the Appellants' duping claim".

77. In the light of these arguments, we will adopt the following approach in order to determine the appeal.

78. First, we shall consider each Ground of Appeal separately and determine the extent, if any, to which it discloses an error of law on the part of the FTT. Following that analysis, we shall then consider whether notwithstanding any such errors of law those findings of the FTT on which it based its overall finding of dishonesty and consequently actual knowledge on the part of Mr Tomlinson that the transactions concerned were connected with the fraudulent evasion of VAT constitute a sufficient basis for the FTT's conclusions. We shall also consider the extent to which our findings of errors of law in respect of any specific findings of the FTT could be said to have pervaded any of the FTT's other findings.

Ground 1: wrongful admission of Mr Tomlinson's convictions and failure to give reasons therefor

79. Mr Tomlinson has two spent convictions for offences of dishonesty. They were referred to in HMRC's Statement of Case and in a witness statement made on their behalf. This evidence was replied to by Mr Tomlinson in his witness statement. No objection to their admission was made until Mr Cunningham sought to refer to them in his opening. At that stage, on the first day of the hearing, Mr Pickup indicated that he wished to challenge their admissibility and/or the weight that the FTT was to place on those convictions in the light of the provisions of the Rehabilitation of Offenders Act 1974. In short, s 4 (1) of that Act provides that no evidence shall be admissible in any judicial proceedings to prove that a person has been convicted of an offence which was the subject of a spent conviction but s 7 (3) of the Act provides in essence that evidence of a spent conviction may be admitted if the court or tribunal in question "is satisfied, in the light of any considerations which appear to it to be relevant… that justice cannot be done in the case" except by admitting evidence relating to the spent conviction.

80. It was submitted on behalf of the Appellants in written and oral submissions that the convictions ought not to be admitted given the narrow test for admissibility imposed by s 7 (3) of the Rehabilitation of Offenders Act 1974. Various authorities were cited to the FTT from which it was argued that the threshold for admission was a high one, deliberately chosen by Parliament, given the importance ascribed to rehabilitation, s 7 (3) having been described as a "strong presumption" against the admission of such evidence. The question for the FTT was therefore whether it was able to resolve the issues in the case, fairly to both parties, without reference to the spent convictions.

81. HMRC opposed the application to exclude the evidence of the spent convictions, broadly on the basis that the Appellants' case was based on Mr Tomlinson's plea that he was an innocent dupe in the fraudulent scheme and that he was an honest trader so that it was hard to see how it would not be just for the FTT to take into account two convictions for dishonesty when asked to find by that person that he is honest. HMRC also asked the FTT to have regard to the extent to which it could properly be said that there had already been consent to the admission of the

evidence, through the fact that they were referred to in a witness statement of one of HMRC's witnesses and in Mr Tomlinson's own witness statement.

82. Submissions on the application were heard at the beginning of day 20 of the hearing. After the hearing, the FTT adjourned briefly before delivering its decision orally on the application, which was that "evidence of the spent convictions should not be excluded." No reasons for the decision were given at that point and Mr Tomlinson was then called. He was cross-examined on the spent convictions and the circumstances relating to them later on the same day. At the end of the same day, Mr Pickup asked the FTT for reasons for the decision, indicating that he would be content whether the decision was made the subject of a separate ruling or contained in the final decision. Judge Demack indicated that he was happy to do so.

83. No separate ruling was provided but the matter was addressed at [638] as follows:

> "Before we proceed to deal with the subject of this section of our decision, there is one preliminary matter we must dispose of. In the original BTS statement of case, which was served as long ago as 2008, HMRC made reference to two convictions of Mr Tomlinson. Despite BTS having been professionally represented throughout the appeal, no objection to their disclosure was made until Mr Cunningham mentioned them in his opening statement. Mr Pickup then submitted that we should not admit them in evidence as they were spent. We heard submissions from both parties on the point, and decided to admit them. Having now had an opportunity to consider the convictions, we place no relevance on them and ignore them. We thus need not provide our reasons for deciding to admit the convictions."

84. It would appear that there is a typographical error in that paragraph in that "relevance" should be "reliance" in the penultimate line.

85. Mr Pickup submits that the determination of the FTT to ignore the convictions and not give reasons for their admission was wholly wrong, irrational and perverse. No reasons were given why the convictions were admitted but the FTT must, in order to admit them, have concluded that justice could not be done in the case except by admitting the evidence. Therefore, to state in the Decision that they were going to be ignored was perverse because they should never have been admitted if they were of no relevance and not to give reasons why they were admitted because the FTT claims to ignore them is, again, irrational and perverse. In any event, the FTT erred in law in failing to provide any reasons for its decision to admit the convictions.

86. Mr Tomlinson having been questioned about the seriousness of the offences and it having been suggested to him that his very pleas were dishonest because he did not admit (in giving evidence before the FTT) the offences to which he had pleaded guilty, Mr Pickup submits that the admission of the convictions provided the foundation from which HMRC were able to make their submissions that Mr Tomlinson was dishonest. He says that HMRC focused attention on the convictions in its closing submissions, and whilst not seeking to rely upon them as determinative of the appeal in their favour placed them at the forefront of their submissions on

dishonesty as being one indicator of dishonesty among many. He goes on to say that it was perverse of the FTT to admit the convictions, permit HMRC to use and rely on the convictions, not only in written submissions but also in cross examination of Mr Tomlinson, and then in the Decision state that it places "no relevance" upon them.

87. Mr Cunningham in his submissions before us accepted that the failure on the part of the FTT to give reasons for its decision not to exclude the spent convictions was a mistake on its part. He was right to do so. There can be no doubt on the basis of the authorities referred to at [70] above that the FTT's failure to do so was an error of law on its part. He pointed out that there was no reference to the conviction in HMRC's opening skeleton before the FTT and in his closing submissions he submitted that HMRC do not need to and do not rely on the evidence of the convictions as determinative of the appeal in their favour.

88. We do not regard this error as being significant in relation to the FTT's overall finding of dishonesty against Mr Tomlinson. It would appear from [638] that although the FTT stood by its decision not to exclude the convictions, and indeed it would be difficult not to have done so in the light of the fact that Mr Tomlinson was subsequently cross-examined on them, it decided to place no weight on them. We therefore reject Mr Pickup's submission that the FTT acted perversely by deciding to admit them and then determining that they were not relevant. In our view the language of [638] is consistent with a determination that although the convictions were held to be relevant, no reliance was going to be placed on them. As we have said, the word "relevance" in [638] must be a typographical error for "reliance".

89. In our view, we should accept, as the FTT clearly stated, that the fact of the spent convictions and Mr Tomlinson's oral evidence in relation to them played no part in the FTT's decision-making on the question of whether Mr Tomlinson was, as they found him to be, "thoroughly dishonest". Therefore, there is no basis in our view for Mr Pickup's submission that HMRC's focus of attention on those convictions was the primary foundation for their submissions as to Mr Tomlinson's dishonesty. The FTT stated categorically that it would ignore them and made no reference to Mr Tomlinson's cross-examination or HMRC admissions on them; it was therefore in the same position as if having seen the evidence it decided to put it out of its mind and not allow it in any way to influence their decision. It is of course not uncommon for a Tribunal to find itself having to take that approach. Accordingly, the FTT's error in not giving reasons for its decision not to exclude the evidence regarding the spent convictions cannot be regarded as being significant on its own to the outcome of the Appellants' appeal.

90. On that basis, it is unnecessary for us to consider any further whether the FTT made an error of law in not excluding the evidence relating to the spent convictions in the first place.

Ground 2: The FTT's finding of dishonesty against Mr Edmonds

91. We have set out at [36] and [37] above the FTT's findings regarding Mr Edmonds's evidence concerning the Appellants' due diligence procedures. The FTT

concluded at [673] that Mr Edmonds was "as dishonest as Mr Tomlinson; that is to say he too is thoroughly dishonest."

92. Mr Pickup submits that this finding was wholly unsupported by the evidence, irrational and perverse and constituted a serious procedural irregularity and error of law.

93. It is clear from the transcript of the proceedings that at no point in his cross-examination was any accusation or allegation of dishonesty made against Mr Edmonds. Neither did HMRC's Statement of Case or its opening or closing submissions make any such allegations against Mr Edmonds.

94. We were referred to *Vogon International Limited v The Serious Fraud Office* [2004] EWCA Civ 104. In that case, the Judge at first instance formed a view that Vogon had pursued an opportunistic and dishonest claim with no legitimate prospects of success. In the Court of Appeal Lord Phillips MR (as he then was) observed that it was never the defendants' case that Vogon were dishonest, there was no cross-examination to that effect and the judge gave no indication to Vogon's witnesses or to their counsel that he was thinking of making findings of this kind. Lord Phillips had this to say about the Judge's findings at [29] to [31] of the judgment:

> "29. I …consider that the judge was entirely wrong in the circumstances of this case to make these unnecessary findings. It is, I regret to say, elementary common fairness that neither parties to litigation, their counsel, nor judges should make serious imputations or findings in any litigation when the person against whom such imputations or findings are made have not been given a proper opportunity of dealing with the imputations and defending themselves. In the absence of such an opportunity, it is of little consequence to examine details of the evidence given to see whether the judge's findings might have been justified.
>
> 30. In my judgment the judge was wrong to make the findings he did in his principal judgment as to Vogon's original true intentions. He was also wrong to rely on those findings and elaborate them into an explicit finding of dishonesty in his judgment as to costs. Neither was remotely necessary to the decisions which the judge had to make. More importantly, however, findings of this kind ought not to have been made when those involved had not been put on notice that they might be and had not been given the opportunity to defend themselves.
>
> 31. Although, in my judgment, for the reasons which I have given, the substantive appeal should be dismissed, as should the appeal as to costs, Vogon and Mr Sear are entitled to a finding by this court which they can hold out in support of their reputations that the judge's adverse findings as to their intentions and honesty were unjustified and should not have been made."

95. By its findings at [673] the FTT has plainly breached this fundamental principle of elementary common fairness and Mr Cunningham did not seek to argue otherwise. It was quite wrong to have made the findings it did without first having given Mr Edmonds the opportunity of responding to them. In common with Lord Phillips in *Vogon*, we have no hesitation in finding that the FTT's adverse findings as to Mr Edmonds's honesty were unjustified and should not have been made.

96. We therefore accept Mr Pickup's submission that the FTT's finding of dishonesty against Mr Edmonds amounted to a serious procedural irregularity which was an error of law on its part. As *Vogon* makes it clear, in those circumstances we should not examine the details of the evidence given to see whether the FTT's findings might have been justified.

97. We do, however, need to consider whether this finding has significant consequences for the appeals. Mr Pickup submits that Mr Edmonds's evidence was relevant to a number of important issues before the FTT. He gave evidence, both in written and oral form, as to Mr Tomlinson's character and general reputation, the due diligence processes undertaken by the Appellants, the traders with whom the Appellants chose not to trade, the Appellants' relationship with HMRC, the Appellants' knowledge of fraud in the market, his advice to Mr Tomlinson about Notice 726 and joint and several liability and the Appellants' ability to know the details of traders beyond their immediate counterparties. Mr Pickup submits that it followed from the finding of dishonesty against Mr Edmonds that there was no support from him for the evidence of Mr Tomlinson on any of those significant issues and had the FTT given proper and fair consideration to Mr Edmonds's evidence, its further findings of fact may well have been different.

98. In our view the question as to whether the FTT's findings would have been different had it treated Mr Edmonds fairly is pure speculation on Mr Pickup's part. The FTT did not give any weight to Mr Edmonds' evidence in relation to the matters described at [97] above. In none of the key findings made by the FTT on which it based its overall finding of actual knowledge, and in particular those findings which are summarised at [903] to [909], does the FTT seek to rely on Mr Edmonds's evidence or its finding of dishonesty against him. Neither does it appear from the Decision that the FTT relied on that finding in making either its overall finding of dishonesty against Mr Tomlinson or the individual factors which the FTT concluded pointed to Mr Tomlinson's dishonesty as summarised at [22] to [35] above. That much is clear from the way [673] is expressed: the wording indicates that the FTT has made its assessment of Mr Tomlinson's honesty independently of its assessment of Mr Edmonds. We therefore accept Mr Cunningham's submission that the evidence of Mr Edmonds was wholly peripheral in this case and the error of law in respect of its finding of dishonesty against Mr Edmonds is not on its own significant in relation to the outcome of the appeals.

Ground 3: Split deals and Mr Tomlinson's dishonesty

99. Mr Pickup submits that the FTT erred in law in its finding that Mr Tomlinson was dishonest, made on the basis of an analysis of the documentary evidence of the "split deals" carried out by the FTT itself, which was neither raised nor considered by the parties during the course of the hearing and not put to Mr Tomlinson during the course of his evidence. Mr Pickup submits that this analysis was a serious procedural irregularity which caused substantial prejudice to the Appellants. Mr Pickup further submits that the finding of dishonesty on the basis of the FTT's own analysis of the "split deals" was highly significant in the context of the appeals because on a fair and

balanced reading of the Decision, the finding pervaded the FTT's approach to all issues raised and determined its factual findings thereafter and its final conclusion.

100. The Appellants had argued before the FTT that the splitting of deals was not consistent with the existence of an overall contrived scheme, given that splitting deals would have made managing the scheme considerably more difficult without any real advantage. HMRC had argued that one of the indicia of MTIC fraud was unbroken consignments. It was argued by the Appellants that if HMRC assert that unbroken consignments are an indicator of fraud, it must follow that the splitting of consignments is a contra-indicator.

101. None of the matters on which the FTT made findings at [523] and [524] in relation to the "split deals" formed part of HMRC's case and Mr Tomlinson was not cross-examined on them. Accordingly, Mr Tomlinson was not given the opportunity of giving an explanation as to why the "split deals" were undertaken, why they had the features, if that were the case, described at [523] and why the inferences described at [524] should not be drawn from the FTT's analysis of these transactions.

102. Mr Pickup referred us to the Court of Appeal's judgment in *Murphy v Wyatt* [2011] EWCA Civ 408 where Lord Dyson MR set out the proper approach for a judge to adopt when he is proposing to decide a case on the basis of a point which was not argued, or in a way, or to an extent, which is more favourable to a party than the case which that party had advanced in court. He said at [14] to [20]:

> "14. The first point to make is that, at least as a matter of principle, a judge is entitled to take such a course. After all, a judge must decide a case according to the facts and the law as he believes them to be. Accordingly, subject to any particular reason to the contrary in the particular case, there is no reason for objecting in principle to a judge taking such a course.
>
> 15. Secondly, however, there may be particular reasons why such a course is not open to the judge in a particular case. For instance, the course he wishes to take may not be open on the pleadings, or it may be precluded by virtue of a concession which has not been, or cannot be, withdrawn. Equally, a finding of primary fact, or even a finding of secondary fact or an assessment of a witness or expert evidence, may simply not, on analysis, be open to the judge on the evidence before him.
>
> 16. Thirdly, whether or not the point turns out to be open to the judge, it is clear that, save perhaps in very exceptional circumstances (which I find it very hard to envisage), he must ensure that the parties are given a fair opportunity to deal with the point. If the point is, on analysis, a bad one, it is fairer to the parties and less embarrassing for the judge that this is established before the judgment is available, rather than the parties either having a hearing at which the judge has to withdraw or amend the judgment or suffering the delay and expense of an appeal.
>
> 17. But there is an even more important reason for the requirement that the parties are given a proper opportunity to deal with the judge's point, namely procedural fairness. It is simply unfair on a party if she loses a case because of

> a point thought up by the judge, which she or her representatives have not properly been able to address. In this case, a major factor which (if I may say so, correctly) influenced Mummery LJ when giving the defendant permission to appeal, was that her representatives stated that they had not been given a proper opportunity of dealing with the two reasons advanced by the Judge for holding that the 1983 Act did not apply.
>
> 18. How a judge ensures that parties have an opportunity to deal with a point which he has thought of must depend on the circumstances. If the point occurs to him before or during the hearing, he should obviously raise it in court in clear terms with the parties, ideally ensuring that it is reduced to writing, and give the parties a fair opportunity to deal with it. Sometimes it can be fully disposed of at the hearing; on other occasions, it may be only fair to give the parties time, and subsequent written submissions may be the appropriate course. If the point occurs to the judge after the hearing, it would, I think, normally be sufficient if he writes to the parties or their representatives, giving them the opportunity of dealing with the point in written submissions (sometimes with the opportunity for counter-submissions). Occasionally, a further hearing may be appropriate, but it would normally be disproportionate.
>
> 19. Where (as here) the judge's point is crucial in the sense that, without it, the decision would be different, it is obviously of particular importance that the parties are given a full opportunity to deal with it. Where the point represents a further reason to those which have been advanced and accepted by the judge as reasons for finding for the successful party, it would still normally be fair and sensible to give the parties an opportunity to deal with it, but, in such a case, a relatively short procedure may be justifiable.
>
> 20. It is only right to record that, in this case, there is disagreement between the parties as to the extent to which Judge Wakefield raised at the hearing the two grounds upon which he found for the claimant. Counsel for the claimant said that he did so, and I certainly intend no criticism of the Judge, who, it should be added, produced a very clear and full judgment. However, this case represents a useful opportunity to deal with what seems to me to be an important procedural issue. It is also right to add that I have little doubt that permission to appeal would and should have been given in this case, even if the defendant had not suggested that she had not been afforded an opportunity to deal with the Judge's reasons."

103. In our view, it is not so much the carrying out of the analysis about which the Appellants can complain, but rather the conclusions which the FTT sought to draw from it without giving the Appellants the opportunity to address the case against them; in particular, the finding at [523] that the analysis provided the clearest possible evidence of orchestration and contrivance. As to that finding, the FTT noted that no evidence was adduced to corroborate Mr Tomlinson's claim to have negotiated purchase and sale prices for the split deals and considered that that, coupled with the analysis which they had carried out, demolished his claim to have negotiated individual purchase and sale prices within a highly volatile market. And so, the FTT inferred that BTS was told when and from whom to buy, when and to whom to sell, in each case at what price, and acted on the instructions given to it. The FTT also inferred that Mr Tomlinson knew from his own documentation that the "split deals"

were not genuine commercial sales. It follows that they further inferred that he was dishonest.

104. Mr Pickup submits that without giving Mr Tomlinson the opportunity to consider and give an explanation for the product of the analysis conducted by the FTT, it could not know for what reason and in what circumstances the Appellants might enter into a split deal; what would be the nature of the negotiation; whether or not it would be affected by the model and quantity of the phone; how a split deal might impact on or indeed be driven by profit margins, and in what circumstances the goods might be shipped to the same EU freight forwarder. Such matters, he submits, were relevant to the FTT's consideration of the facts as they found them to be upon their analysis. In the absence of any evidence, to draw the inferences the FTT does, and find that this was the clearest possible evidence of orchestration and contrivance was wholly wrong, irrational and perverse.

105. In our view, having decided to embark on an exercise of analysing the "split deals", the FTT should have written to the parties giving them the opportunity of dealing with the findings they were proposing to make in written submissions. The FTT did not take that course and in our view as a result the making of the findings on the "split deals" amounted to a procedural irregularity which was an error of law on the part of the FTT. As is clear from *Murphy v Wyatt*, the failure to give the parties the opportunity of making representations on the point is unfair in circumstances where that point is determinative of the case. Even if it is not and represents a further reason to those on which the FTT based the Decision it would still have been fair to give the parties an opportunity to deal with it.

106. Matters are not, however, quite as stark as Mr Pickup's submissions might suggest. Mr Tomlinson was cross-examined generally about the deals which the Appellants entered into and the percentage mark-ups. Thus, he was cross-examined in relation to details of the profit margins in respect of all the deals which were the subject of the appeals. He was asked about the difference between the percentage and absolute mark-ups on the disputed transactions and accepted that there was a striking difference between the range of absolute mark-ups and the percentage mark-ups, although he did deny working on percentage mark-ups. He was also cross-examined on the issue of negotiation generally in relation to all the deals which the Appellants entered into. He therefore had the opportunity to say in the course of this cross-examination if there was something different about the split deals. We find it inconceivable that if there was something different about these deals which would assist in defeating the claim of contrivance and orchestration he would not have mentioned it. However, Mr Tomlinson admitted that, in retrospect, he could see that he was being duped and that there was in reality a contrived scheme, a scheme in which he claims to have no knowledge.

107. Therefore, we consider that the error of law in relation to the manner in which the FTT made its findings on the "split deals" is not on its own significant in relation to the outcome of the appeals.

108. However, even if we are wrong on that point, then in our view the findings on the split deals are not as critical to the outcome of the Decision as Mr Pickup submits and we do not accept that they have pervaded the FTT's other findings on the question of dishonesty to the extent that he submits.

109. We return to that issue later, having considered the remaining grounds of appeal and our assessment of the overall conclusions of the FTT.

Ground 5: The FTT's findings as to the due diligence on "rejected traders"

110. As we have set out at [30] to [31] and [40] above, the FTT made findings to the effect that the Appellants' due diligence was no more than window dressing and demonstrated that the Appellants' transactions were orchestrated and contrived. The FTT referred to the due diligence carried out on 87 traders with whom the Appellants decided not to trade but regarded the carrying out of due diligence on those companies to have been "pointless" in view of "our earlier finding that the Appellants were told with whom to trade". That finding, as the FTT made clear at [652], was made after having assessed Mr Tomlinson's replies to the questions put to him in cross examination about due diligence, the relevant exchanges between Mr Cunningham and Mr Tomlinson being set out at [651]. The FTT also concluded at [903] that the factor most indicative of the irrelevance of due diligence was Mr Tomlinson's admission that he would have traded with one particular trader, East Telecom, whatever the due diligence exercise on that company showed.

111. Mr Pickup submits that the FTT erred in law by failing to have any regard to the evidence of the due diligence conducted on the "rejected traders" before finding that the Appellants were active participants in contrived fraudulent trading. The Appellants placed considerable reliance not only upon their due diligence procedures, but on the outcome of those procedures which had resulted in the Appellants deciding not to conduct business with a large number of traders that failed to meet their chosen criteria.

112. Mr Pickup submits that the fact that the Appellants rejected traders as a result of their due diligence was an important factor because it was inconsistent with HMRC's assertion that the due diligence process was part of the fraud and merely window dressing. This was even more significant given HMRC's allegation that the Appellants were members of organised cells of which other rejected traders were also said to be members. If the Appellants were members of such a cell, there can be no reason for refusing to trade with the members of those cells.

113. Mr Pickup submits that the final sentence of [751] makes plain that the FTT, because of its earlier finding on the "split deals" analysis, found that the Appellants had been told with whom to trade and concluded that the due diligence carried out on the rejected traders was "pointless". In his submission, the findings on due diligence were therefore infected by the findings on the "split deals".

114. Mr Pickup submits that the evidence regarding the rejected traders was important as it showed that the Appellants did not have the necessary actual or

constructive knowledge. The evidence was simply ignored, because the FTT had already reached a settled view from consideration of the evidence presented by HMRC. The FTT had already reached the decision that the Appellants were dishonest and decided it did not need to look at evidence that the Appellants had adduced which might undermine that finding.

115. We accept that there was extensive evidence before the FTT as regards the due diligence carried out on the rejected traders and the reasons why they were rejected. It would have been open to the FTT to find that this evidence demonstrated a genuine and rigorous operation of a due diligence system. However, the task of the FTT was to weigh that evidence against the other evidence available to it, and in particular the evidence from Mr Tomlinson's cross-examination, as referred to at [652] and [903]. It is clear from [751] that the FTT did not ignore the evidence on the rejected traders but rather decided to attach little weight to it and more weight to the other evidence before it on the issue. Its finding that the due diligence on the rejected traders was "pointless" was, in our view, a finding open to the FTT bearing in mind that it found that all of the due diligence undertaken by the Appellants was "window dressing". In those circumstances, we characterise Mr Pickup's challenge as an instance of what Evans LJ described in *Georgiou* as a "roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong." It cannot be characterised as a finding which is made without any evidence to support it or where the only reasonable conclusion contradicted the finding. Mr Pickup's challenge therefore fails to surmount the very high hurdle which the test in *Edwards v Bairstow* necessarily requires to be surmounted.

116. Therefore, the fact that the FTT's finding on the point may have been influenced by its earlier findings regarding the split deals is of no consequence.

Ground 6: The FTT's failure to consider the evidence of NTS's on-going trading

117. As we have set out at [16] and [42] above, the FTT made findings at [98] and [764] regarding the question as to whether Mr Tomlinson's method of trading was substantially the same between 2003 and 2006 and as it is today. It records Mr Tomlinson's claim that that was the case, save for the introduction of the reverse charge in 2007, but the FTT were unwilling to accept his evidence "without corroborative evidence".

118. We were taken to the transcript of the oral evidence given by HMRC witnesses who were asked in cross examination about their knowledge of the current trading of NTS. In summary, their evidence was to the effect that NTS commenced trading again in 2008, had continued to trade, albeit at much lower volumes, in the same market, that is the wholesale distribution of mobile telephones, and in the same way, subject to the introduction of the reverse charge provisions in June 2007.

119. In his closing submissions, Mr Pickup invited the FTT to take account of how NTS had continued to trade after the introduction of the reverse charge and compare the patterns and nature of the transactions undertaken by the Appellants in April, May

and June 2006 with those undertaken in earlier periods, in determining whether the only reasonable explanation for those transactions was that they were connected with fraud. Further submissions were made to the effect that transactions are still conducted in the same way, with modifications brought about by the reverse charge, by NTS and that the business model was precisely the same as it was in those earlier periods.

120. Mr Pickup submits that the FTT erred in law in rejecting the evidence as to the continuity of NTS's trading and ignoring the corroborative evidence from HMRC's witnesses that was before it. He submits that the decision to reject Mr Tomlinson's evidence because of a lack of corroboration was perverse and irrational, and unsupported by and wholly contrary to the evidence.

121. Mr Pickup submits that the FTT's finding was again driven by its earlier finding of dishonesty, reached on its analysis of the "split deals" which had provided the basis for the FTT rejecting Mr Tomlinson's evidence in the stated absence of corroborative evidence.

122. We accept that the FTT does not appear to have considered the corroborative evidence from HMRC's witnesses in coming to its findings on the continuity of NTS's trading.

123. However, we do not accept that this finding is significant on its own in relation to the FTT's overall conclusions. At best, the evidence demonstrates that NTS did indeed trade in mobile phones both before, during and after the VAT periods which are the subject of these appeals and that its trading model, operating on a back to back basis in the wholesale market did not change, although the scale of its trading clearly did. However, as Mr Cunningham submitted, the introduction of the reverse charge changed the landscape and the fact that it effectively removed the possibility of trading fraudulently in the mobile phone market does not assist in determining whether the Appellants knew that their trading during the periods which are relevant to these appeals was connected with the fraudulent evasion of VAT.

Ground 7: The FTT's findings on the guidance in Public Notice 726

124. Public Notice 726 (PN 726) contains guidance issued by HMRC in 2003. The notice explains how a trader can be held liable jointly and severally with others for the unpaid VAT on specified goods. The notice was issued in order to give guidance following the introduction of s 77A Value Added Tax Act 1994. That provision enabled a VAT registered business receiving a taxable supply from another VAT registered business of specified goods (including mobile phones) to be held liable for the net tax unpaid on those goods if the business "knew" or "had reasonable grounds to suspect" that the VAT on supply, or any previous or subsequent supply, of those goods would go unpaid to HMRC.

125. The notice indicated that in determining whether to serve a notice of liability HMRC will take into account whether the trader had "taken reasonable steps to verify

the integrity of [its] supply chain or any other factors [felt] should be brought to our attention."

126. The notice advised that in order to avoid being caught up in MTIC fraud a trader should take reasonable steps to ensure that it was not unwittingly caught up in a supply chain where VAT goes unpaid. The notice said at paragraph 4.5:

> "We do not expect you to go beyond what is reasonable. You are not necessarily expected to know your supplier's supplier or the full range of selling prices throughout your supply chain. However, we would expect you to make a judgement on the integrity of your supply chain."

127. The notice set out a number of factors that a trader may wish to consider, including the nature of the supply, aspects of payment arrangements and conditions and details of the movement of goods involved. It was made clear that the checks that needed to be made, and extent of them, will vary depending on the individual circumstances of the business and individual transactions.

128. Before the FTT there was a dispute as to the extent to which it was necessary for a trader to make a judgment in relation to traders further up the chain from his own supplier and the integrity of the chain, HMRC's position being that the response of an honest trader in the situation of the Appellants would, emphatically, have been not to trade. The Appellants submitted that the reasonable steps required by PN 726 required the trader to make a judgment on the integrity of his supply chain by conducting checks on his immediate counterparties and checks as to the commercial viability of the transaction. The trader could in commercial reality do no more.

129. In his evidence, Mr Tomlinson said in relation to his suppliers that he "had to believe that these counterparties would conduct their own reasonable due diligence and that this would be repeated by each supplier customer throughout the chain." It was then put to Mr Tomlinson that this was a "pretty convenient" position, to which he answered that it was his belief at the time.

130. The FTT's findings as to the requirements of PN 726 are at [752], which is set out at [40] above. In essence, the FTT interpreted Mr Tomlinson's evidence as his belief that he was "able to trade with impunity irrespective of what was going on in the remainder of the chains", which the FTT found to be behaviour which was contrary to the recommendations of PN 726.

131. Mr Pickup submits that in its reasons the FTT adopted an erroneous interpretation of PN 726 and that it was perverse to find that Mr Tomlinson ignored the advice of the notice. Mr Pickup submits that the evidence plainly demonstrated that Mr Tomlinson and Mr Edmonds followed the guidance given by HMRC, properly interpreted. Consequently, the findings of the FTT in this regard were irrational and perverse, and such that no reasonable tribunal was entitled to reach.

132. In our view the picture is not as black and white as Mr Pickup seeks to paint it. In our view the wording of PN 726 makes it clear that what "reasonable steps" means is to be determined by the particular circumstances of the case. The use of the phrase

"integrity of the supply chain" does not in our view rule out the need to consider whether it would be appropriate to make enquiries further up the supply chain, depending on the other circumstances which might give rise to suspicion that the transactions concerned may be connected with the fraudulent evasion of VAT. So much is made clear from the wording of that we have quoted above. The use of the word "necessarily" in paragraph 4.5 of PN 726 demonstrates that it will not always be sufficient merely to conduct due diligence on the immediate supplier; circumstances may dictate otherwise.

133. In this case, the FTT was presented with evidence from Mr Tomlinson that it was his belief that he was entitled to do no more than undertake due diligence on his immediate supplier and consider the other circumstances of the transactions concerned before deciding whether to proceed with a particular transaction. That evidence indicated to the FTT that Mr Tomlinson had closed his mind to the possibility of undertaking any due diligence on the rest of the supply chain, whatever the circumstances. In our view, the FTT was therefore entitled to conclude, as it did, that the Appellants believed that they could continue to trade with impunity regardless of whatever was going on further up the supply chain. Having made that finding, in our view the FTT was entitled to find that such behaviour was not consistent with the guidance in PN 726. We can therefore find no error of law on the part of the FTT on this ground. In any event, it does not appear that the FTT's finding at [752] was relied on by it in reaching its finding of dishonesty on the part of Mr Tomlinson and accordingly the point does not take the Appellants any further.

Ground 8: The FTT's findings as to the behaviour of the alleged contra traders

134. The FTT heard a considerable amount of evidence about the role of contra traders in the scheme. In particular, Mr Humphries of HMRC analysed the transaction chains of the alleged contra traders and identified groups of contra traders which appeared to him to be working in distinct schemes or cells. Mr Stone of HMRC gave evidence, which was agreed, that the aim of the contra trader was to submit a VAT return form showing nil net tax. Mr Humphries' evidence was that the aim of a contra trader would be a VAT return showing a limited reclaim.

135. The FTT at [303] recorded Mr Humphries' evidence regarding Cells 1 and 5 which showed that in period 06/06 a number of the contra traders submitted multi-million pound repayment returns and that when challenged as to whether the returns indicated that the traders concerned did not act as contra traders, Mr Humphries said that they did so act; the controlling minds concerned in the fraud "were not very good at their job". The FTT also recorded at [305] that another contra trader in Cell 5 ended the 06/06 quarter making a repayment return of almost £9 million.

136. At [307] the FTT recorded Mr Pickup's submission that the evidence from Mr Humphries' analysis demonstrated that the supposed contra traders had not behaved as one would have expected them to behave; their behaviour had no obvious rationale, and must cast doubts on HMRC's case as to the essential structure of the contrived schemes and, in particular, on Mr Humphries' contention that all traders concerned were knowing participants in them.

137. At [309] the FTT referred to Mr Stone's unchallenged evidence to the effect that during 2005 and the first half of 2006 there were the following matters of note: a great increase in trading in goods that were commonly the subject of MTIC fraud; the judgment of the ECJ in *Optigen* in January 2006; the government's announcement of its intention to introduce the reverse charge on the importation of mobile phones; the issue of the Advocate-General's opinion in *Kittel* in March 2006 and the continued increase in the grey market turnover in phones. At [310] the FTT referred to an article by a well-known adviser on accounting, tax and business to the "grey market" and its conclusion that in the light of the changes to VAT legislation there was likely to be a rush to trading by those behind fraudulent businesses seeking to take advantage of the VAT system before the legislation came into force.

138. At [316] the FTT made the following conclusions on this evidence and the submissions as follows:

> "…..As Mr Stone disclosed, the value of wholesale exports plummeted from £3,163 million in June 2006 to a mere £758 million in July 2006 – a drop of almost 75% - to be followed by further huge decreases in the immediately following two months. By December 2006 monthly exports had fallen to £61 million. As Mr Stone further said in his unchallenged statement, there was no apparent commercial or economic explanation for the increase in turnover in 2005 and early 2006. The distinct change in the behaviour of the contra-traders from June 2006 onwards points to their having recognised, perhaps in the knowledge of the Vantis article, that the judgment of the ECJ in *Kittel*, due for delivery a few days after the end of the period 06/06, would almost certainly provide HMRC with the powers they required to enable them to deal with MTIC fraud. The MTIC opportunity to obtain large profits at no risk would effectively be at an end: they might as well make input tax repayment claims as large as they could arrange. Notwithstanding that the behaviour of the companies concerned at the end of period 06/06 was not that until then to be expected of contra-traders, since we accept that there was no apparent commercial or economic explanation for the huge increase in turnover in the grey wholesale market in mobile phones, and since the "clean chains" identified by officers Humphries and Murphy bore the same characteristics as the "dirty chains" – of goods rapidly changing hands in the UK, arriving in the country at the beginning of the day and leaving by the end of it - in our judgment, the traders identified by HMRC as contra-traders acted as such."

139. Mr Pickup submits that if, as the FTT speculated, the contra traders believed that *Kittel* was likely to equip HMRC with the powers to combat MTIC fraud by denying traders their reclaims, the rational course would been to trade in such a way that did not generate the need to make reclaims. He submits that an objective analysis of the evidence showed that the alleged contra traders did not act as they should have done, if they were fulfilling the role of contra traders as alleged. The only inference that could properly and safely be drawn was that they were not. HMRC were unable to offer any explanation for the apparently irrational behaviour of the alleged contra traders. Accordingly, the FTT's findings were perverse, irrational and without evidential foundation, and such that no reasonable tribunal could have reached.

140. We accept the narrow point that the only rational conclusion based on the evidence was that the behaviour of the contra traders in the relevant period was not typical of how contra traders would normally behave. However, we do not think that this point assists Mr Pickup to any material extent. There was no challenge to the finding of the FTT at [476], based on its detailed review of the evidence of the trading within the various Cells reviewed at [178] to [to [269], that each of the contra traders deliberately and fraudulently offset some or all of the input tax repayment claims it would otherwise have had to make by conducting acquirer deals as well as broker deals and that in so acting each contra trader was aware of the connection of its broker deals to fraud. That led to the FTT's conclusion at [478] that there were fraudulent VAT losses in the contra traders deal chains and consequently that the Appellants' transactions which were the subject of their appeals were connected with the fraudulent evasion of VAT.

141. Therefore, even if the FTT erred in its conclusion at [316] that conclusion was not significant on its own in relation to the FTT's overall conclusions.

142. In any event, we are satisfied that the FTT was entitled to make the findings it did at [316] as to why the contra traders behaved as they did in the relevant period, based on the evidence that they referred to. Mr Pickup's challenge to these findings is another example of an instance of what Evans LJ described in *Georgiou* as a "roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong." We can therefore find no error of law on the part of the FTT on this ground.

Ground 9: the FTT's finding as to the "Special VAT Certification" required by FCIB

143. The Appellants each opened a sterling account with FCIB in response to the decision of some UK high-street banks to close the trading accounts of traders operating in the grey market in the wholesale distribution of mobile telephones. The FTT referred at [538] to FCIB offering "first-class banking services supported by sophisticated bank software and a reliable 24-hour service." They also referred to the fact that companies involved with MTIC fraud who had accounts with FCIB were able to pay monies to and from each other without their payments being visible to HMRC. FCIB was closed down by the Dutch authorities in October 2006.

144. When opening their accounts with FCIB the Appellants were required to sign a document headed "Special VAT Certification" which included the following declaration:

> "we have and will continue to comply with the provisions of the Finance Act 2003 enacted as section 77A of the Value Added Tax Act 1994 (the "Act")."

As we have seen, s 77A made provision for joint and several liability for the net tax unpaid on specified goods if the business "knew" or "had reasonable grounds to suspect" that the VAT on supply, or any previous or subsequent supply, of those goods would go unpaid to HMRC.

145. It was not suggested before the FTT that prior to September 2006 FCIB was considered to be anything other than a perfectly reputable *bona fide* bank which was affiliated, at different times, to major financial institutions such as HSBC and Barclays.

146. It was put to Mr Tomlinson in cross examination that the reference to s 77A should have prompted the response that FCIB had "MTIC written all over it", which Mr Tomlinson denied.

147. At [901], the FTT accepted that, throughout the appeal period, FCIB presented as a reputable bank offering state-of-the-art facilities but the exception to that was the requirement to make the declaration regarding s 77A. The FTT found that that requirement "should at least have put the Appellants on notice that all was not as it appeared on the surface.".

148. Mr Pickup does not dispute that the inclusion of a reference in the application form to s 77A was such to put the Appellants on notice that the bank was aware of the problem of MTIC fraud. However, the FTT's conclusion as summarised at [147] above, was Mr Pickup submits, contrary to the evidence, irrational, perverse and one which no reasonable tribunal could have reached. He submits that given the well-publicised issues concerning the closure of traders' accounts with major banks in the UK, the certification was, as far as the Appellants could know, prudent and cautious due diligence on the part of FCIB to ensure that prospective customers were not only aware of the problem of MTIC fraud but also had conducted their transactions in accordance with s 77A.

149. We agree with Mr Pickup on this point. In our view the FTT's conclusion must have been made with the benefit of hindsight. Such a declaration, made in circumstances where all concerned were aware of the fact that traders in mobile phones applying to open an account with the bank were operating in a sector in which VAT fraud was prevalent but were unaware at that point of any issues with FCIB, could not properly lead to the inevitable inference that opening an account with FCIB was an indication that all those who dealt with it were engaged in MTIC fraud. The declaration would, at the time, properly be seen as an appropriate act of due diligence on the part of the bank.

150. However, the point does not assist the Appellants. This finding is not significant in relation to the FTT's overall conclusions and Mr Pickup did not submit otherwise. The finding at [901] is not relied on by the FTT as one of its indicators of dishonesty on the part of the Appellants.

Ground 10: The FTT's findings as to the circularity of money flows within FCIB

151. The FTT found at [552], [567], [569], and [595] that HMRC had proved a circular flow of money in all but one of the transaction chains in Cells 5 and 10 and partial circularity in the other.

152. Miss Parikh, the HMRC witness who carried out the analysis of payment flows in FCIB, had conceded during cross examination that certain aspects of her analysis,

which she initially described as her "best judgment" were, in fact, "informed guesswork", a concession which the FTT did not appear to have taken into account when finding at [584] that it did not accept that Miss Parikh's "best judgment" was nothing more than "informed guesswork". Nevertheless, in the same paragraph, the FTT found that Miss Parikh carefully considered all the FCIB material, took into account other transactions traders had entered into and, to some extent, by process of elimination reached her conclusions.

153. Mr Pickup took us to a number of the payment flows relating to the Appellants' transaction chains which demonstrated, contrary to the FTT's findings, that in those analyses circularity was not established; for example, there were contradictory narratives as to quantity and/or model of handsets in the FCIB account statements, the amounts in the selected payments between traders in the transaction chains were inconsistent and in places monies used by a trader to make payment within the chain originated from sources not shown on the chart. Thus it is clear that in these instances circularity could not have been established.

154. We are also satisfied that the FTT fell into error in concluding at [578] that the Appellants accepted the assertion of circularity in payment chains which were not the subject of specific cross examination; it appears from the transcript of the hearing that Mr Pickup had made it clear during Miss Parikh's cross-examination that the Appellants had selected samples of the analysis to demonstrate to the FTT the submissions being made, but that similar points arose in respect of all the transactions.

155. Consequently, Mr Pickup submits that the FTT has made findings as to circularity which no reasonable tribunal could have reached, which were irrational and perverse and unsupported by the evidence.

156. However, even if the FTT has made errors of law in relation to these findings, we are not satisfied that the findings made are significant to the FTT's overall conclusions. Whilst the FTT has relied to a degree on its findings of circularity for its findings of contrivance at [613] to [615], as set out at [26] above, it is clear both from those paragraphs, [573] and [904] that the FTT relied rather more on the fact that the time that BTS logged into and out of its account with FCIB was indicative of orchestration and contrivance. In particular, at [570] the FTT recorded details of the timing analysis for the payments relating to one particular transaction, which Mr Cunningham also took us to. As the FTT found, BTS could not have by coincidence logged in to its account by accident just at the time that it needed to accept payment and then pass it on in the transaction chain. The Appellants have not challenged these findings. In our view, those findings are very important findings of relevance to the FTT's assessment of Mr Tomlinson's honesty.

Ground 11: The FTT's findings as to "uncommerciality"

157. Aside from the matter of the Appellants' due diligence, which we have dealt with when considering Ground 5 above, HMRC relied upon thirteen features of the Appellants' transactions said to be obviously uncommercial and, therefore, indicative

of participation in a fraud of which the Appellants must have had knowledge. Those on which the FTT relied in the Decision are summarised at [41] to [53] above.

158. The FTT's conclusion at [908] was that a number of these features, viewed individually, indicated that the Appellants had actual knowledge of the connection with fraud and taken in combination the FTT found that they demonstrated actual knowledge.

159. The Appellants challenge the FTT's findings on six of these features on the following basis:

(1) *Phones of non-UK specification and Nokia 8801s*: the FTT discounted the evidence of Mr Tomlinson without reason and ignored expert evidence which provided a credible explanation for this feature of the Appellants' transactions;

(2) *Back-to-back trading*: the FTT's findings were contrary to the evidence and, therefore, irrational;

(3) *No meaningful insurance:* the FTT failed to address the central issue as to whether or not the Appellants had legal title to the goods and, therefore, whether they were able to obtain insurance and, thereby, failed to give adequate reasons;

(4) *Remote delivery:* the FTT's decision was contrary to the evidence and irrational;

(5) *Delivery of goods prior to receipt of payment:* the FTT failed to have regard to the evidence concerning the "hold and release system" by which practice goods were shipped "on hold" before payment and the transfer of title. Its findings were contrary to the evidence and irrational; and

(6) *Profits/Turnover:* the FTT's decision to reject the evidence of Mr Tomlinson that an increase in liquidity was the basis of an increase in trade because of a perceived inconsistency between it and the evidence of Mr Stone was irrational, and ignored the evidence of HMRC; the FTT's decision regarding the increase in turnover ignored the unchallenged industry data.

160. In summary, Mr Pickup submits that these findings fail to provide any adequate detail as to why they have been made, and the finding that the uncommercial features, taken in combination, indicate actual knowledge, in the light of the evidence adduced and submissions made by the Appellants, is not a finding which any reasonable tribunal could have reached.

161. We reject these submissions. Whilst the FTT did not deal with every piece of evidence that might be said to support a different conclusion, it cannot be said that there was no evidence to support the findings that it made on each of these issues. When Mr Pickup refers to the FTT having "ignored" or "failed to have regard to" evidence, in essence his complaint is that it did not deal with the evidence in the Decision. However, we have no reason to believe that the FTT ignored or failed to have regard to that evidence; it cannot be expected to refer to every piece of evidence before it.

162. In relation to the Phones of non-UK specification and Nokia 8801s in our view the FTT was entitled to rely for its findings at [758] that the presence of such phones within the UK raised questions which Mr Tomlinson should have sought answers for and which he failed to do. The FTT was therefore entitled to reject the other evidence on the point.

163. In relation to back-to-back trading, in circumstances where even Mr Tomlinson accepted with the benefit of hindsight that all the transactions concerned were part of an orchestrated scheme, in our view the FTT was entitled to conclude as it did at [769] that the fact that customers' requirements were instantly matched in every single case indicated that the deals were artificially contrived and were not genuine grey market transactions.

164. In relation to insurance, the position on title to the goods was unclear, bearing in mind that the Appellants had signed supplier declarations to the effect that they had title to the goods, notwithstanding Mr Tomlinson's admission that the Appellants obtained ownership of phones only when they paid for them. In those circumstances, it was not unreasonable to expect that the Appellants would have investigated the insurance position, and the FTT records at [791] that the Appellants were unable to produce any evidence of the goods being insured whilst allocated to the Appellants. In those circumstances, in our view, the FTT was entitled to find as it did, at [792], that the lack of insurance and of any interest in whether cover had been effected, indicated that insurance was a matter of no concern to them, and that the goods in which they dealt were not held in furtherance of legitimate and genuine trading.

165. In relation to remote delivery, we do not regard the FTT's finding in this regard as open to criticism. It merely found that the practice of delivering to a freight forwarder in a different country from that of BTS's customer should "at least have suggested fraud to Mr Tomlinson", an inference which in our view the FTT was entitled to draw notwithstanding other evidence to the effect that the choice of freight forwarder was "customer-driven".

166. In relation to delivery of goods prior to receipt of payment, the FTT considered at [813] Mr Tomlinson's evidence that the goods had to be moved abroad to enable the customers freight forwarder to inspect them but, against a background where it was accepted that the transactions were not genuine grey market trades, in our view the FTT was entitled to reject that evidence and find, as it did at [814] that the transportation of the goods abroad without having been paid for, or payment having been secured, was "uncommercial".

167. In relation to the level of profits made by the Appellants and its turnover in the relevant period, it is clear from [830] that the FTT considered all the relevant evidence, including that of both Mr Stone of HMRC and Mr Tomlinson and again, against a finding that the transactions were contrived, in our view the FTT was entitled to reject Mr Tomlinson's evidence that an increase in liquidity was the basis of the increase in the amount of trade.

168. In summary Mr Pickup's challenges on uncommerciality are further examples of challenges to the weight that the FTT chose to put on particular items of evidence. We therefore characterise Mr Pickup's challenges as further instances of what Evans LJ described in *Georgiou* as a "roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong." Neither do we accept that the FTT failed to provide adequate reasons for the conclusions that it made on each of these points. It is clear to us that the Appellants would have appreciated from the Decision why the findings in question were made. It is clear to us that these findings follow from the FTT's acceptance of HMRC's submissions that, looked at in context, these features are indicators that the transactions were in fact contrived and orchestrated as part of MTIC fraud.

169. We can therefore find no error of law on the part of the FTT on this ground.

Ground 12: The FTT's finding as to the size of the grey market in 2006

170. There was evidence before the FTT from expert witnesses on both sides as to the size of the wholesale grey market in mobile telephones in 2006. The only reference to this evidence in the Decision was at [883] as follows:

> "The one witness for the Appellants with whose evidence we have not dealt was that of their expert, Mr Nigel Attenborough. He likened their trading model in the appeal period to that found in a commodities market. His claim in that behalf was challenged on the basis that commodity trading was strictly controlled, whereas there was no control in the mobile phone market. We accept that the Appellants' trading model as described to us – back-to-back trading, not holding stock, always being able to match purchases with sales – was consistent with practice in a typical of commodity market, but it was without control. Neither Mr Attenborough nor the corresponding expert for HMRC, Mr Taylor, was able to provide us with details of the size of the wholesale grey market in mobile phones in 2006, so that their evidence took things no further. For the record, we note that the Appellants did not seek to conceal any relevant evidence as to the size of the wholesale market."

171. Mr Pickup submits that, contrary to the FTT's findings, there was in fact substantial evidence from both experts as to details of the size of the grey market in 2006 and that the FTT was invited to reach a finding as to any conflict between their evidence. In ignoring or failing to have proper regard to the expert evidence on this material point the FTT failed to take into account relevant evidence and its finding was contrary to the unchallenged evidence of Mr Attenborough, irrational and perverse.

172. We accept that this is a finding that the FTT was not entitled to make on the basis of the evidence before it and consequently amounted to an error of law on its part. However, in our view the finding is not significant in relation to the FTT's overall conclusions. As Mr Cunningham submitted, the fact that there may have been a legitimate grey market operating during 2006 was irrelevant in the circumstances. The Appellants accepted, with hindsight, that their transactions were connected with

fraud, contending that Mr Tomlinson was an innocent dupe. The transactions which were the subject of the appeals could not therefore have been legitimate grey market transactions. The FTT was aware that there was a legitimate grey market, but the extent of it was not relevant to Mr Tomlinson's belief or otherwise that he was operating within it. Therefore, in the circumstances, the FTT's decision to take no account of the evidence relating to the grey market cannot be criticised.

Conclusions

173. We have found that the FTT made an error of law in seeking to draw the conclusions it did regarding the "split deals" without having given the Appellants the opportunity to address the FTT's findings that their analysis provided the "clearest possible evidence of orchestration and contrivance", although as we observed at [106] and [107] above, we do not consider that the findings are as significant to the Decision as a whole as Mr Pickup would have us believe. Nevertheless, in case we are wrong about that, we propose to reach some further conclusions on the basis that the error of law in relation to the "split deals" analysis was significant in relation to the FTT's finding that the Appellants had actual knowledge that the transactions which were the subject of their appeals to the FTT were connected with the fraudulent evasion of VAT. We must also consider whether all of the errors of law that we have identified taken cumulatively are such that the conclusions which the FTT made as regards its findings of dishonesty could not reasonably have been reached. The question is whether taken together the errors are so serious that they pervade the overall findings to the extent that those conclusions cannot be relied on.

174. In those circumstances, as we indicated at [67] above, we have to consider whether to exercise our discretion to set aside the Decision pursuant to s 12 TCEA. As we also indicated at [67] above, following the approach described by Briggs J in *Megtian,* we should not exercise our discretion to set aside the Decision if we are satisfied, notwithstanding the errors of law in the Decision, that there was a sufficient basis in the findings of the FTT which were fully reasoned and not subject to challenge to justify its conclusions that the Appellants knew that its transactions were connected with fraud.

175. In deciding whether the Appellants had actual knowledge that their transactions were connected with the fraudulent evasion of VAT the FTT had to evaluate all the relevant primary facts and draw inferences from them. The evidence from which it had to make its findings was necessarily circumstantial. The FTT referred at [522] with approval, and which we endorse, the following observations of Briggs J on circumstantial evidence at [24] of *Megtian:*

> "In my judgment, the primary facts found by the tribunal relevant to *@tomic's* [the contra-trader] knowledge were, in the aggregate, sufficient to permit the tribunal, if it thought fit, to make a finding of dishonest knowledge on the part of *@tomic*. It is in this context important for an appeal court to have regard to the need to appraise the overall effect of primary facts, rather than merely their individual effect viewed separately. This was dealt with by Lewison J in *Arif v Revenue and Customs Commrs* [2006] EWHC 1262 (Ch) at para 22. He said:

> 'There is one other general comment that is appropriate at this stage. It relates to the evaluation of circumstantial evidence. Pollock CB famously likened circumstantial evidence to strands in a cord, one of which might be quite insufficient to sustain the weight, but three stranded together might be quite sufficient (*R v Exall* (1866) 4 F&F 922). Thus there can be no valid criticism of a tribunal which considers that one piece of evidence, while raising a suspicion, is not enough on its own to find dishonesty; but that several such pieces of evidence, taken cumulatively, leads to that conclusion.'"

176. Mr Pickup submits that the Decision cannot be sustained as a result of the manner in which the question of the "split deals" was dealt with by the FTT and the manner in which it is referred to in its later findings. In essence, we are invited to find that the "strands of the cord", to use the analogy referred to in *Exall*, have been so weakened by the infection of the findings on the issue of the "split deals" that the conclusions of the FTT on the question of actual knowledge can no longer be justified.

177. Mr Pickup submits that the way the Decision is structured and its findings expressed demonstrate that the inferences drawn from the Tribunal's own analysis of the "split deals" were critical to its findings of contrivance and orchestration, dishonesty and the Appellants' actual knowledge of the connection of their transactions with fraud. The FTT's finding of dishonesty was founded upon its own analysis of the "split deals", was highly significant in the context of the appeals, pervaded the FTT's approach to all issues raised and determined its factual findings. The first finding of dishonesty made by the FTT was at [524] on the basis of the analysis of the "split deals". This indicates that this was the critical finding in the Decision and it infects the other findings of dishonesty in the Decision, in particular the FTT's findings:

(1) as to the single deals carried out in Cell 5 at [529] and [530] were made by drawing the same inferences in relation to those transactions as they did in relation to the "split deals";

(2) as to the circularity of the money chains at [614] and [615] are stated to be reinforced by the analysis of the "split deals";

(3) as to the supplier declarations at [647] was expressed in terms that it confirmed the FTT's view that Mr Tomlinson was dishonest, that view having been formed from the analysis of the "split deals";

(4) at [652] as regards due diligence which were expressed as "clearly further demonstrating… dishonesty", again as a result of the analysis of the "split deals";

(5) at [663] as regards the shipping of goods on hold which were expressed to be made "against the background of our finding that Mr Tomlinson is dishonest";

(6) at [667] where the conclusion as to each of the additional factors regarding dishonesty is expressed as confirming its "earlier finding that Mr Tomlinson is dishonest";

(7) at [803] and [831] where the conclusion relating to the negotiation of deals was expressed as relying on the reasons given for rejecting Mr Tomlinson's evidence in relation to the "split deals"; and

(8) at [909] and [910] where it says that "had we any doubt as to the question of the Appellants' knowledge it was dispelled as the result of our analysis of their split deals" and that the evidence as to the result of the split deals "finally disposes of the Appellants' duping claim".

178. Mr Pickup submits that the findings of the FTT on the matters referred to above were inevitable once the FTT had found Mr Tomlinson to be dishonest on the basis of the analysis of the "split deals". Having made the findings that it did, without giving Mr Tomlinson the opportunity to address them, the course of the FTT was set and the outcome of the appeals inevitable.

179. We accept Mr Pickup's submission in relation to the findings as to the single deals referred to at [529] and [530]. It appears to us that the FTT do rely at [529] on its analysis of the "split deals" to justify the inference of contrivance they make on the 12 single sales in Cell 5. As the FTT stated at [529] it relied on the fact that those sales were made to the same customers BTS supplied in its "split deals" and the profits obtained fell within the narrow range established for Cell 5. There is no suggestion in its findings that the FTT drew its inference on the single sales simply by reason of their own context.

180. Despite Mr Pickup's powerful submissions and our findings in relation to [529] and [530], we are unable to accept that the findings on the "split deals" were as critical to the outcome of the Decision as Mr Pickup would have us to believe for the following reasons.

181. First, as is usual in an MTIC appeal the context in which the trading took place and the features of that trading are critical factors in a tribunal's overall assessment of an appellant's state of mind and knowledge as to the existence of contrivance and orchestration, which, Mr Tomlinson admitted, with hindsight, was present in all the transactions which were the subject of the appeals before the FTT. The scene was set by the FTT at [130] to [134] and it is clear that it placed considerable emphasis on the answers that Mr Tomlinson gave in his cross examination when it was put to him that on his own admission fraudsters successfully manipulated him on every occasion. In the absence of any evidence from Mr Tomlinson as to how his trading model operated, Mr Tomlinson put his own honesty as central to the Appellants' case, as the FTT observed at [133]. Put frankly, the FTT did not believe Mr Tomlinson's evidence and its reliance at [134] on Mr Tomlinson's admission that he could think of no reason why a successful and clever fraudster would allow a free agent into his fraud, following his claim to have been duped was clearly highly significant in its overall assessment as to Mr Tomlinson's honesty. This was in circumstances where, as the FTT found at [154], Mr Tomlinson was very knowledgeable about the existence of MTIC fraud and its prevalence in the mobile phone industry.

182. We therefore do not accept that the fact that the first specific finding of dishonesty FTT made was at [524] in relation to the "split deals"; at [133] the FTT had flagged the point clearly that it did not accept Mr Tomlinson's assertions of his honesty, which it would deal with "in some detail later". We therefore do not place any weight on the way the decision was structured, in terms of the order in which the specific findings of dishonesty were made.

183. Second, we do not accept Mr Pickup's submission that all the findings set out at [177] above have been infected by the findings on the "split deals" in the manner that he suggests. In our view:

(1) The findings as to supplier declarations, due diligence, shipping of goods on hold and the overall conclusion as to the additional factors regarding dishonesty are expressed in terms of confirming earlier findings of dishonesty, rather than specifically referring to the finding in respect of the "split deals";

(2) As we have found at [106], Mr Tomlinson was cross-examined on the issue of negotiation generally in relation to all the transactions which are the subject of these appeals and therefore the FTT's findings on the lack of negotiation applied to all the transactions generally, and were not dependent purely on the findings in relation to "split deals" or the single deals in Cell 5;

(3) The findings at [909] and [910] that the findings on "split deals" "finally disposes of the… duping claim" come after the enumeration of all the other factors which have led the FTT to come to its conclusions on actual knowledge.

184. Third, as Mr Cunningham submitted, there are a considerable number of wide ranging findings of dishonesty on the part of Mr Tomlinson which were independent of the findings on the split deals. In summary, these findings were:

(1) as to the consistency of the profit margin in relation to all the transactions leading to the inference that Mr Tomlinson was told at what price to buy and what to sell ([633]);

(2) that each supplier declaration was false ([647]);

(3) that the replies of Mr Tomlinson in cross examination regarding due diligence were untrue ([652]);

(4) that Mr Tomlinson's declarations to FCIB on opening the Appellants' bank accounts were false ([655]);

(5) that Mr Tomlinson's statement in cross examination that as the Appellants did not have title to the goods they traded in they could not demonstrate an insurable interest in the goods was contradicted by the false declarations to customers as to ownership of the goods ([657] and [658]);

(6) that Mr Tomlinson's evidence as to the arrangements for the export of goods on hold was incredible ([663] and [665]); as Mr Cunningham points out, at this point in the Decision there had been six findings of dishonesty apart from those in relation to the "split deals";

(7) that Mr Tomlinson's evidence regarding the inspection of goods by freight forwarders was untrue and the Appellants' aspect of due diligence consisting of inspection was nothing more than window dressing ([786] and [788]);

(8) the irregularity of the days on which the Appellants traded and the lack of negotiation of a considerable number of deals carried out on 22 June 2006 quite apart from the "split deals" undertaken on that day demonstrating that the Appellants did not operate as genuine traders ([802] and [803]);

(9) that negotiation played no part in the determination of the Appellants' profits in the appeal period indicating orchestration and contrivance ([831]);

(10) the acceptance of Mr Cunningham's submission recorded at [858] that it can be inferred that Mr Tomlinson was quite happy to turn a blind eye to the fraud to make as much money as he could;

(11) the further findings of fact as to actual knowledge summarised at [903] to [909] and which are set out at [76] above; and

(12) that Mr Tomlinson's dishonesty is equated with actual knowledge of fraud ([909])

185. Finally, in addition to the answers given by Mr Tomlinson in his cross examination referred to at [181] above, it was put to Mr Tomlinson that he was told who to buy from and who to sell to across the board, and what mark-up he could apply and that accordingly he was "thoroughly dishonest". Mr Tomlinson denied that to be the case but the FTT made it clear, through its finding at [667] that Mr Tomlinson was "thoroughly dishonest" and its unreserved acceptance of Mr Cunningham's submissions at [902] that it rejected Mr Tomlinson's denials. In the light of those answers, HMRC's submissions before the FTT were that the honesty and credibility of Mr Tomlinson was a matter for the FTT to decide. That was a finding of fact and in the light of our conclusions that the FTT's conclusions were not undermined by the findings on the "split deals" to the extent submitted by Mr Pickup we should regard that finding as unassailable.

186. We have identified minor errors of law in relation to Ground 6, 8, 9, 10 and 12 none of which are significant in relation to the Decision. In relation to Grounds 1, 2 and 3, those errors are more significant. Nevertheless, the matters we have set out at [181] to [185] above lead us to conclude that the FTT's overall findings as regards Mr Tomlinson's dishonesty could reasonably have been reached by them. We do not consider that taken cumulatively the errors undermined the Decision to the extent that we should exercise our discretion to set it aside.

187. We therefore conclude, bearing in mind our obligation as an appeal tribunal to have regard to the need to appraise the overall effect of the primary facts found by the FTT and notwithstanding the procedural irregularity in relation to the FTT's findings on the "split deals" and the other errors of law that we have identified, the unchallenged factors that the FTT took into account in concluding that the Appellants knew that the transactions which were the subject of their appeals were connected with the fraudulent evasion of VAT, taken together with those factors which have

been unsuccessfully challenged on these appeals, nonetheless constituted a sufficient basis for that conclusion. For these reasons, we should not interfere with the Decision.

Disposition

188. The appeals are dismissed.

Costs

189. Any application for costs in relation to these appeals must be made in writing within one month after the date of release of this decision. As any order in respect of costs will, if not agreed, be for a detailed assessment, the party making an application for such an order need not provide a schedule of costs claimed with the application as required by rule 10 (5) (b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

MR JUSTICE WARREN JUDGE TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGES

RELEASE DATE: 25 April 2017