[2021] UKUT 0075 (TCC)

Appeal number:
UT/2019/0114

VAT— Bad debt relief - historical claim– appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

SAINT-GOBAIN BUILDING DISTRIBUTION LIMITED	**Appellant**
-and-	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

TRIBUNAL: JUDGE SWAMI RAGHAVAN
JUDGE GUY BRANNAN

Sitting in public by way of remote video Skype for Business hearing, treated as taking place in London, on 8 and 9 December 2020

Andrew Legg, counsel, instructed by Grant Thornton, for the Appellant

Eleni Mitrophanous QC, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

Introduction

1. This is the appeal of Saint Gobain Building Distribution Limited ("the appellant") against the decision of the First-tier Tribunal ("FTT") published as *Saint Gobain Building Distribution Limited v HMRC* [2019] UKFTT 314 (TC). The appellant made a claim, in 2014, to HMRC for historic bad debt relief on value added tax on supplies in the period 1 April 1989 to 18 March 1997. HMRC rejected the claim. The FTT dismissed the appellant's appeal against HMRC's rejection. As at the date of the FTT hearing, the amount of the claim stood at around £9.9 million. The key issue before the FTT was whether the appellant could show that it had not already made bad debt relief claims ("BDR claims") for those supplies before, in circumstances where the VAT records relating to the relevant period of claim had long since been destroyed. The FTT was not satisfied the appellant could show that the bad debt relief claims had not already been made before. With the permission of the Upper Tribunal, the appellant challenges the FTT's conclusion on a number of grounds. These concern the effect of guidance the then HM Customs and Excise ("HMCE") gave in relation to the availability of BDR claims in VAT Notices published in the relevant period of claim and also the FTT's approach and the conclusions it reached on the evidence before it.

Background and Law

2. The bad debt relief claim related to three companies selling building materials in a group of companies in respect of whom the appellant is the representative member for VAT purposes: Jewson Limited ("Jewson"), Harcros Timber and Building Supplies Limited ("Harcros") and Graham Group Limited ("Graham") (together "the claimant companies").

3. There is no real dispute concerning the VAT law context in which the appellant's claim arises. This was set out at [5] to [7] of the FTT's Decision. In summary, throughout the claim period, the UK had implemented, first in s11 of the Finance Act 1990, and then s36 Value Added Tax Act 1994, a scheme of VAT Bad Debt Relief which sought to implement Article 11C(1) of the Sixth Council Directive 77/338/EEC.

4. At the relevant time, the BDR claims had to meet the "Property Condition". That provided, that in the case of the supply of goods, the property in the goods had to have passed to the person to whom they were supplied or to a person deriving title from, through or under that person (s11(4)(b) FA 1990, s36(4)(b) VATA 1994). That condition was later removed by s39(1) Finance Act 1997 for supplies made after 19 March 1997 (which is why the claim period ended then). Over the period HMCE issued a number of notices giving guidance in relation to bad debt relief (VAT Notice 700/18) the relevant parts of which we set out when we deal with the appellant's detailed grounds of appeal. A number of evidential requirements, for instance that the claimant held an invoice for the supply in respect of which the claim was made, and records showing the tax on the supply was accounted for and paid, were set out in VAT regulations. The ones relevant to the time when the appellant made its claim were the

Value Added Tax Regulations 1995. It is common ground the appellant cannot show those evidential requirements have been met.

5. It was later held, and is not a matter of dispute, that the Court of Appeal's decision in *GMAC UK plc v Revenue and Customs Commissioners* [2017] STC 1247 ("GMAC") established that the Property Condition was unlawful under EU law and should be disapplied. Both parties agree that where traders were unaffected by the Property Condition, they still had to prove their claim. The basis for the appellant's claim is the Property Condition stopped them from claiming. In brief, this was because their standard terms included reservation of title clauses. HMRC argued it was, despite those clauses, legally possible for title to pass (because title passed when the goods were incorporated by the appellant's customers into building projects). The Property Condition had thus presented no impediment. The claim, submitted HMRC, should fail as there was no evidence that the BDR claims had not been made before. The FTT agreed. The central issue before the FTT, and on appeal before us, concerns the factual issue as to whether no BDR claims had been made before. It was accepted that the burden of proof, for showing that no BDR claims on the supplies had been made before, rested on the appellant.

FTT Decision

6. In this section we set out the parts of the FTT Decision relevant to this appeal (paragraph numbers are to those in the FTT Decision unless otherwise stated).

7. The FTT identified at [48] that the main issue was whether there had been a prior claim to BDR by the claimant companies for the relevant period. The FTT heard evidence from three witnesses, who were cross-examined and who answered the tribunal's questions: Mr Malcom Ellis, a finance director of the appellant, Mr Andrew Leach, the indirect taxes manager of the appellant's holding company, and Mr Nathan Lunn, for HMRC, the customer compliance manager for the appellant's group. Of these, Mr Ellis was the only one who had been employed by the appellant at the relevant time. At [8] to [11] the FTT recorded details of the witnesses, summarised their evidence in chief and in cross-examination. We deal where appropriate with the detail of the evidence when discussing the appellant's grounds.

8. Having recorded the parties' respective submissions and analysed the case-law on the approach to be taken it concluded that the taxpayer bore the burden of proving, on the balance of probabilities, 1) that there were historical bad debts, 2) that BDR had not previously been claimed thereon, and 3) that the amount of the claim could now be reasonably and sustainably estimated or approximated by the taxpayers. The passage of time and consequent lack of records did not absolve the taxpayer from the obligation of proving these matters. The burden of proof was only important where the application of the normal test of balance of probabilities exceptionally resulted in a conclusion that there was insufficient evidence to reach a decision ([54]).

9. The FTT sorted the evidence into categories which it then discussed in turn: 1) the retention of title clauses used in the relevant claim period 2) Mr Ellis's recollection of

the appellant's accounting treatment for bad debts during the relevant claim period 3) Mr Leach's calculations of the disputed BDR claim 4) Mr Lunn's experience of another customer (which the FTT went on to find was of little assistance given the possibly different nature of the products sold by that customer) and 5) a share purchase warranty given in relation to the appellant's acquisition of Harcros ([56]).

10. As to the retention of title clauses, the FTT set out (at [57]) a typical example taken from one used by Jewson:

> "3. The property in the goods shall not pass to the Buyer until the Buyer has paid to the Seller the whole price thereof. If, notwithstanding that the property in the goods has not passed to the Buyer, the Buyer shall sell the goods in such manner as to pass to a third party a valid title to the goods, the Buyer shall hold the proceeds of such sale on trust for the Seller. The Buyer agrees that prior to the payment of the whole price of the goods the Seller may at any time enter upon the Buyer's premises and remove the goods therefrom and that prior to such payment the Buyer shall keep the goods separate and identifiable for this purpose, [sic] Nothing herein shall constitute the Buyer the Agent of the Seller for the purpose of any such sub-sale, Notwithstanding that property in the goods shall not pass to the Buyer save as provided above, the goods shall be at the risk of the Buyer from the time of collection by or delivery to him of the goods or after the expiration of any agreed rent-free period whichever is the earlier. Any delay caused by the unreasonable act or default of either party to rail or road transport or craft furnished by the other to be for the account of the party causing the delay. Notwithstanding the preceding provisions of this clause, the Seller may, at his sole option and at any time by notice in writing to the Buyer, transfer the property in the goods to him."

11. The appellant's case was that, because of the retention of title clause, property did not pass if the full price had not been paid, whereas HMRC argued property passed to the customer when the goods were incorporated into the customer's building projects – for example where bricks sold were then built into a wall. The legal basis by which title passed when the seller's goods were incorporated into the goods of another by the buyer was explained by the FTT (at [61] to [67]) by reference to the various propositions emerging from case-law on the relevant commercial principles as summarised and discussed in *Benjamin's Sale of Goods (10th Ed)* ("*BSG*").

12. At [58], the FTT found as fact from evidence of Mr Ellis and Mr Leach that:

> "the trading builder customers of the Claimant Companies were unlikely to acquire purchased goods for resale, in the sense of selling on the goods in the same or similar condition as they were acquired from the Claimant Companies" [and] "that it was very likely that those customers would use (probably within a short time of purchase) those goods as materials in the building projects that the builder customers were performing for their own customers".

13. The particular discussion in *BSG* relevant to this is appeal was extracted by the FTT (at [63]):

> "For the current situation – builders incorporating purchased goods into their own building projects – *BSG* 5-146 states: '… where goods are sold to a manufacturing or trading company, and particularly where a period of credit is allowed, it can scarcely be supposed that the buyer company is meanwhile to have no right to consume the goods in manufacture or to resell the goods in the ordinary course of its business. Accordingly, a term may be implied to that effect in order to give business efficacy to the contract. An implied, or even express, provision of this nature will not, however, invalidate the seller's retention of ownership of the goods until such time as they are so consumed or sold.'"

14. The FTT noted *BSG*'s summary of two different lines of cases, on the one hand where goods lost their identity and where the seller lost proprietary rights and on the other where, despite incorporation, the substance of the good remained and where the seller's proprietary rights remained. As set out in *BSG* 5-151 as noted by the FTT (at [67]):

> "These cases move into very difficult and uncertain areas of law relating to the creation of a new product from materials owned by another or the attachment of one person's chattel to that of another. They appear to establish that, in the absence of an express provision to the contrary, the seller's property in the goods will be lost and vest in the buyer if the identity of the goods is destroyed in the manufacturing process or if they are transformed by manufacture into different goods, but may be retained if the goods are in their original state and can easily be removed from the finished product. But other intermediate possibilities exist. The question whether or not goods which are still identifiable, but have to a greater or less extent been worked on by the buyer or incorporated in other articles, remain the property of the seller would seem to depend upon what intention is to be imputed to the parties, having regard to such factors as the nature of the goods, the product, the degree and purpose of incorporation, and the manufacturing or other process applied."

15. The FTT then turned to decide the effect of the retention of title clauses used by the claimant companies in the claim period. Referring to its earlier finding at [58] it concluded (at [68]):

> "…that the builders' merchant's goods supplied by the Claimant Companies to their customers would have been consumed by being incorporated into other goods by the customers, probably within a short time of purchase from the Claimant Companies – for example, goods such as timber, bricks, copper pipe, electric cable and paint would be used on the customers' building projects in such a way that they were incorporated into the buildings and could not easily be removed, and further that the intention of the customers and the suppliers (the Claimant Companies) was that such incorporation was expected and permitted notwithstanding that the purchases had been on credit terms and the full price was still unpaid. On that basis, the title to the goods passed to the

> customers when they incorporated the goods into their building projects."

16. Thus, the FTT agreed with HMRC that the Property Condition did not present a bar to BDR claims and that it was more likely than not that the BDR claims in relation to the relevant period of claim *had* been made accordingly.

17. The FTT also agreed that, even if BDR claims had not been made, they could have been made and the appellant was now out of time to make such claims ([60] and [69]-[70]). (The appellant suggests this paragraph shows the FTT wrongly considered there was a limitation period whereas HMRC say that misreads what the FTT meant. We deal with this point later).

18. As to the appellant's argument that the BDR claims were prevented by the retention of title clauses, as set out in HMCE's VAT Notice 700/18, the FTT noted (at [69]) that "…while the Notice does not go into the legal detail to be found in *BSG*, it does explain that goods could have been passed on even if not paid for". The FTT also noted, as set out later in its decision that Harcros had claimed BDR, at least at the end of the relevant claim period.

19. At [70], the FTT explained a further consequence of HMRC's contention was that:

> "…even if no BDR claims were made in the Claim Period, such claims were available at the time and the Appellant is thus now doing nothing more than attempting to make a (very) late claim for the Claim Period, and without the requisite documentation. From my findings and conclusions I have to agree that it is the correct analysis."

20. The FTT then dealt with the next two topics of evidence:

> (1) Mr Ellis's recollection of the appellant's accounting treatment for bad debts: the evidence included half-year produced internal guides prepared to assist the appellant's board members with review of the accounts (referred to internally as "White Books") which were available for some but not all of the relevant period. The FTT concluded (at [76]) the White Books provided "no basis for deciding that it was more likely than not that VAT BDR was not claimed in the Claim period."
>
> (2) Evidence related to the acquisition by Jewson of Harcros: in particular, warranties made by the vendors of Harcros regarding BDR claims and disclosures made against such warranties referring to specific BDR claims that had been made (at [86] to [90]). It rejected the appellant's argument on the inference to be drawn from that, viz that the purchaser, Jewson was not making such claims. It concluded the evidence that Harcros, a claimant company who was in exactly the same line of business as other claimant companies, had made BDR claims in the relevant period counted against the appellant's case that no such claims had been made.

21. The appellant raises specific grounds of appeal on both of the above topics. It is convenient to deal with the FTT's specific findings and reasoning when we deal those grounds later.

22. The FTT conclusions were:

> "91. The Appellant has not shown that it was more likely than not that no VAT BDR claims were made in the Claim Period. There is no retained contemporaneous documentary evidence. The only witness employed at the relevant time was not involved in the group's VAT affairs. The White Books do not assist. The Appellant has just assumed that no claims were made, because the group used retention of title clauses in its standard terms of business. One of the Claimant Companies (Harcros) did make BDR claims at the end of the Claim Period.
>
> 92. The reservation of title clauses did not prevent title passing to customers when the goods were consumed by being incorporated into building projects being undertaken by the customers. Thus the Property Condition did not operate to deny eligibility for VAT BDR claims by the Claimant Companies in the Claim Period. Thus VAT BDR claims were available to the Claimant Companies but the Appellant has not shown that none were made (except for the Harcros claims in 1997) and the Appellant is now out of time to make such claims."

Grounds of Appeal

23. Mr Legg, who appeared for the appellant, in his skeleton and oral presentation sought to address the appellant's grounds under three broad headings. While we are content to adopt his structure, the specific grounds upon which the appellant was granted permission to appeal were set out in its Notice of Appeal as a series of points a) to i). We have noted below how we consider those points relate to the three broad categories. Mr Legg, who did not appear below before in the FTT, argues the FTT made the following three errors:

> (1) "Legal" error. This, as we come onto, is essentially about the FTT's construction of the guidance in the VAT Notices. *(Grounds a) and c))*
>
> (2) "Logical" error, namely that even if it was correct that the appellant *could* have claimed BDR, the FTT was wrong to infer from that that the appellant *did* claim BDR. *(Ground c))*
>
> (3) Various factual errors. *(Grounds b), d),e), f),g),h))*

24. Ms Mitrophanous QC, for HMRC, who also appeared before the FTT, defends the FTT's decision. The appellant had to show, on the balance of probabilities that no claims had been made and the FTT had correctly concluded the appellant *could* fulfil the Property Condition. There was no evidence, or there was insufficient evidence, that the appellant had not acted precisely on that basis and therefore had made prior BDR claims. In fact, critically, one of the claimant companies, Harcros *had* made BDR claims in the claim period.

25. To the extent the grounds attack findings of fact, then as HMRC point out, the circumstances in which such challenges can amount to errors of law, and the higher bar for interfering with such finding on appeal, should be borne in mind. For present purposes we can summarise those uncontroversial propositions as follows:

> (1) Challenges to factual findings may involve an error of law where there was no evidence to support it, the evidence contradicted the finding, or where the only reasonable conclusion contradicted the finding (*Edwards v Bairstow* per Lord Radcliffe [1956] AC 14 at 36). This has also been expressed in terms of whether the finding "…was 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." (*Georgiou (t/a Marios Chippery) v CCE* [1996] STC 463 at 476). As identified by Briggs J in *Megtian Ltd. (in administration) v Revenue and Customs Commissioners* [2010] EWHC 18 (Ch) "the question is not whether the finding was right or wrong, whether it was against the weight of the evidence, or whether the appeal court would itself have come to a different view."
>
> (2) For a number of reasons, as explained by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 (at [114]) appellate bodies should not interfere with the first-instance judge's findings unless compelled to do so. These include the judge's expertise in determining relevant facts and what those facts are if disputed, that the judge will have had regard to "the whole of the sea of evidence" presented whereas the appellate court will only be "island hopping".
>
> (3) Lord Hoffmann in *Biogen Inc v Medeva plc* [1998] 1 LRC 21 at 29 gave further reasons why an appellate court should refrain from interfering with the trial judge's findings: "It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said 'la vérité est dans une nuance'), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."
>
> (4) Questions of weight are for the first instance decision maker (Lord Millett in *Runa Begum v Tower Hamlets London BC* [2003] UKHL 5 (at [99]).

Discussion

"Legal error": FTT misinterpreted guidance in VAT Notices 700/18

26. The appellant submits that the FTT misconstrued the guidance, which applied at the relevant time. Under that guidance, where retention of title clauses (also referred to

as "*Romalpa*" clauses) were used, the property condition could only be satisfied if i) the goods were sold on to a third party ii) formal notices relinquishing title were sent to customers. There was thus no scope to claim BDR in circumstances where goods were incorporated into building projects. No BDR could therefore have properly been claimed.

27. That such published revenue guidance could be binding was not in issue (see: *R v IRC ex p MFK Underwriting Agencies Ltd* [1989] STC 873 at 892 per Bingham LJ). We note, in any case, that the more relevant issue in this appeal, was whether the appellant would have regarded the guidance as binding on it, (to the extent it considered its circumstances were caught by the guidance). No separate point arose before us suggesting that, aside from the scope of the guidance, the appellant did not regard the guidance as binding on it. As to how guidance should be interpreted it is common ground that "guidance is not to be dissected with the rigour appropriate to an exercise in statutory construction or interpretation of a deed or contract" (see: the Upper Tribunal's decision in *R (oao Vacation Rentals (UK) Ltd) v HMRC* [2018] UKUT 383 (TCC) which referred to statement to that effect in *R (oao Mohibullah) v Secretary of state for the Home Department* [2016] UKUT 561 (IAC)).

28. The guidance applicable to the relevant claim period (1 April 1989 to 18 March 1997) appeared in a number of iterations of Notice 700/18 issued in 1986, 1991, 1996, and 1997 which Mr Legg helpfully took us through.

29. The 1986 Notice (which applied in relation to the earliest part of the claim period) set out:

> "**When can you claim bad debt relief**
>
> 4. You can claim relief from VAT on bad debts for goods or services that you supplied if all the following conditions are met:
>
> …
>
> In the case of a supply of goods, ownership has passed to the customer or through him to a third party. [You cannot claim bad debt relief if, for example, you supplied the goods under a contract which reserves title until they have been paid for, unless you follow the procedure in paragraph 5(e).] [*This last sentence in square bracket was omitted in later versions*]
>
> **What you must do before you can claim bad debt relief.**
>
> 5. Before you can claim bad debt relief:
>
> …
>
> (e) If you supplied goods under a contract with a clause reserving title until they have been paid for (a "Romalpa" clause), and ***the goods have not been passed on, with good title to a third party***, you must send ***to the *person in charge of the insolvency**** [*in later versions this referred to "the customer" instead]* ***a statement formally giving up your rights*** under the clause.

30. The subsequent versions followed essentially the same structure and wording, save for the changes indicated above. Mr Legg emphasised certain parts of the wording (shown in bold italics) in the notices and also in the guidance issued (in December 1997) following the removal of the property condition in March 1997 (again shown in bold italics):

> "**Reservation of title agreements [or hire purchase]**
>
> The rules for claiming bad debt relief on goods supplied under an agreement with a clause reserving title until they have been paid for (known as a Romalpa clause) changed from 19 March 1997. If you supplied goods before that date, ***you can only claim bad debt relief if you have sent your customer a statement formally giving up your rights under the clause***. For supplies made on or after 19 March 1997, the requirement that title to the goods must have passed no longer applies. This change allows claims for bad debt relief for supplies of goods on hire purchase ***and other reservation of title agreements without the requirement to formally give up the rights to title under the agreement***."

31. Following the *GMAC* case HMRC issued "Revenue and Customs Brief 1 (2017): VAT – historical bad debt relief claims" (which the FTT had referred to at [7] of its decision). This referred to the Notices in the following terms:

> "Notice 700/18 made clear that title in goods would pass, and therefore bad debt relief would apply, where either of the following occurred:
>
> • goods in question had been sold on to a third party by the debtor
>
> • supplier chose to write to their customer and give up title in the goods to them"

32. Mr Legg's core point was the guidance could not be read so as to cover transfer of title where that took place through incorporation of the goods into a building project. The reference to the goods not having been "passed on" with good title referred to the situation where the goods were passed on in their current form or sold. That would not capture situations where the goods' identity was lost. Although HMRC sought to argue that when the builder used the goods in a building project that amounted to sale to the builder's customer, that was not what was meant by sale. The guidance did not encompass the incorporation of goods into a building project. Where the goods were not so passed on or sold, the guidance made clear that notice had to be given. Practitioner texts from the time, which indicated how prudent compliant businesses would have arranged their affairs, also reflected, Mr Legg argued, the guidance that BDR could never be obtained unless the supplier formally waived the supplier's claim to title.

33. For a number of reasons we disagree with the appellant's submission on the scope of the guidance. We consider the words "the goods have not been passed on, with good title to a third party" are apt to cover the situation where title passes through incorporation of the goods:

(1) The words are consistent with the description in *BSG* (see [14] above) that the "seller's property in the goods will be lost and vest in the buyer if the identity of the goods is destroyed…" Thus, even in the situation where the goods are no longer goods as such because their identity has been destroyed (which is itself only one of the possible scenarios where the incorporation of goods results in transfer of title), the goods may be regarded as having been passed on with good title to a third party.

(2) Mr Legg's reliance on the additional sentence in the 1986 version, which applied in the earliest part of the period is also misplaced. Even that version is not inconsistent with HMRC's interpretation on the scope of the guidance: the crucial point is that ownership must have passed to a customer or through the customer to third party. The second sentence – which is stated by way of example — must be read subject to what is said in 5(e) which qualifies the notice procedure with "and the goods have not been passed on with good title to a third party…." As explained in *BSG*, the basis on which incorporation acts to transfer title, despite the *Romalpa* clause, is because of an implied term to that effect. It therefore qualifies or acts as an exception to any retention of title effected by the *Romalpa* clause. In that sense, incorporation is better understood as a means of transferring title which sits outside the operation of the *Romalpa* clause. That explains why the reference to the notice in 5(e) is qualified in the way it is in the 1986 version and subsequent versions.

(3) To the extent HMCE's later description of the effect of its guidance informs the guidance in the relevant period, the reference to the goods in question having been sold on to a third party would, as HMRC argue, encompass the common situation where a builder customer had incorporated the goods into a building project as part of work carried out for a third party. The reference to "sale" in this context did not only cover sales in the sense where A sold goods to B who then sold goods to C in the same or similar condition. This did not amount, as Mr Legg suggested, to an erroneous conflation of sale with incorporation. The question was how the guidance (to the extent it was relevant to the earlier guidance) was to be interpreted.

34. We are reinforced in our view by the fact that it appears more sensible, and in keeping with the language of the statutory provision, to read the guidance in accordance with the statutory language so as to capture, by use of a generic description of goods "passing on", all the possible ways in which title may be transferred. That is preferable to reading what, on the face of it, is general guidance in a way which omits a route of passing title, but without specifically stating that it is doing so.

35. There is also nothing that advances the appellant's case on the point in the Tolley's publication practitioner texts to which Mr Legg took us. The Tolley's extract relied on from Tolley's *VAT 1990-1991* envisages a situation involving a *Romalpa* clause but where property is passed on to a third party:

> "No relief, for example, can be claimed under a contract with a clause which reserves title until the goods have been paid for (a 'Romalpa' clause). However where goods are supplied under such a contract **and the goods have not been passed on, with good title, to a third party**, relief can be claimed provided the claimant sends to the person in charge of the insolvency a statement formally giving up his rights under the clause." [emphasis added]."

36. Similarly, a further extract (Tolley's *VAT Planning 1993-94*) which is prefaced with "In a case of a supply of goods the property in the goods must have passed…") assumes title has not passed to a third party. A further extract from Tolley's *VAT Planning 1990* sets out that "Relief from bad debts can be extended to goods supplied under *Romalpa* contracts". It goes on to explain that in such circumstances the claimant must send a statement formally giving up rights under the *Romalpa* clause. However, as Ms Mitrophanous pointed out, the context for that extract was a discussion of extra statutory VAT concessions. That title could be regarded as transferred, by concession, by a notice, did not mean title could not pass under the law under other means.

37. Mr Legg also referred us to a letter of 24 February 1997 which HMCE sent to the appellant enclosing public notice 700/18 (the January 1996 edition), and in which HMCE explained that the notice did not cover what was, at that point, the new regulations. Mr Legg suggested that this supported the view that the appellant was interested in the change in law. However, to the extent the argument from this is that the appellant could make claims for something it considered it could not have made before the change in law, that would in our view read far too much into the appellant's purposes in engaging with HMCE on the guidance. The letter does not shed any light on the appellant's purposes. The letter could just as easily be prompted by a desire that the appellant be kept abreast of the latest position.

38. In conclusion, we reject the appellant's ground that the FTT erred in law in misconstruing guidance.

Proper scope of appeal

39. At this point it is convenient to record that HMRC objected to the challenge Mr Legg sought to make above because it was not a ground that was included in the appellant's notice of appeal. That notice did not refer to the appellant's submission, that the guidance on the VAT notices, which a prudent trader would have complied with, provided only two routes to passing of title neither of which applied to the current case. Nor had permission had been sought or granted so as to include it within the scope of the appeal before us. While HMRC were correct to flag the absence of the point in the grounds we consider the issue of how the guidance was to be construed was relevant to the question of the appellant's belief regarding whether a claim was possible at the relevant time (*Ground a)*) and to the question of whether the FTT was correct to place the weight it did on HMRC's legal point regarding title passing on incorporation of goods (*Ground c*)). That was because, even if incorporation was a legally possible route to passing title, if the guidance ruled it out as a means of showing title had passed for

BDR purposes, the mere possibility of title so passing would not be something which tended to show that previous BDR claims had been made.

40. We therefore considered the point was within the scope of the appeal before us but that the appellant ought to have flagged the specific particulars of the appeal grounds earlier. The issue was therefore whether it was fair, in the light of that, to deal with the point. We consider it was. The materials sought to be relied upon regarding various iterations of the Notice on were before us. The point was a short point of interpretation of guidance which was brief and which we regard HMRC as having sufficient opportunity to address us on.

41. We do however agree with HMRC that the point Mr Legg sought to raise that the FTT wrongly considered there to be a limitation period (at [70] and [92] of the FTT Decision: see [19] and [22] above) is an entirely new one and was not within the scope of the grounds of appeal. We also agree, in any event, that a fair reading of what was said was that the FTT meant the appellant was late in the sense that its claim was delayed because it no longer held the records and because the appellant was not prevented from making a BDR claim by the Property Condition, not that it failed because of a limitation period.

FTT committed "logical" error: wrong of FTT to infer that if appellant could have made claim that it did make claim

42. Under this ground the appellant argues that, even if it was theoretically possible for property to pass, on the balance of probabilities the appellant would not have made such claims. It did not follow logically, Mr Legg argued, that if a person *could* claim BDR that they *had* claimed BDR. Highlighting the relevant legal principles in *BSG*, which were acknowledged to be complex (and as contained at [63] of the FTT's decision at [13] above), title would still be retained until the point at which the goods were "consumed or sold". That would require a level of factual investigation on the part of the appellant that would have required internal process structures. There was no evidence of that. Moreover, the investigation would be disproportionate to the sums involved. The concession HMRC had made allowing BDR for supplies of items such as hard hats and tools (which were unlikely to have been incorporated into a building project) ought logically to apply to all supplies of goods which were still separately identifiable even if incorporated or worked on because they would remain the appellant's property until paid for.

43. Mr Legg relied on the following by way of evidential and factual support for the appellant's argument:

> (1) the FTT heard evidence from Mr Ellis that there was a credit control team to deal with slow payers (recorded at [9(7)] of the FTT's decision). There were no findings about any other machinery within the business to make the necessary enquiries regarding whether title had passed.
>
> (2) Mr Leach's evidence regarding his experience of bad debts, viz that amounts, other than those larger amount debts resulting from insolvency

or similar type of proceedings, tended "to relate to unpaid balances where in-house collection action [had] been unsuccessful and the prospect of payment [was] negligible".

(3) The appellant's advisers, Grant Thornton, in responding on 20 September 2017 to HMRC's questions, stated the majority of annual spend by credit customers was less than £500 and it would be uneconomic to pursue debtors.

44. As to Mr Legg's overarching point that it was illogical to conclude a possibility of making claims meant that claims were made, this does not reflect the FTT's reasoning. The FTT (at [69] of its decision) accepted HMRC's argument (set out at [60] of the FTT's decision) that where the Property Condition did not present a bar to BDR claims that meant "it [was] more likely than not that VAT BDR claims *were* made accordingly". There is nothing illogical in that proposition. It is effectively an inference based on the evidence that if the appellant could have claimed then it probably would have. As is apparent from the remainder of the FTT's decision the FTT did not simply stop its analysis at the point at which it was determined that the BDR claims could have been made but went on to consider various other evidence. That included the Harcros evidence which was that a claim had been made in the claim period. In the particular circumstances it was certainly not irrational of the FTT to reason as it did. The inference is no different, as Ms Mitrophanous pointed out, from the inference which lay at the heart of the appellant's case (that a trader, who considered they could not claim BDR because of the Property Condition, would not have claimed BDR).

45. In our view, the evidence the appellant relies on is insufficient to back up its argument regarding the extent to which factual investigations would have been required and the lack of systems and resources to undertake that. It does not appear this argument was put to the FTT. Unsurprisingly, there is no consideration in its decision on this aspect. None of the points the appellant relies on are found in the findings of fact made by the FTT for the simple reason that it was not required to do so – the argument was never put forward. Furthermore, even if it was accepted that such factual investigations were required, none of the evidence relied on, would require a finding that the credit control or other resources the appellant had were not equipped to carry out appropriate investigations. Also, Mr Leach's evidence and Grant Thornton's response were not based on any direct experience in relation to the appellant but amounted to views of the appellant's approach to debt collection from a collection standpoint. It would have been open to the FTT to accord the evidence little weight or find it was irrelevant to how the issue of whether title had passed was investigated.

46. We therefore reject the appellant's argument that the FTT was wrong to infer from the availability of the incorporation route of passing of title, that that meant the appellant had not shown the absence of prior claimsof . None of the evidence the appellant points to means the FTT was unreasonable to find as it did. We consider it was open to the FTT to reach its conclusion on the evidence before it.

Factual error: errors in findings and treatment evidence

47. Under this heading the appellant raises various points in relation to evidence which it maintains the FTT wrongly disregarded or overlooked. We deal with these under the grounds as described in the appellant's points a) to i) in its notice of appeal, noting where we consider those points have already been addressed in the preceding analysis.

Ground (a): the FTT "Failed to take into account the unchallenged evidence of the Appellant that there was no contemporaneous belief within the Appellant organisations in any ability to make a BDR claim during the claim period."

48. It is submitted the FTT failed to take account of evidence that there was no belief at the relevant time of an ability to make a BDR claim. Mr Legg clarified he was not saying the evidence was unchallenged, in the sense of not being cross-examined, but because there was no competing evidence. In particular the FTT did not take account of:

(1) Mr Ellis's evidence, summarised at [9(7)(c) and (d)] of the FTT's decision, that he did not know if BDR claims had been made and that he "would expect to see this as part of the reporting" and that

> "he believed the group had no expectation of recovering VAT on bad debts; it was not a conversation they were having because they understood it was not an option".

(2) Mr Leach's evidence which the FTT had summarised [10(4)], that his understanding:

> "was that VAT BDR was not available in the Claim Period because of the retention of title clause; GMAC had held that restriction was invalid. In correspondence HMRC had said that VAT BDR would have been available if the supplier wrote to the customer to waive the retention of title clause; [Mr Leach] was not aware of this practice nor of seeing any suppliers being advised to follow this course of action".

(3) Mr Leach's evidence (at paragraph 18 of his first witness statement), albeit hearsay, that the claim calculation incorporated a number of assumptions (including that no VAT bad debt relief had previously been claimed) which had been "confirmed as reasonable by company management".

49. Ms Mitrophanous maintains the FTT was right not to be persuaded that any of the witnesses' evidence meant there was a contemporaneous belief among those responsible for making the VAT BDR claims. Mr Leach had no direct knowledge of what claims were made in the claim period and could not give evidence on the appellant's belief at the relevant time. He had confirmed no VAT returns for the claim period had been located and that no current employees had been able to comment on VAT return workings related to that period. Mr Ellis was employed in the claim period but had no involvement in the preparation and filing of VAT returns and did not know if BDR claims were made. He had "assumed" the group had no expectation of relief at

that time. The FTT rightly concluded the witnesses had assumed that no VAT BDR claims had been made but could not give evidence that they had not.

50. We consider it was open to the FTT to treat the evidence as it did, essentially for the reasons HMRC advance. There was no evidence given by anyone who could directly speak to the appellant's beliefs at the time regarding VAT BDR claims and, to the extent the witnesses did so, that was speculation. To the extent there was indirect evidence the FTT did clearly take it into account. It evaluated it and concluded it was of little weight because it was predicated on an assumption the claim could not be made rather than knowledge. There was nothing unreasonable in that. In any case, as explained above (see [25]), the weight to be attributed to items of evidence was for the FTT to determine. To the extent a challenge is made to the FTT not making a finding of fact that the appellant lacked a belief at the time that it could make a BDR claim, then we consider it was clearly open to the FTT to decline to make such a finding.

Ground (b): "Failed to take into account the clear documentary evidence of the White Books that (consistently with (a)), no such BDR claim had been made."

51. We first describe in more detail how the FTT dealt with the relevant evidence in this area.

52. Mr Ellis, who worked in the group as finance director during the claim period, explained in his evidence his involvement in the preparation of a handbook known within the appellant's accounting team as the "White Book". This was "a half yearly briefing document prepared for board members, providing additional detail on the half-yearly and annual accounts of the group" ([9(2)] of FTT's decision).

53. As recorded by the FTT, Mr Ellis's evidence was that:

> (1) "The White Books set out details of the Appellant's specific provisions for bad debts and bad debts charged to the Profit and Loss account. The specific provisions for bad debts reflect the age profile of debtor balances and the likelihood that some may prove to be uncollectable. The bad debt charges to the Profit and Loss account were a combination of the specific provisions and those debts written off when it was known that payment would not be received by the Appellant.… Bad debts charged to Profit and Loss account took into account any recoveries that were made from debtors during the relevant period. …" ([9(3)]).
>
> (2) "The Appellant's group used the Meyer International Accounting Manual ("**the Accounting Manual**"). Paragraphs 6.2 to 6.4 of the Accounting Manual described the accounting for the bad debts provision. Throughout the year, on a monthly basis, a reserve of 0.4% of external credit sales (**including VAT**) was charged to profit and loss account, against which debts assessed by management as bad or irrecoverable would be charged. At the end of the final month of the accounting year (March) the overall bad debt provision would be allocated to specific debts regarded as irrecoverable and any surplus on the reserve credited to profit and loss

account. In other words, the bad debts reported annually constituted an actual figure, not a provision. In the statutory accounts the charge for bad debts would be part of "cost of sales" – per para 16.1 of the Accounting Manual" ([9(4)]). The FTT noted "…bad debt figures were **inclusive of VAT**" [9(5)] (bold underlining added).

(3) In response to questions in cross-examination, Mr Ellis's evidence was that if VAT BDR claims had been made "He would expect to see this as part of the reporting; it was not covered by the Accounting Manual" ([9(7)(c)]).

(4) "He believed the group had no expectation of recovering VAT on bad debts; it was not a conversation they were having because they understood it was not an option. If it had been possible then he would expect to see it in the White Books somewhere." ([9(7)(d)]).

54. Mr Leach's evidence was that:

(1) The Accounting Manual at 5.3.5 stated that:

> "The specific bad debts … should **include** value added or sales tax and stated before taking account of credit insurance claims and other recoveries" [10(6)]

(2) "the White Book figures for debtors and bad debts showed figures as **including** VAT; that was in line with the Accounting Manual. There were no specific references to VAT in the White Books. He accepted that the White Book did not reveal whether BDR had been claimed; he felt that if BDR was claimed then this would have needed an extra column on the bad debts analysis page" [10(8)(b)] (bold underlining added).

55. The FTT specifically mentioned Mr Ellis's recollection of the appellant's accounting treatment of bad debts including the White Books and the Accounting Manual during the claim period at [56(2)]. It dealt with that at [71] to [76] where it concluded, for the reasons set out below, that the White Books provided "no basis for deciding that it [was] more likely than not that VAT BDR was not claimed in the Claim Period" noting the following:

> "72. From paragraphs II2.6 6.2-6.4 of the Accounting Manual, as Mr Ellis explained, a general bad debt reserve (of 0.4% of credit sales) was accrued over the year. Those amounts were inclusive of VAT – see paragraph II3.5 5.3.5 [*as to which see paragraph below*] of the Accounting Manual – which is in accordance with SSAP 5 (I agree with Mr Ellis that the reference to "net" in one of the columns of the schedules means net of recoveries, not net of VAT). Then at year end specific bad debts would be identified and recognized, with any under/over provision being charged/released to profit and loss account – those amounts would also be VAT-inclusive. The corresponding profit and loss account entry for all these bad debt account items was made to the cost of sales ("**COS**") account – per paragraph II2.16 16.1 of the Accounting Manual.

> 73. The White Books available were a mix of half-year and full-year versions. Copies of the bad debt schedules from the available White Books were in evidence. With Mr Ellis's helpful explanation, it was possible to see and track the movement on those accounts as described above.
>
> 74. The parts of the Accounting Manual and White Books in evidence gave no analysis of the VAT account (i.e. the ledger account relating to the VAT creditor account for HMRC). The most I can understand from the evidence is that a VAT-inclusive bad debt account was run throughout the year, with corresponding entries to the COS account. I understand that any VAT BDR recovery would be recorded in the White Books by a credit to COS and a corresponding debit to the VAT account. There was no accounting evidence (from the White Books or otherwise) to show whether that was happening, or not, or what amounts were involved.
>
> 75. Mr Southern pursued the literary allusion of "the dog that did not bark" but that approach can only work in the context of other reliable evidence. I appreciate the difficulties facing the Appellant in trying to prove a negative but, as Ms Mitrophanous observed, this is not a situation of being required to draw a conclusion from incomplete information, but instead of there being no information to consider."

56. The excerpt from the Accounting Manual, 5.3.5 which the FTT referred to at [72] and had referred to earlier at [10(6)] stated:

> "… The amounts should include value added or sales tax and stated before taking account of credit insurance claims and other recoveries"

57. The FTT later dealt with Mr Leach's views on how the VAT BDR would be reflected in the White Book when discussing his evidence on the calculation of the BDR claim…. ([80]).

> "In oral evidence Mr Leach stated he felt that if VAT BDR had been claimed then this would have needed an extra column on the bad debts analysis page in the White Book. I was not then sufficiently familiar with the documents to explore that comment with him, but it follows from my analysis at [72] above that I do not agree; a successful VAT BDR claim would be reflected in the COS account and the VAT account, not the bad debt account – and I think that also follows from the examples given by Mr Ellis. There is no evidence that such entries were not made during the Claim Period."

58. The FTT continued:

> "82 …taking all the above together, and without in any way suggesting the above representation was not given in good faith, it does seem to me that everyone on the taxpayer's side has simply assumed that no previous VAT BDR claims could have been made (because of the Property Condition) and so were not made. In the absence of contemporaneous VAT records they then started work on the

> considerable task of computing what claims they believed could now (post *GMAC*) be made.
>
> 83. None of the above provides any basis for deciding that it is more likely than not that VAT BDR was not claimed in the Claim Period."

59. The appellant submits that, for a number of reasons, the FTT erred in its conclusion, failing to appreciate the significance or effect of the evidence:

> (1) Evidence that the White Book bad debt figures and internal accounting manual figures recorded bad debts as inclusive of VAT (which indicated no BDR claims had been made).
>
> (2) The appellant's change in its reporting from VAT inclusive to exclusive after change in law in 1997.
>
> (3) Mr Leach's evidence in his witness statement of 11 October 2013. In revising the calculation of the claim (for reasons which are not relevant to this appeal), he revisited certain documents that had been provided with Mr Ellis's witness statement. At paragraph 24 he explained: "The…White Books for the years ended 31 March 1996 and 31 March 1997 both include a page which includes a Credit Control report showing under account code 9258 "External Credit Sales inc. VAT" with further account codes alongside of 9270 "Specific Bad Debts YTD" and 9260 "Bad Debts charge to P&L".
>
> He continued at Paragraph 25:
>
> > "In my experience it would be highly unusual for the management accounts to report bad debts net of VAT alongside "External Credit Sales inc. VAT" if VAT bad debt relief was being claimed by Jewson Ltd in those years for those bad debts. Whilst **Trade Debtor figures include VAT, the comparison with the bad debt figures made by including them on the same pages (see Appendix 6) would be misleading if VAT bad debt relief was being claimed**. I would consider it more likely than not that **the bad debt figures were included on the VAT inclusive Debtors report page because they included VAT which Jewson Ltd was unable to claim under the VAT that debt relief legislation in force from 18 March 1989 until the legislation was changed**." (appellant's emphasis)

60. The appellant thus placed much emphasis on the bad debt figures being VAT inclusive. The suggestion was this assumed no VAT would be recovered. It was, Mr Legg argued, significant that in later periods the bad debt figures were exclusive of VAT.

61. As HMRC point out there is, however, no written evidence to support the appellant's submission that in 1997 when the Property Condition changed, the accounting changed. The appellant referred us to excerpts from Mr Leach's evidence referring to averages of bad debt figures written off in relation to more recent years (2010-2014) which were calculated on a VAT exclusive basis. But here the witness was just saying that when he looked at figures for those years they were VAT exclusive –

he did not and was not purporting to say what the position was in 1997. We also note that the approach of using amounts which were inclusive of VAT was in accordance with SSAP 5 (see [72] of the FTT's decision). Although we place no great reliance on the point, it would tend to suggest any change in treatment would be driven by that practice not by a change in legislation.

62. The more significant point, however, concerns whether the FTT was correct to find that VAT inclusive reporting of the bad debt figure was irrelevant to whether VAT BDR had been claimed. The FTT considered it was irrelevant because a successful BDR claim would not be reflected in the BDR account but elsewhere in cost of sales and the VAT account. The FTT noted there was no evidence that no such entries were made in those sales and VAT accounts. This issue overlaps with the appellant's ground d) that the FTT: "Developed its own, unfounded, theory as to the possible existence of another, now lost, accounting record and relied on that possibility as relevant to whether there was sufficient evidence before it to support a conclusion that all the BDR had not already been claimed." In particular, the appellant argues that at [74] and [80] of its decision the FTT erroneously invented its own interpretation of the White Book and the Accounting Manual which was contrary to the uncontroverted explanation given by the witnesses and failed to explore its interpretation with the witnesses.

63. We do not accept the FTT erred as alleged. The FTT did not refer to paragraph 25 of Mr Leach's evidence but we consider it dealt in substance with the point. It rejected the view that BDR claims would have been reflected in the bad debt account, in essence preferring Mr Ellis's description of how the accounts fitted together over Mr Leach's. We consider it was open to the FTT to find that any BDR claim would not be reflected in the bad debt account and that it would be reflected directly into the cost of sales. That did not involve any invented, but subsequently lost, record as the appellant had suggested. Mr Leach's evidence effectively amounted to the non-expert opinion of someone who was looking at the accounts after the event rather than someone such as Mr Ellis who was involved with them at the time and the FTT was entitled to ascribe it such weight as it saw fit. There was no issue that it was incumbent on the FTT to explore with him beforehand. We should, as HMRC point out, also be wary of looking at passages from one witness's statement in isolation; it was the view formed of the witness evidence, after cross-examination and tribunal's questions, which was relevant to the FTT's conclusion.

Ground (c): "Gave significant or even conclusive weight to the Commissioners' legal Romalpa analysis, as if it had any material evidential relevance to the enquiry as to the likelihood of BDR claims having been made."

64. We have dealt with this under our discussion of the legal and logical error above.

Ground (d): "Developed its own, unfounded, theory as to the possible existence of another, now lost, accounting record and relied on that possibility as relevant to

whether there was sufficient evidence before it to support a conclusion that all the BDR had not already been claimed."

65. We have dealt with this above.

Ground (e): "Concluded that the lack of evidence, as it saw it, that some of the BDR in question had not been claimed already, meant that it was bound to conclude that there was no evidence that all the BDR had not been claimed."

66. The point raised in this ground, also features in *Ground g)* (that the FTT: "Gave no apparent weight to the lack of any positive evidence that all the BDR had been claimed.") and *Ground h)* (that the FTT: "Failed to engage with its duty to ask itself what was the amount of tax emerging from the evidence before it as unlikely to have been claimed in the past as BDR"). It is also a point raised in relation to the appellant's criticism of the FTT's reasoning at [80] of its decision where, in explaining that BDR would appear in the cost of sales and VAT account, it said: "There is no evidence that such entries were not made during the Claim Period". That is flawed, the appellant submits because 1) the absence of evidence that claims were not made is not evidence that claims were made, and 2) no evidence that some claims were not made, is not evidence that all the claims were made.

67. We agree with HMRC that none of these grounds amount to errors of law. In circumstances where i) claims could be made, ii) some were made, iii) where there was evidence that if claims could be made then they would be, and iv) where such evidence that there was, did not support the view that no claims were made, it would have been irrational for the FTT to then say *some* claims had not been made.

68. Regarding the appellant's reference to "the lack of any positive evidence", HMRC are right to highlight that this is not a helpful description of the situation in this case. Here there were no relevant VAT records, there was no-one with any recollection of what had happened. All that could be said was that there was an absence of records. One could not take from that that there were no records of a claim.

69. Ultimately, the FTT was not satisfied on the evidence that no claims had been made. There was no dispute the burden to show no claims had been made rested on the appellant. The FTT rejected the appellant's whole case. There was no question of which bad debts had been claimed and which had not. The FTT's reasoning was entirely consistent with the conclusion that all claims that could be made had been made.

Ground (f): "Accorded to the Harcros evidence a significance that it could not reasonably bear."

70. The FTT covered this issue at [86] to [90] of its decision (see [20(2)] and [22] above). Regarding the share purchase agreement warranties, in relation to the acquisition of Harcros by Jewson in December 1997, which stated no claim had been made as at 31 December 1996, the FTT explained:

> "Although the entire agreement was not included in the hearing evidence bundle, I take it that, in accordance with normal commercial law practice with which I am familiar, the warranties would have been given on the basis of "save as disclosed in the disclosure letter defined" or similar."

71. At [87] the FTT noted:

> "A disclosure letter dated 21 October 1997 made the following disclosure against the above VAT warranty:
>
> "Value Added Tax
>
> Bad debt relief claimed since the Balance Sheet date:
>
> Quarter to 31/03/97 £182,427.78
>
> Quarter to 30/06/97 £138,847.09""

72. At [88] the FTT noted that the appellant accepted the Harcros claims altered the calculation of BDR but rejected (at [89]) the appellant's case that the disclosure strengthened its case. The FTT explained tax warranties were standard matters:

> "Standard practice (with which I am familiar) is that such warranties are phrased as bald assertions, and it is then up to the warrantor (ie the vendor) to disclose as they consider fit. No inference can be drawn about Jewson's own policy from the fact that a warranty was requested concerning BDR claims made by Harcros."

73. In fact, at [90] the FTT considered the evidence:

> "…far more important than the Appellant is prepared to accept. It is evidence that Harcros as one of the Claimant Companies … was in exactly the same line of business as the other Claimant Companies – did make VAT BDR claims during the Claim Period. Accordingly, this is evidence that counts against the Appellant on the question of whether that it is more likely than not that VAT BDR was not claimed in the Claim Period."

74. The appellant submits the FTT erred:

> (1) in drawing conclusions as to the effect and prevalence of the VAT BDR warranty in the Harcros transaction, not on the basis of any evidence, but on the basis of its own purported familiarity with "normal commercial law practice".
>
> (2) In concluding that no inference could be drawn about Jewson's own policy from the fact it requested a warranty regarding Harcros's BDR claims, failing to consider Mr Leach's unchallenged evidence in his supplementary witness statement to the opposite effect that the given VAT

warranties sought, including BDR, "were those items of concern to Jewson Ltd due to the specific VAT risks involved."

(3) In dismissing Mr Leach's explanation that the 1997 claims were mistaken as they were made around the time the law changed. There could have been an error, given how close the claims were (albeit relating to earlier sales) to the time at which the legislation changed. In those circumstances it was wrong to make inferences regarding claims in other periods.

(4) In the significance it placed on the Harcros BDR claims: the fact the appellant group acquired Harcros in 1997, which had made substantial claims in 1997, said nothing about whether the appellant, an acquirer, had been making such claims over the entirety of the claim period.

75. In our view none of these points amount to an error of law. Regarding 1) and 2) the FTT is a specialist tribunal. We consider it was well within its remit to bring its specialist expertise to bear on the use of tax warranties and disclosures in corporate acquisitions in dealing with the submission the appellant had put to it. It was not a view taken without evidence but with the benefit of the FTT's experience. It was not a finding contrary to the evidence as the appellant advanced no evidence as to what the intentions of the parties were in requesting the warranties. Mr Leach, who was not there at the time, and not an expert, simply offered his opinion which the FTT was entitled to disregard without the need for Mr Leach to be cross-examined on the point. In any event, our experience is the same as that of the FTT.

76. As for 3) above the suggestion that the claims were mistakes was purely speculative. The FTT was perfectly entitled not to accept it.

77. As for 4) the FTT explained that Harcros was in exactly the same line of business as the other claimant companies. None of its other findings suggested the nature of Harcros's supplies were different and it was not argued there was any evidence before the tribunal which made that finding unsustainable. Indeed, we note that Mr Leach's evidence in his witness statements, which were referred to, when discussing the calculation assumptions and noting the comparability of the average debt percentage across the companies, which included Harcros, described the companies as "carrying on similar builders' merchant businesses in the same mainland UK trading environment".

78. We accordingly reject the appellant's case on this ground.

79. In the light of our decision above we do not deal with the issues relating to the extent to which statutory interest under s78 VATA was payable. (We had agreed, pursuant to the parties' request, that we did not need to be addressed on the issue at the hearing. If the issue had become relevant, the parties in any event had invited us to remit it to the FTT to be stayed behind another case proceeding before the FTT on the same issue).

Decision

80. The appellant's appeal is dismissed.

Signed on Original

JUDGE SWAMI RAGHAVAN

JUDGE GUY BRANNAN

UPPER TRIBUNAL JUDGES

RELEASE DATE: 29 MARCH 2021