Neutral Citation Number: [2022] EWHC 202 (Ch)

Case Number **CR-2014-002237**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (Ch D)

IN THE MATTER J D GROUP LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 3 February 2022

Before :

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE AGNELLO QC

B E T W E E N :

- -

MICHAELA JOY HALL
(as liquidator of JD Group Limited)

Applicant

and

DEEPAK BHATIA

Respondent

- -

Mr Peter Shaw QC (instructed by Wedlake Bell) for the Applicant Liquidator
Mr Kevin Pettican (instructed by Treon Law) for the Respondent

Hearing dates: 26 – 28 October 2021

- -

JUDGMENT

Judge Agnello QC:

Introduction

1. This is the trial of the application dated 7 May 2020 issued by the Applicant, being the Liquidator of JD Group Limited ('the Company') against Mr Deepak Bhatia ('the Respondent') seeking relief pursuant to section 213 (fraudulent trading) and section 212 (breach of fiduciary duty) of the Insolvency Act 1986. On 9 May 2014, the Company went into a creditors voluntary liquidation. This was superseded by a winding up order made on 12 May 2014 on the undefended petition of Her Majesty's Customs and Excise ('HMRC'). At all material times, the Respondent was effectively the sole

director of the Company. Prior to 2005/6, the Company had an established business of dealing in babywear. In 2005/6 the Company entered into the world of trading mobile phones.

2. In summary the Liquidator's case is as follows:-

(1) The Respondent was a knowing party to the carrying on of the Company's business with intent to defraud HMRC, as a creditor or for a fraudulent purpose and that the Respondent do contribute to the Company's assets in the sum of £743,872 (being £457,975 plus £285,897) plus interest (section 213 of the Insolvency Act 1986) ;

(2) Alternatively, the Respondent acted in:

(i) fraudulent breach of duty, alternatively

(ii) breach of the duty to act honestly, bona fide and/or to exercise his director's powers for the purpose for which they were conferred (a non fraudulent breach of duty);

(3) In so far as the Liquidator's case relating to breach of duty is established, the Liquidator seeks an order that the Respondent contributes to the Company's assets in respect of the breaches of duty in the sums of £285,897 (the misdeclaration penalty) and the total input tax paid to suppliers, being £2,117,762 less the profits (£692,500) plus interest on the total sum.

3. Section 213 of the Insolvency Act 1986 states as follows:-

> (1) *'If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.*
>
> *(2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper.'*

The relevant parts of section 212 of the Insolvency Act 1986 which are, as both Counsel agreed, a statutory shortcut for office holders to bring misfeasance proceedings as against former office holders of a company, are :

'(1) This section applies if in the course of the winding up of a company it appears that a person who—
(a) is or has been an officer of the company,
….has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company.
(3) The court may, on the application of the official receiver or the liquidator, or of any creditor or contributory, examine into the conduct of the person falling within subsection (1) and compel him—
(a) to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or
(b) to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.'

Summary Factual Background

4. The Liquidator's case derives from transactions, being the purchase and sale of mobile phones undertaken by the company during the period August 2005 to August 2006. In particular, the Liquidator relies on the VAT return for the period ended May 2006. In that period, the Company recorded 7 export transactions, being the purchase of phones from 2 UK suppliers, Mana Enterprises Ltd ('Mana'), Regal Portfolio Ltd ('Regal') and sale to 3 overseas purchasers – URTB Sarl ('URTB'); Compagnie Int'l de Paris SARL ('Compagnie Paris') and Rakha SARL ('Rakha'). The total VAT paid by the Company to the 2 UK suppliers in these chains was £2,117,762. In the May 2006 VAT return, the Company sought to claim this sum as part of its total input deductions of £37,943,297 to set off against its output tax liability on its sales. The Company recorded total output tax liabilities of £37,072,271 in this period, consisting of both UK to UK sales and the output tax liability on 5 import transactions. These 5 import transactions consisted of purchases from a single supplier, a Polish registered company, Pol Comm Trading sp z o.o ('Pol Comm') and the onwards sales all to the same company, being the The Export Company (UK) Limited ('TEC'). The total output tax liability in respect of those sales was £1,243,200. After conducting a verification exercise into the Company's claim to offset the £2,117,762 input tax on the 7 export transactions, it disallowed the claimed credits on the basis that (1) the Company knew or had the means of knowing that those transactions were connected to missing trader

intra community VAT fraud (MTIC fraud); (2) HMRC had suffered a tax loss in those transaction chains in that each one could be traced back to a defaulter who had deliberately not paid its output tax liabilities. The effect of this disallowance of the input tax liability was that the Company was left with a net VAT liability of £1,246,736.17 in respect of the March – May 2006 period which primarily comprised of the £1,243,200 output tax within the 5 import transactions.

5. On 3 September 2008, the Company appealed to the First Tier Tribunal against the refusal by HMRC to allow the claimed input tax credit. This appeal was combined with the appeal issued on 17 December 2007, by JD Net Solutions Ltd, being another company which had traded in mobile phones and where at the relevant time, the Respondent was also a director. Extensive evidence was served by both the Respondent on behalf of the Company and by HMRC. The witness statements filed by the Respondent in the Tribunal proceedings were exhibited by the Respondent and relied upon as part of his defence to these proceedings. The Liquidator also sought to rely on the extensive evidence served by HMRC in those proceedings. Mr Kevin Pettican, Counsel on behalf of the Respondent, made the point before me that all the documentation which was before the First Tier Tribunal may well not have been before me. I entirely accept that might be the case, but the witness statements filed on behalf of the Company by the Respondent are in the evidence alongside those filed by HMRC. This enables me to see the evidence relied upon, including any documentation exhibited and relied upon, as well as consider the points made by the Company in its appeal. This remains the case even taking into account that there may well have been documents included in bundles for the purpose of the First Tier Tribunal hearing which were not before me. Mr Shaw did not suggest that all the documents which had been filed before the First Tier Tribunal were before me.

6. On 29 February 2012, the Tribunal directed that unless the Company confirmed within 21 days its intention to proceed with the appeal, it would be struck out. As there was no response from the Company during the requisite period, the appeal was thereafter automatically struck out on 22 March 2012. No application was made by the Company seeking to reinstate the tribunal process.

7. On 21 March 2014, HMRC issued an assessment for a misdeclaration penalty pursuant to section 63 of the VAT Act 1994 in the sum of £285,897 in respect of the misdeclaration in the May 2006 VAT return relating to the claimed and disallowed input tax credits. There was no appeal by the Company against that assessment. HMRC's VAT claim in the liquidation is the sum of £1,286,470.78 and £285,897.

The current proceedings

8. These proceedings were issued on 7 May 2020 with the witness statement of the Liquidator dated 7 May 2020 in support with additionally Particulars of Claim with an Appendix. The Respondent filed witness statements dated 18 June 2020 and 2 August 2021, with the latter relying heavily on the two witness statements filed by him in the Tribunal proceedings. He also filed a defence on 10 August 2020 to which the Liquidator filed a reply dated 18 September 2020. The two Tribunal witness statements relied upon as part of the defence in the current proceedings are dated 26 June 2010 (with a list of documents) and 14 October 2010 with exhibits. There were numerous witness statements filed on behalf of HMRC in the Tribunal proceedings. None of the makers of those statements were called to give evidence. Mr Shaw submitted that the purpose of the HMRC witness statements was to enable the documents which were primarily those which had been produced by the Company relating to the various transactions to be before the Court. The evidence also consisted of schedules produced by HMRC relating to the transactions. Additionally, Mr Shaw submitted that it was unhelpful for me to have the evidence of the Respondent in the Tribunal processing without being able to consider the evidence he was replying to. Mr Pettican's concern was to ensure that the Tribunal evidence was not accepted by me in some way as establishing the case against the Respondent. As the statements of the Respondent make clear, his defence is based upon his lack of knowledge and his lack of dishonesty. The Respondent did not accept that the chains of transactions were necessarily MTIC fraud and this is a matter which the Liquidator will need to establish. In those circumstances, I approached the HMRC Tribunal evidence with the above in mind. As will become clear below, the Liquidator's case was document based and relied upon the documentation mainly produced by the Company and the analysis and evidence of HMRC relating to those traders who HMRC asserted were defaulters.

9. I heard evidence from the Liquidator and the Respondent. The Liquidator's evidence was of limited use because, as is common in these cases, her case is based on documentary evidence and she has no actual knowledge of events. There was an issue relating to whether there were any other potential recoveries in the liquidation estate for the benefit of creditors. I will deal with this below but for current purposes, I should add that I did not reject her evidence when she stated that no further recoveries were likely. The Respondent also gave evidence and was cross examined for about a day. I deal below in some detail with his evidence.

Delay

10. Mr Pettican raised the issue of delay and invited me to dismiss the action because, he submitted, due to the passage of time, the Respondent would not be able to have a fair trial. I dealt with this issue by way of a short judgment rejecting that the delay in this case was such that a fair trial would not be possible. I will not repeat what I stated. However, I do accept that I need to consider carefully the passage of time and the effect that may have in relation to memory and recollection of witnesses. As I mentioned during the hearing, this case has the benefit of witness statements filed by the Respondent in the Tribunal proceedings and those are relied upon by the Respondent. As those are dated considerably closer to the dates of the relevant transactions, I have paid close attention to them. Additionally the Liquidator based her case on the contemporaneous documentation most of which was produced by the Company.

11. Unless otherwise referred to below, all references to provisions in an Act will refer to sections in the Insolvency Act 1986.

MTIC fraud

12. The characteristics of MTIC fraud have been well set out in various court decisions and I set these out below. Usefully, it was recently summarised by the Court of Appeal in *Natwest Markets plc v Bilta (UK) Limited [2021] EWCA Civ 680* in the following terms -

> *"4. The criminals involved in MTIC fraud exploit the fact that imports and exports of goods between Member States of the EU are VAT-free. Like all successful forms of fraud, the essential mechanics are simple. A*

trader ("the defaulter") imports goods from State A into State B, and sells them on within the latter State. No VAT would be payable on the goods when imported, but the onward sale (and any sales further down the chain within State B) would attract a liability to VAT until such time as the goods are exported to another Member State (which could be State A or State C). The final link in the chain will be the person who exports the goods, who is often an accomplice of the defaulter. The intervening sales and purchases are known as "buffer transactions".

5. The initial buyer in the chain in State B will pay the price of the goods plus VAT to the defaulter, or sometimes to a third party nominated by the defaulter (often, ostensibly, the person from whom he purchased the goods). The buyer would then be able to offset the VAT he had paid to the defaulter against any liability which he had to account to the revenue authority in State B for VAT received on the price of the goods he sold on. The exporter at the end of the chain can claim back from the revenue authority in State B the VAT that he has paid to the person from whom he purchased the goods, because the goods have now been exported to another EU State in a zero-rated transaction. Meanwhile, the defaulter would pay the price of the goods to its supplier in State A, syphon off the VAT (or pay it to an associate) and then vanish or, if a company, go into liquidation without accounting to the revenue authority in State B for the VAT."

13. Mr Pettican did not dispute this useful summary of MTIC fraud. The Respondent's case is, put simply, that he did not know that the Company was participating in a MTIC fraud. Mr Pettican also submitted that the evidence was insufficient for me to be satisfied that the transactions were part of a MTIC fraud. So that is the first matter which I need to determine. I will consider the evidence that the relevant transactions were part of a MTIC fraud, then deal with the issue of knowledge and dishonesty.

Is the MTIC Fraud established in this case ?

14. It is accepted that the Respondent was the principal director of the Company during the period when the Company was trading in mobile phones. The Respondent accepted that effectively he was in charge. He did not detract from this although he did explain when giving evidence that the Company had employed an in house accountant, Mr Tarun Jain and that this gentleman would have been able to assist in relation to many of the questions which were to be raised. Mr Jain died in April 2020 of coronavirus. At some stages during his evidence, the Respondent averred that he did

not know but that Mr Jain would have been the person who knew. Having considered carefully the evidence of the Respondent as set out in his witness statements as well as his cross examination, in my judgment, none of the references to Mr Jain resulted in the Respondent being unable to deal with the matters raised. The Respondent was aware of the trading of the Company and its operation. That is very clear from his Tribunal statements. In general, the Respondent did not seek to hide from his role as sole director or from accepting that he had the knowledge to answer the questions.

15. The Liquidator relies on the following. In the VAT period 05/06, the Company acted as a broker in relation to seven deals whereby the Company bought from UK based companies and exported the goods purchased to an EU based customer. Seven of these deals have been traced back to a fraudulent evasion of tax, being a simple MTIC fraud chain. Consequently, the evidence shows a loss of revenue by reason of a defaulting business. The remaining five transactions carried out by the Company in the same period were deals in which the company acquired from an EU company and sold onto a UK company ('the contra deals') The Company then used the contra deals to off set in and output tax.

16. The evidence relied upon by HMRC in relation to the appeal in the Tribunal proceedings sets out that the defaulting trader in relation to the chains, in which the Company was a party, is in each case at the head of the chain. At paragraph 35 of the Statement of Case of HMRC, the details of these defaulting traders are set out as follows;

(1) C & B Trading (UK) Ltd ('C&B Trading') was registered for VAT on 7 May 2003 under the name C and B Car Care Ltd which its business stated to be car valeting with an estimated turnover of £80,000. It changed its name in September 2005 and in around March 2006, it notified HMRC as to a change in its trade classification to general trading. Its trade was largely a supplier of electronic goods and it failed to declare in its VAT returns sales of the electronic goods including the ones which were then sold down the chain to the company. It failed to keep appointments arranged with the Commissioners and thereafter it went missing from the premises. Its VAT registration was cancelled and it had a VAT liability raised on assessments in the total sum of £84,368,677.22 on account of these supplies. The sums remained unpaid and a winding up order was made on 10 January 2007.

(2) Causeway Initiative Ltd ('Causeway') was registered for VAT in April 2006 to trade as an advertising consultant. This company made large supplies of electronic goods which included those sold on by the Company. As with C & B, it failed to declare these goods in its VAT return. The Commissioners raised assessments totalling £23,054,862.75 which were not paid. Causeway went missing from its principal place of business and the assessments remain unpaid.

(3) 3D Animation Ltd ('3D Animation') was registered for VAT in April 2006 and declared a business activity of design, multimedia and animation graphics with an estimated turnover of £89,000. It made large supplies of electronic goods including goods the subject of the Company's May 2006 return. Assessments in the total sum of approximately £129,000,000 remain unpaid and the company was the subject of a winding up order on 20 September 2006.

(4) Sunmac (UK) Ltd ('Sunmac') was registered for VAT purposes in January 2003 to trade in 'IT Consultancy' with an estimated turnover of £100,000. Sumnac made large supplies of electrical goods including those the subject of the company's VAT return and it failed to declare the VAT on its returns. As with the other two companies already referred to, Sumnac also failed to declare the VAT in its return. The Commissioners raised assessments totalling £1,438,418.00. Sunmac went missing from its place of business and failed to respond to correspondence. The assessments remain unpaid and Sunmac was dissolved and struck off the Companies Register.

17. The chains which HMRC asserted the Company was part of are set out in some detail in the evidence. The 'deal packs' from which the documentation referred to below originates, is Company documentation. 'Deal 1' shows C& B Trading selling to Highbeam UK Ltd, 5000 units of Nokia 8800 for £421.25 per unit. The next transaction was the resale of the units to Mana for £421.50 per unit. Thereafter, Mana sold the units to the Company for £423 per unit and the Company then sold them outside of the UK, namely to URTB Sarl, an offshore entity, for £427 per unit. This then enabled the Company to claim the VAT in relation to the units it sold outside of the UK. All of these transactions occurred on the same day, being 10 April 2006. Additionally, as submitted by Mr Shaw, the profits between one sale to the other are of extremely modest rises until the Company sold the goods offshore, thereby attracting the VAT refund. Additionally, the evidence demonstrated that Mana released the goods before it was paid by the Company. I will come back to this last point relating to the issue of what

the Respondent knew later in this judgment. For current purposes, I am dealing with whether the chains were MTIC fraud.

18. Mr Shaw submits that the evidence I have set out above is essentially a simple structure of a MTIC fraud, with the defaulter being in this case C& B Trading. The evidence demonstrates that C& B Trading did not account for VAT and then effectively disappeared. Other characteristics include being an entity which doesn't account for its VAT, the low mark ups, the transactions taking place all on the same day (or within a very small time frame) and additionally, the element in this chain of some contrivance in relation to the price and here, that the goods were released by Mana to the Company before payment was made.

19. 'Deal 2' also starts with C & B Trading selling to HillGrove Trading, E5500 Nokia 8800 for the sum of £412.25 per unit. The same day, being 10 April 2006, the goods are sold onto Mana for £412.50 per unit. Mana then sells onto the Company for £423 per unit on the same day. On 19 April 2026, the Company sells onto URTB Sarl for £427, thereby seeking the VAT refund. The sale by the Company to URTB Sarl was for a lessor number of units, being 4500. So all the transactions were on the same day save for the one where the units were then sold offshore thereby allowing for a VAT claim to be made. The date of the export out of the units was 19 April 2006. Again the defaulter is C& B Trading. The mark ups were also very modest with the exception of the export transaction.

20. 'Deal 3' relates to transactions which all took place on 15 May 2006. In this chain, Sunmac sold the 3500 units of Nokia 8801 to Zenith Sports (UK) Ltd, trading as I Connect Telecommunications Ltd at £499.50 per unit. These were sold on the same day to Regal at £449.75 per unit. On the same day the phones were sold onto the Company at £500 per unit. Then the Company sold them for export at £503 per unit by way of export to URTB Sarl.

21. 'Deal 4' is a chain which starts with Sunmac and relates to transactions which all took place on 15 May 2006. This is effectively a 'spilt' with deal 3. Sunmac sold 2000 units of Nokia 8801 at a unit price of £499.50 to I Connect Telecommunications which in turn sold them onto Regal at £499.75 per unit. This was sold onto the Company for

£500 per unit and thereafter, on the same day the Company exported them to URTB Sarl for £503 per unit. Again as with the other transactions, the transactions occur all on the same day, with modest mark ups on each transaction save for the last one, being the export transaction where the Company has a larger mark up, in this deal £3 per unit. In all these cases, the start of the chain is one of the defaulters already detailed above.

22. 'Deal 5' Starts with Causeway on 9 May 2006 selling 5000 units of Nokia 8800 to Realtech Distribution Ltd for £398 per unit. Thereafter on 22 May 2006, Realtech Distribution Ltd sells the units to Fonedealers Ltd for £398.2 per unit. They are sold on the same day to Worldwide Export Ltd at £398.35 per unit. Thereafter they are sold onto Mana for £398.5 per unit. The Company acquires the phones from Mana on the same day at a price of £452 per unit and exports them on the same day at a unit price of £400 to Compagnie Internationale de Paris Sarl.

23. 'Deal 6' relates to 3D Animation selling 3000 Nokia 8800 units on 31 May 2006 at a unit price of £469.50 to Global Tech Services Ltd. The units were then sold on by the latter company to Regal at a unit price of £469.75 on the same day. Thereafter again on the same day, Regal sold the units to the Company at a unit price of £470. The Company then on the same day sold them for export to URTB Sarl at a unit price of £531.

24. Deal 7 relates to 5000 Sony Ericsson W900i sold by 3D Animation in two sales, one for 2000 units and the other for 3000 units to Global Tech Services Ltd. In both sales, the unit price was £299.50. Global Tech sold these units, in two sales, to Regal at a unit price of £299.75. Thereafter Regal sold the 5000 units in one sale to the Company at a unit price of £300. The Company then exported as a sale at a unit price of £339 to Rakha, an offshore entity. All of these transactions occurred on the same day being 31 May 2006. Again, Mr Shaw highlighted the very modest mark up until the goods are to be exported. He also repeated the issue he has already raised, namely that the chain started in all these cases with the defaulters and the transactions occurred on the same day. There are some exceptions relating to the dates as to when the transactions were caried out, but on the whole, the evidence supports the submissions made by Mr Shaw.

25. Deal 8 is the first of the 'import deals' relied upon by the Liquidator. On 31 March 2006, PolComm (another offshore entity) sold 5000 units of Nokia N8800 to the Company at a unit price of £425. The Company sold these in two transactions, on the same day, to TEC, with a mark up of £1 on each unit. The transaction in relation 3700 units was on 31 March 2006 and the transaction relating to the balance of units, being 1300 units was on 3 April 2006. On the same day, TEC sold the 5000 units onto Insignia Telecom (UK) Ltd with a unit price of £428. The latter Company sold on the same date to First Talk Mobile Ltd at a unit price of £432 and thereafter on 6 April 2006, the units were sold overseas to Compagnie Internationale de Paris with a more significant mark up, at £454 per unit.

26. Deal 9 is a further chain starting off shore with a sale of 1500 units of Nokia 8800 from Pol Comm to the Company with a unit price of £425 on 31 March 2006. There is then was a sale some days later, at a unit price of £426 from the Company to TEC. Thereafter, the units were sold on to DSP Wholesalers Ltd at a unit price of £428 and then the export to Compagnie Internationale de Paris at an elevated mark up.

27. Deal 10 starts again with Pol Comm with 3500 units at £425 per unit being sold on 31 March 2006 to the Company. These units were subsequently sold on by the Company on 19 April 2006 to TEC with a mark up of £1 on the unit price. TEC then exported the units to Compagnie Internationale de Paris Sarl on 25 April 2006 with a unit price of £428.

28. Deal 11 starts with Pol Comm and a sale to the Company of 1500 Nokia 9300i units at a unit price of £315 on 31 March 2006. The Company sold the units at a unit price of £316 to TEC on 10 April 2006. That company sold on the units at a unit price of £318 to DSP Wholesalers Ltd who in turn exported them by a sale to Compagnie Internationale de Paris at a unit price of £330 on 10 April 2006. There appears to be a proforma invoice with the date of 10 April 2006 but I do not consider this makes a difference because the point being made is that these units were sold down the chain during a reasonably short period. This is not a chain where the transactions all occurred on the same day.

29. Deal 12 starts with PolComm with the sale to the Company of 7500 Nokia 9300i at £315 per unit on 31 March 2006. The Company sells the units onto TEC on 3 April 2006 at a unit price of £316. TEC sells these onto Insignia Telecom (UK) Ltd for a unit price of £318 and then subsequently the units are sold onto First Talk and thereafter Compagnie Internationale de Paris. These transactions take place within a short period of time being from 31 March 2006 until 4 April 2006. The table at page 3362 does not appear to contain the unit price for the sale to Compagnie International de Paris, but I am prepared to accept that in common with the other chains, this was also for a larger profit as compared to the onshore transactions in this chain. It is noticeable that these transactions involve pretty much the same parties. Additionally, it is difficult to understand on a commercial basis why the Company would import phones which then end up being exported to a company, Compagnie Internationale de Paris, to whom the Company could have sold to directly (and did so in other chains). This again is another characteristic of MTIC fraud in setting up and operating effectively unnecessary transactions to hide the fraud rather than having any commercial value.

30. In relation to the Company as an exporter (Deals 1 – 7), all the chains are traced back to a VAT defaulter, being one of the companies which I have detailed above. In relation to the import related transactions (Deals 8 – 12), three of them end up with brokers, being First Talk, TEC, and DSP Wholesalers Ltd. According to the evidence before me, all three of these companies made repayment claims as part of their VAT returns. First Talk claimed £799,312.50, TEC claimed £262,250 and DSP Wholesalers Ltd claimed £195,826. HMRC disallowed the First Talk input tax claim. In relation to DSP Wholesale Ltd, HMRC allowed the credit claim. There is no evidence before me that TEC's claim was allowed by HMRC, but the return was not, according to the evidence of HMRC actually subject to verification. The evidence suggests therefore, in my judgment, that the credit claim was applied and not challenged by HMRC. This in itself does not mean that the transactions were not part of a MTIC fraud, but that HMRC had not refused the claims at the time.

31. In summary, HMRC lost significant sums in the transaction chains set out in Deals 1 – 7 (the export claims) as each of those chains contained a defaulter. In relation to the contra trades, where the Company was the importer, the goods were thereafter exported by the brokers and HMRC made repayments or granted credit.

32. Mr Pettican did not seek to challenge the evidence I have set out herein. No evidence was presented on behalf of the Respondent challenging this evidence. The Defence admits the details of the transactions which I have set out above, but makes no admissions that the 7 Export Transactions have been traced back to a defaulter. In essence, the main thrust of the defence is on the element of knowledge, but additionally Mr Pettican was keen to emphasize that there was little evidence relating to other proceedings being issued against other members of the various deals and this left the Respondent with a strong feeling that he was being singled out in some way. For present purposes, I am satisfied to the requisite standard, that the Liquidator has established that the relevant chains constitute MTIC fraud. In particular, the chains demonstrate the characteristics of MTIC fraud, with the transactions in many instances occurring on the same day, the mark ups being very small until the export transaction. Additionally, there are instances where the evidence demonstrates that the goods were 'sold' before any payment was made. The prices of the units themselves did not appear to reflect any commercial negotiation because the mark ups remained, in many instances, the same regardless of a unit price. There is a real lack of commerciality when the chains are examined to the extent that these chains are clearly, in my judgment operated for the purposes of MTIC fraud.

Dishonesty, knowledge – legal principles

33. It is common ground that the Liquidator needs to establish that the Respondent was dishonestly causing the Company's participation in the MTIC fraud described above. Both parties referred me to the two fold test for dishonesty set out in *Ivey v Genting Casinos [2018] AC 391* at paragraph 74:-

> *"When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest"*

34. Knowledge includes what is called blind eye knowledge. A person's belief may include suspicion which falls short of blind eye knowledge. Again, none of this was really contradicted by Mr Pettican. The test was paraphrased in *NatWest v Bilta*, paragraph 130, is where dishonesty is in question, the fact finding tribunal must ascertain (i) the defendant's actual state of knowledge and belief as to the facts, and (ii) whether in the light of that state of mind, their conduct was honest or dishonest applying the objective standards of ordinary decent people. So, "*the honesty of a person's conduct falls to be considered objectively in the light of all relevant material including their state of mind."*

35. The two stage test set out in *Ivey* and approved in *Nat West v Bilta* requires little further elaboration, but it is important, in my judgment not to confuse the two parts. The first fact finding exercise and ascertaining what was the Respondent's actual state of knowledge and belief as to the facts requires me to consider carefully the evidence before me including, the evidence given by the Respondent before me. The second part requires an application of the objective standard of ordinary decent people to determine whether that state of mind was honest or dishonest. The remaining section of paragraph 130 in *NatWest v Bilta* and the subsequent paragraphs provide a helpful discussion of blind eye knowledge and belief;

'In Group Seven Ltd and another v Nasir and others [2020] EWCA Civ 614, [2020] Ch 129, when applying the Ivey test in the context of a claim for dishonest assistance in a breach of trust, (in that case, the payment of a large sum of money to someone who was not entitled to it) this Court held that at stage 1 of the Ivey test "knowledge" includes blind-eye knowledge, but in principle "belief" may include suspicion which in and of itself falls short of blind-eye knowledge.

131. At [59] the court expressly endorsed the test for blind-eye knowledge in Manifest Shipping, reiterating that "it is not enough that the defendant merely suspects something to be the case, or that he negligently refrains from making further inquiries." At [60] the court quoted from the passage in Lord Scott's judgment at [116] of Manifest Shipping, where he said that:
"to allow blind-eye knowledge to be constituted by a decision not to enquire into an untargeted or speculative suspicion would be to allow negligence, albeit gross, to be the basis of a finding of privity."

132. The Court of Appeal in Group Seven then went on to make the entirely orthodox observation at [61] that knowledge and belief are different things, and expressed the

view that in principle a person's beliefs may include suspicions which he harbours. They said that a person's suspicions which in and of themselves fall short of constituting blind-eye knowledge are not necessarily irrelevant when evaluating if their behaviour was
dishonest because:"the state of a person's mind is in principle a pure question of fact, and
suspicions of all types and degrees of probability may form part of it, and thus form part of the overall picture to which the objective standard of dishonesty is to be applied".

133. It is important not to take these observations, which were obiter, out of context. The case goes no further than confirming that the honesty of a person's conduct falls to
be considered objectively in the light of all relevant material including their state of mind. The court went on to find that, on the basis of the trial judge's findings as to the state of the defendant's actual knowledge of the relevant facts, the inescapable conclusion was that he had blind-eye knowledge that the recipient was not beneficially entitled to the money [96]–[101]. The defendant's whole course of conduct was objectively dishonest, because no reasonable and honest person who knew those facts would have done what he did to facilitate the payment. The case was therefore one of actual knowledge of facts which, objectively assessed, constituted a breach of trust.

134. The Judge correctly directed himself on the law on dishonest assistance. The conduct complained of in the present case was continuing to trade with CarbonDesk despite the unprecedently high volumes of transactions coming to the Desk from that source on and after 17 June 2009, which are said by the claimants to have been sufficient to alert the Traders to the risk that CarbonDesk was being used as a vehicle for VAT fraud. When the matter is retried it will be a matter for the judge to determine whether, in the light of all relevant circumstances, including their states of mind, specifically their knowledge (actual or imputed), beliefs, and conduct (including, but not limited to their dealings with Compliance), it was or was not dishonest for the Traders to continue that trading.'

36. As is clear from these paragraphs, the honesty of a person's conduct falls to be considered objectively in the light of all relevant material including their state of mind. So a person can be held to be dishonest even if the defendant held a belief that he was not dishonest providing a court held him to be objectively dishonest, meaning that no reasonable or honest person who knew the facts would have done what he did. It is this second limb of the *Ivey* test which effectively ensures that the test of dishonesty has

moved past *R v Ghosh [1982] QB 1053*. This is clear from the history to the dishonesty test set out in *Ivey*. At paragraph 54, Lord Hughes stated

'A significant element to the test for dishonesty was introduced by R v Ghosh [1982] QB 1053. Since then, in criminal cases, the judge has been required to direct the jury, if the point arises, to apply a two-stage test. Firstly, it must ask whether in its judgment the conduct complained of was dishonest by the lay objective standards of ordinary reasonable and honest people. If the answer is no, that disposes of the case in favour of the defendant. But if the answer is yes, it must ask, secondly, whether the defendant must have realised that ordinary honest people would so regard his behaviour, and he is to be convicted only if the answer to that second question is yes.'

37. The consequences of the adoption of the Ghosh test are then clearly set out by Lord Hughes at paragraph 57,

'Thirty years on, however, it can be seen that there are a number of serious problems about the second leg of the rule adopted in R v Ghosh.
(1) It has the unintended effect that the more warped the defendant's standards of honesty are, the less likely it is that he will be convicted of dishonest behaviour.
(2) It was based on the premise that it was necessary in order to give proper effect to the principle that dishonesty, and especially criminal responsibility for it, must depend on the actual state of mind of the defendant, whereas the rule is not necessary to preserve this principle.
(3) It sets a test which jurors and others often find puzzling and difficult to apply.
(4) It has led to an unprincipled divergence between the test for dishonesty in criminal proceedings and the test of the same concept when it arises in the context of a civil action.
(5) It represented a significant departure from the pre-Theft Act 1968 law, when there is no indication that such a change had been intended.
(6) Moreover, it was not compelled by authority. Although the pre-Ghosh cases were in a state of some entanglement, the better view is that the preponderance of authority favoured the simpler rule that, once the defendant s state of knowledge and belief has been established, whether that state of mind was dishonest or not is to be determined by the application of the standards of the ordinary honest person, represented in a criminal case by the collective judgment of jurors or justices.'

38. In the course of his submissions, it did appear that Mr Pettican was seeking in some way to refer me to what would have been the Ghosh test when he submitted that

I needed to be satisfied of the actual dishonesty of the Respondent and it was important to ascertain what he believed. Mr Pettican submitted that I needed to consider that the Respondent genuinely believed that the transactions were commercial transactions and if that was my determination, then, Mr Pettican submitted, the Respondent was not dishonest. In my judgment, the *Ghosh* test has long gone and the test to be applied is clearly set out in *Ivey* to which both Counsel referred me to. There is, in my judgment, no room for any Ghosh type gloss to the second limb which is an objective test. Unlike and in direct contradiction of the Ghosh test, a person can be held to be dishonest even if he believes his conduct was not dishonest. That is the effect of limb 2 which is in my judgment entirely sensible for the reasons set out by Lord Hughes. Accordingly, I do not accept the proposition of Mr Pettican that if I find the Respondent honestly believed that the transactions were effectively commercial transactions and that they were not part of MTIC fraud, then that is effectively the end of the matter. Before turning to a consideration of the evidence and the application of limb one and two in this case, I will deal with the meaning of knowledge.

39. As set out by Mr Justice Pattern (as he then was) in *Morris v Bank of India [2005] EWHC Civ 693,* at paragraph 13, the test of knowledge for the purposes of section 213 is as follows:-

1.1. The Respondent must have known of the fraud, but need not have known every detail or the precise mechanics;

1.2. Knowledge includes blind eye knowledge – deliberate shutting eyes because of a conscious fear to enquire will confirm suspicion of wrongdoing;

1.3. Untargeted, speculative suspicion will not be sufficient.

40. In the context of MTIC fraud and the Respondent's knowledge, Mr Shaw asserts as follows:-

(1) The Respondent need not have known which aspects of the fraud he would have uncovered had he made reasonable enquiry,

(2) A person who knows that the transaction he participates in are connected to fraudulent tax evasion is a participant in the fraud and has a dishonest state of mind, and

(3) a party down the chain that is removed from the defaulter by intermediate buffers, will nevertheless be liable for dishonest assistance of a breach of fiduciary duty by the director of the defaulter if that party is aware of the general nature of the scheme and the implication of non payment of VAT by the defaulter.

41. In *Bilta v NatWest [2020] EWHC 546* (at first instance), at paragraph 168, Mr Justice Snowden said,

'The claims were brought by liquidators of the importer companies, Alpha and UA. The Deputy Judge found (i) that Mr. Sakhi and Fern assisted the breaches of duty by the directors of Alpha and UA (at [61]), and (ii) that they did so dishonestly (at [65]-[67]),

"61. The participation of Fern in these lines was in each case an integral part of a scheme whose function was to divert payment of the VAT element on the importer's sale into the UK market to a prior European supplier. This could only be achieved with at the lowest the connivance of a person conducting the affairs of the importer company, and thus necessarily involved a breach of fiduciary duty owed by him to the company in engaging in arrangements under which the company incurred a VAT liability for monies which were not to be collected from its customer. Equally, it was only because of the existence of the whole line, and as part of it, that the management of Alpha and UA engaged their companies in these arrangements. It follows, and I so find, that in each of the cases in which it participated in such a line Fern (and through it Mr Sakhi) facilitated and thus assisted that breach.

…

65. From at latest his meeting with HMRC in May 2005 Mr Sakhi was aware of the existence and nature of MTIC frauds and that they involved diversion of payment abroad. The fact that thereafter he himself did not perform the role of the party making that payment to an overseas recipient was likely to mean only that somebody else would do so. The other elements remained. I am in no doubt that his buy and sell prices were notified to him on the basis of an agreed and repeated margin, and that his account to me of prices being negotiated at arm's length on each occasion was untrue.

66. He may well not have known the identity of the supplier companies from which the payments were diverted, let alone of the employees or of the managers of those companies who were causing them to incur a VAT liability without collecting the corresponding amount from their purchasers, or that the law would categorise that conduct as a breach of fiduciary duty. But that degree of knowledge is unnecessary,

provided he was aware of the general nature of the scheme and its implications in terms of the deliberate non-receipt of money by a prior supplier. As to that it is in my view most unlikely that the general mechanics of the scheme were not the subject of conversation by Mr Sakhi with those orchestrating the trading, but even if he refrained from exploring that subject, that in itself would be a powerful indicator of dishonesty, unless indeed he had no need of clarification. As it was, Mr Sakhi never engaged in evidence with such questions, consistently with his stance - which I have rejected - that all his trades and prices were negotiated by him ad hoc and at arm's length.
67. In the result I am satisfied and find that Fern assisted dishonestly the breaches of fiduciary duty by the management of Alpha and UA on those deals in which it participated, and, concomitantly, that Mr Sakhi also dishonestly assisted those breaches by causing Fern so to participate."

169. The decision in Alpha Sim was that the director of a company in a chain of MTIC transactions – and by logical extension the company itself - could be liable for dishonestly assisting the breaches of fiduciary duty by the directors of the importer/defaulter company. The Deputy Judge clearly took the view that Mr. Sahki and his company were centrally involved in a number of entirely artificial transactions, without which the directors of the importer companies would not have been able to divert VAT monies that had been paid along the chain.

170. Although the facts were different, I accept that the decision in Alpha Sim is authority for the proposition that a person who causes a company to participate in a transaction under which monies are passed in one direction and goods are passed the other, together with the company itself, can be liable for providing "assistance" to defaulting fiduciaries of a company further along a chain of similar transactions. As a matter of principle, such actions provide the means by which an MTIC fraud can ultimately be committed by directors of an importer company further along the chain. Put another way, the defaulting fiduciaries would not be able to commit their breaches of duty if the defendant individual did not cause his company to enter into the transact ion in question, and if the defendant company did not then pay or transmit the monies due under it.

171. I acknowledge that Alpha Sim appears to have been a case in which, in one sense, the defendants were more closely connected to the fraud than the Traders or RBS are said to have been involved in the instant case. It would seem that the judge in Alpha Sim took the view that all of the links in the chain were artificial transactions, whereas the Traders and RBS were separated from the frauds at the Claimant companies by at least one buffer company (CarbonDesk), against which fraud is not alleged. It is also not alleged that the Traders had the same type of direct knowledge of the fraud as Mr. Sakhi (who was told what prices to agree for the trades).'

42. I have quoted at some length from *Nat West v Bilta*, which incorporates the passages approved and relied upon in *Alpha*, because of the way that the Liquidator in this case relies upon what she submits, it is clear the Respondent knew. I should add, that although the Court of Appeal set aside the first instance decision in *NatWest v Bilta*, the passages above relating to dishonest assistance and the principles relating to knowledge did not form any basis of the appeal itself. The passages above make clear that the level of knowledge is not such that requires a knowledge of every detail or indeed of the identity of the actual defaulter. The Respondent's case is that he was not aware of the chains and the companies involved therein. This therefore, by itself does not mean he did not have the requisite level of knowledge.

43. As submitted by Mr Shaw, these passages from *NatWest v Bilta* are also support for the principle that a party down the transaction chain may be liable for dishonest assistance and fraudulent trading when the making of payments passed money down the chain to facilitate the non payment of VAT by the defaulter. In particular as regards fraudulent trading at paragraphs 189 to 191, the Judge stated as follows:-

'The Deputy Judge then went on to conclude that as a result of the decision of the Supreme Court in Williams v Central Bank of Nigeria [2014] UKSC 10, the claims against Mr. Allen and GTC for dishonest assistance by Revapoint were statute barred by limitation. Nonetheless, he went on to hold Mr. Allen and GTC liable to the liquidator of Revapoint for participating in the carrying on of Revapoint's business with intent to defraud its creditors (which claim was not statute-barred). He said, "... the same matters which led to my findings that (1) the management of Revapoint was
guilty of the breach of fiduciary duty which I identified (2) ... GTC and Mr Allen facilitated
and assisted in that breach and did so dishonestly lead me equally to the conclusion that
(a) Revapoint's business was carried on with intent to defraud creditors, namely HMCE, or
for another fraudulent purpose, namely depriving the company of sums due to it, (b) each of these Defendants participated therein, and (c) they did so knowingly. On that basis it would be right that they should contribute to the company's assets to the
extent of the loss which I have identified ... as being appropriate in a claim for dishonest assistance
Contrary to the submissions of their counsel, I do not consider it appropriate to limit the contribution of
any of them to only part of that loss."

190. In that passage, and consistent with the other authorities to which I have referred, the Deputy Judge equated the facilitation and assistance knowingly rendered by Mr. Allen and GTC in relation to the breaches of duty by Revapoint's directors, with those defendants being "knowingly parties to the carrying on of [Revapoint's] business" for a fraudulent purpose under Section 213.
191. The imposition of liability under Section 213 on an outsider who has not been directly involved in the management of the company or its business, and in particular the parallels that seem to exist between Section 213 and accessory liability for dishonest assistance, have been criticised by David Foxton QC in an article, Accessory Liability and Section 213 Insolvency Act 1986 [2018] JBL 324. The author was critical of Neuberger J's reasoning and conclusion in Re BCCI, Banque Arabe Internationale d'Investissement v Morris. However, given that such reasoning was endorsed at the level of the Court of Appeal in Bank of India, I do not consider that I am entitled to hold that the scope of Section 213 cannot extend to an outsider to the company which has been carrying on its business with a fraudulent intent.'

44. Mr Shaw also relied upon *Megtian (in Administration) v Revenue and Customs Commissioners [2010] EWHC 18(Ch*), a decision of Mr Justice Briggs (as he then was). The case was an appeal against a decision of HMRC disallowing the company's claims to input tax in respect of two accounting periods relating to mobile phone trades. As Mr Pettican pointed out, this decision was not a case of fraudulent trading. I agree, but nonetheless it provides assistance relating to the approach relating to the issues I have to determine. At paragraph 24, the Judge made the point relating to findings of facts being, in certain cases, in the aggregate sufficient to permit the Tribunal to make a finding of dishonest knowledge. At paragraph 24, the Judge stated :-

'In my judgment the primary facts found by the tribunal relevant to @tomic's 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. As Lewison J put it in Arif (t/a Trinity Fisheries) v Revenue and Customs Comrs [2006] EWHC 1262 (Ch) at [22], [2006] STC 1989 at [22]:

'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, lead to that conclusion.'

45. Such statements of the applicable principles were not directly challenged by Mr Pettican, save he was keen to emphasize that some of the cases were not fraudulent trading cases. I will deal with the submissions made behalf of the Respondent shortly. *Metigan* was also relied upon by Mr Shaw for the following passage, at paragraphs 36 and 38,

'Secondly, Lewison J acknowledged that in many if not most cases of contra-trading, the clean chain and the dirty chain were likely to be part of a single overall scheme to defraud the Revenue. As he put it, at [109]: 'Indeed it seems to me that the whole concept of contra-trading (which is HMRC's own coinage) necessarily assumes that to be so.'
[37] In my judgment, there are likely to be many cases in which a participant in a sophisticated fraud is shown to have actual or blind-eye knowledge that the transaction in which he is participating is connected with that fraud, without knowing, for example, whether his chain is a clean or dirty chain, whether contra-trading is necessarily involved at all, or whether the fraud has at its heart merely a dishonest intention to abscond without paying tax, or that intention plus one or more multifarious means of achieving a cover-up while the absconding takes place.
[38] Similarly, I consider that there are likely to be many cases in which facts about the transaction known to the broker are sufficient to enable it to be said that the broker ought to have known that his transaction was connected with a tax fraud, without it having to be, or even being possible for it to be, demonstrated precisely which aspects of a sophisticated multifaceted fraud he would have discovered, had he made reasonable inquiries. In my judgment, sophisticated frauds in the real world are not invariably susceptible, as a matter of law, to being carved up into self-contained boxes even though, on the facts of particular cases, including Livewire, that may be an appropriate basis for analysis.
[39] It follows in my judgment that the tribunal did not in the present case make any error of law in approaching the question what Megtian knew or ought to have known on the general rather than segmented basis for which Mr Patchett-Joyce contends. Ground 3 accordingly fails.'

46. In particular, Mr Shaw emphasises the test set out as being 'knew, or ought to have known', which is effectively part of the dishonesty test which I have set out above in paragraph 130 of the Court of Appeal in *Natwest v Bilta*, referring to *Ivey* test. As Mr Justice Briggs makes clear, there is no need to know all the detail, but the Respondent

has to know that he is participating in a fraudulent scheme. Here, the Respondent says that he didn't know anyone else in the chain save for his direct suppliers and his buyers and that he didn't know the identity of the defaulters. However, this in itself, as in *Megtian* and *Revenue and Customs Comrs v Livewire Telecom Ltd [2009] EWHC 15 (Ch)*, is no defence in itself. In *Livewire*, Mr Justice Lewison (as he then was) considered whether a disallowance of repayment of input tax claimed by the broker at the foot of the clean chain required it to be shown that he knew or ought to have known of both of these frauds, or merely one or the other of them. The Judge concluded that the second of these alternatives was sufficient, at least on a case where dishonesty had been established as against the contra-trader.

47. As quoted by Mr Justice Briggs in *Megtian*, at paragraph 32,

Lewison J's conclusion is set out at para [103] of the judgment as follows: 'Thus it must be established that the taxable person knew or should have known of a connection between his own transaction and at least one of those frauds. I do not consider that it is necessary that he knew or should have known of a connection between his own transaction and both of these frauds. If he knows or should have known that the contra-trader is engaging in fraudulent conduct and deals with him, he takes the risk of participating in a fraud, the precise details of which he does not and cannot know. As Millett J put it in Agip (Africa) Ltd v Jackson [1992] 4 All ER 385 at 406, [1990] Ch 265 at 295 (in the context of dishonest assistance in a breach of trust):
"… In my judgment, however, it is no answer for a man charged with having knowingly assisted in a fraudulent and dishonest scheme to say that he thought that it was 'only' a breach of exchange control or 'only' a case of tax evasion. It is not necessary that he should have been aware of the precise nature of the fraud or even of the identity of its victim. A man who consciously assists others by making arrangements which he knows are calculated to conceal what is happening from a third party takes the risk that they are part of a fraud practised on that party." '

The legal principles – submission on behalf of the Respondent

48. As I have already set out above, the parties were agreed in relation to *Ivey* setting out the correct test for me to follow in relation to dishonesty. I have already rejected any *Ghosh* type gloss to the test. Mr Pettican disputes that the requirements of section 213 are met by establishing that the Respondent ought to have known or that he should have known that the transactions being undertaken by the Company were linked to a

VAT defaulter. Mr Pettican submits that the Liquidator must establish that the Respondent was a knowing party to the carrying on of business of the Company with intent to defraud creditors or for a fraudulent purpose. Mr Pettican accepts the passage I have set out above from *Morris v Bank of India*, but he did not address me substantially on the passages from *Megtian, Livewire*, and *Natwest v Bilta* which I have set out above. He referred me to a passage from a judgment of ICC Judge Mullen in *Pantiles Investments Ltd v Winckler [2019] EWHC 1298(Ch).* The passage I was referred to does not provide anything further in terms of the test and principles to be followed by me, but perhaps makes it clear (again) that the reasonableness or otherwise of the Respondent's knowledge or belief is a matter of evidence going to whether he held that belief, but that does not create a test that the belief must be reasonable. In my judgment, the test can be satisfied, as submitted by Mr Shaw on the basis that the Respondent 'ought to have known'. This is not seeking to insert an objective element into the first limb of the *Ivey* test which is a real fact finding exercise, but more in the way described by ICC Judge Mullen, namely that in determining what was the knowledge or belief held by the Respondent, the reasonableness or otherwise of that belief or knowledge being genuinely held. This also leads to the blind eye knowledge which I have also set out.

49. Mr Pettican reminded me that allegations of fraud need to be proved by clear and cogent evidence. Again, there is agreement in relation to this principle which is in any event well known. I accept the submissions made by Mr Shaw in relation to the applicable principles. However I have not ignored the points made by Mr Pettican and I have approached the evidence with these points in mind relating to what the Respondent asserts is his belief and knowledge. I turn to the evidence in particular relating to belief and knowledge.

The Liquidator's case on knowledge

50. Mr Shaw reminded me that on the facts of this case, the Respondent was told, 'in the clearest terms' exactly what the problem was in relation to MTIC fraud cases, how a party could be held liable and how to take steps not to be caught up in such a fraud. The Liquidator relies upon actual knowledge and alternatively blind eye knowledge.

Actual knowledge

51. The Liquidator relied heavily upon HMRC's repeated notifications in letters (for example one dated 7 July 2005), during visits to the Company, and HMRC's Notice 726 ('the Notice'). The Respondent admitted that details were provided to him at meetings and accepted that he was given a copy of the Notice, at least at a meeting on 19 May 2005 (relating to JD Solutions Ltd) and that he understood it. He was probably given a copy of the Notice on several other occasions, but that is not something which I need to determine. The Respondent was also a director of JD Net Solutions Ltd and this company had sought to commence to trade in mobile phones prior to the Company, in 2005. The Notice sets out how joint and several liability applies to the supply of 'specified goods'. As the notice makes clear, the measures apply where there is a supply of goods or services that are subject to widespread Missing Trader Intra-Community (MTIC) VAT fraud. The notice specifically refers to telephones as being 'specified goods'.

52. Clause 2.1 states,

'Where you (a VAT registered business)

- *Receive a taxable supply from another VAT-registered business; and*
- *The supply is of specified goods; and*
- *You 'knew' or 'had reasonable grounds to suspect' that the VAT on that supply, or any previous or subsequent supply, of those goods would go unpaid to Customs and Excise; and*
- *You have received notification of liability under a joint or several measure,*

You may be held liable for the net tax unpaid on those goods.'

The Notice sets out, in my judgment, what was MTIC fraud and the risk of a company being implicated in such a fraud. The Respondent accepted he had the Notice and had read it but did not view trading in phones as being negative.

Clause 2.4 states

'You may be held jointly and severally liable for the net tax charged on specified goods if we consider that you 'knew' or 'had reasonable grounds to suspect' that the VAT on the supply of those goods would go unpaid and you have been served with a

notification letter (see paragraph 4.1). ln determining whether to serve a notice of liability we will take into account whether you have taken reasonable steps to verify the integrity of your supply chain or any other factors you feel should be brought to our attention. Where we are not satisfied, we may serve you with a notice of liability under which we will hold you jointly and severally liable for the unpaid tax in the supply chain. We will use this measure to combat MTIC fraud. As this fraud generally involves wholesale of the specified goods and their dispatch from the UK, it is highly unlikely that manufacturers or retail suppliers of the specified goods will be affected by this measure.'

Clause 4.4 states

'4.4 How can I avoid being caught up in MTIC fraud?
It is in your interests to carefully check who you are dealing with. In order to help you avoid being unwittingly caught up in a supply chain where VAT goes unpaid, this notice contains examples of reasonable steps you can take to establish the integrity of your customers, suppliers and supplies'

Clause 4.5 provides suggestions of reasonable steps
'We advise you to carry out checks to establish the legitimacy of your supplier to avoid being caught up in a supply chain where VAT would go unpaid. There are a number of checks that you probably already undertake in line with good commercial practice such as credit checks. 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 judgment on the integrity of your supply chain.
Factors you may wish to consider include:
. the type and level of checks you carried out to establish the Integrity of the supply chain and the action you took as a consequence of those checks;
. the nature of the supply;
. aspects of payments arrangements and conditions; and
details of the movement of goods involved'
You can find examples of checks at section 8'

Clause 8 sets out the following:-

'Dealing with other businesses – How to ensure the integrity of your supply chain
8.1 Checks you can undertake to help ensure the integrity of Your supply chain
The following are examples of checks you make wish to undertake to help establish the integrity of your supply chain.
1)Undertaking reasonable commercial checks to consider the legitimacy of customers or suppliers. For example:
What is the supplier's history in the trade?
Are normal commercial arrangements in place for the

financing of the goods?

Are the goods adequately insured?

What recourse is there if the goods are not as described?

2) Undertaking reasonable checks to ensure the commercial viability of the transaction. For example:

is there a market for this type of goods - such as superseded or outdated mobile phone models?

ls it commercially viable for the price of the goods to increase within the short duration of the supply chain?

Have normal commercial practices been adopted in negotiating prices?

. ls there a commercial reason for any third party payments?

3) Undertaking reasonable checks to ensure the goods will be as described by your supplier. For example:

Do the goods exist?

Have they been previously supplied to you?

Are they in good condition and not damaged?

We recommend that sufficient checks be carried out in each of the above categories to ensure that you are not caught in a fraudulent supply chain.

8.2 Checks carried out by existing businesses

The following are examples of specific examples of checks carried out by existing businesses. These may also help you to decide what checks you should carry out, but this list is not exhaustive and you should decide what checks you need to carry out before dealing with a supplier or customer:

- obtain copies of Certificates of lncorporation and VAT registration certificates;

- *verify VAT registration details with Customs and Excise;*
- *obtain letters of introduction on headed paper;*
- *obtain some form of trade reference, either written or verbal;*
- *obtain credit checks or other background checks from an independent third party;*
- *insist on personal contact with a senior officer of the prospective supplier, making an initial visit to their premises wherever possible*
- *obtain the prospective supplier's bank details' to check whether :*

(a) payments would be made to a third party; and

(b) that in the case of import, the supplier and their bank shared the same country of residence'

- *check details provided against other sources' eg website' letterheads, BT landline records'*

Paperwork in addition to invoices may be received in relation to the supplies you purchase and sell. We believe that this documentation should be kept as evidence of a

transaction's legitimacy. The following are examples of additional paperwork that some businesses retain:

- *purchase orders;*
- *pro-forma invoices;*
- *delivery notes;*
- *CMRs (Convention Merchandises Routiers) or airway bills;*
- *Allocation notification;*
- *inspection reports.*

Again this is not an exhaustive list, but does show some of the more common subsidiary documentation'

53. I have set out certain paragraphs on the Notice at some length because in my judgment, it demonstrates clearly the level of knowledge which the Respondent actually had. The checks which were set out and proposed as well as the risks involved in trading were repeated at meetings held between HMRC and the Respondent. The Respondent stated in his evidence that people from HMRC were 'always there'. The Respondent was, in my judgment, fully aware that the trade of telephones was an extremely risky business and that the Notice provided extensive examples and explanations so as to enable a party seeking to trade in this area not to find itself liable.

54. The Respondent was asked about the contents of the Notice and accepted that he had read it and understood it. When asked about the examples of checks to be carried out by the Company, he accepted that these were set out. When asked about his knowledge relating to the details of the transactions, the Respondent replied that he wouldn't have known where the goods originated from. He added that he was an agent to buy and sell for the Company. When asked if he was aware that there were supply chains, he replied that he couldn't comment on that. He admitted that he knew customers were selling on to their customers. The Respondent accepted that the examples of checks and references referred to in clause 8.2 above were an essential part of the integrity of the chain.

55. The Respondent was asked about a note of a meeting attended by him and representatives of HMRC on 11 July 2005. The notes set out details of JD Net Solutions carrying out phone deals (already named in the note as MTIC deals). The note deals with transactions where JD Net Solutions brought phones from TEC and sold them onto Digi Trading in Switzerland. The note refers to the trader (being JD Net Solutions)

having no original export evidence from the second deal (being another purchase from TEC and onward sale to Digi Trading). The note states that trader has made no checks on Digi Trading. It states that the Trader has carried out checks on TEC. When asked about this, the Respondent replied that he wasn't sure that in fact he didn't carry out checks on Digi Trading. When challenged and asked whether the HMRC contemporaneous note was incorrect, he replied yes. It was put to the Respondent that despite having access to the Company's books and records held by the Liquidator, the Respondent had not provided any evidence of checks being carried out on Digi Trading. He stated that that he and his solicitors had been given an opportunity to examine the Company records but that there were over 60 boxes in the room and he was not able to find the box or material he was looking for. He did accept that he believed the Company files were complete and that they had all the information relating to 'our suppliers'. I understood this to relate to both JD Net Solutions as well as the Company. During the next exchange, the Respondent then asserted that the files were incomplete. The Respondent then maintained again that the HMRC contemporaneous note was incomplete. The inaccuracy of the note was not challenged in the Respondent's evidence and additionally, no documents were submitted by the Respondent in support of this assertion made by him during cross examination.

56. In the Respondent's second witness statement dated 2 August 2021 filed in these proceedings, at paragraph 40, he stated,

'The suggestion that I was fully aware of the prevalence of and of MTIC fraud is not correct. I was aware of MTIC fraud based largely on numerous discussions with HMRC officers, as a result of which we created a robust procedure for carrying out extensive due diligence checks. My main concern was to ensure that the Company did not get involved in any fraudulent transaction and we achieved this, from the Company's perspective, by carrying out the due diligence we did'.

57. In my judgment, there is a different emphasis by the Respondent in relation to his knowledge of MTIC fraud presented in his written evidence as opposed to what he accepted and admitted before me. As was clear when he was presented with, in particular, the clear and unambiguous contents of the Notice, the Respondent accepted that he was fully aware of how MTIC fraud operated, that the phones were clearly specified goods and that HMRC actually spelled out clear examples of steps and checks

which could be taken. These steps were important because otherwise the Respondent would not be able to satisfy HMRC as to the integrity of the chain. This is why statements by the Respondent that he knew about his buyers and suppliers are not sufficient. I will examine below exactly what the Company actually did under the control of the Respondent. The discussions with HMRC also added to the extent of the Respondent's knowledge.

58. Mr Shaw asked the Respondent about the robust procedure which was carried out by the Company. The Respondent stated that he was involved in that procedure in a way. He stated that it was a template, an ongoing template. When asked about the robust procedure relating to due diligence being carried out, the Respondent's replies, in my judgment were extremely unsatisfactory. In relation to Mana, which was involved in export transaction 1 (dated 10 April 2006) ,2 (dated 10 April 2006) and 5 (dated 22 May 2006), the Respondent was taken to the documents relating to the due diligence and the checks carried out by the Company. A fax cover sheet with a date of 11 April 2006 titled, 'Verification of Supplier'(Mana Enterprises Ltd)' was sent to HMRC VAT office in Redhill. It consists of an undated letter from Mana introducing the company and includes, company registration number and VAT registration number. There is also a document containing bank details. The use of First Curacao International Bank NV ('FCIB') is a matter which I shall come back to as it forms part of the Liquidator's case on knowledge.

59. The documentary evidence demonstrates that the form sent out by the Company seeking due diligence details is dated 18 April 2006, which is after the date of the first deal. Equally, the bank reference was only sought on 18 April 2006 which was after the first deal. In fact, the bank reference obtained in a letter dated 4 July 2006 refers to the enquiry made dated 4 July 2006. It is clear on this evidence that the Company commenced trading with Mana before seeking and/or obtaining any meaningful due diligence. When the Respondent was asked about this, he accepted that he had obtained some of the material after trading commenced. He was questioned about the utility of obtaining references or details after the trading had commenced. The Respondent then sought to assert that the Company had carried out or had other references beforehand. He stated, 'I am sure my team would have done…'. He stated when questioned again that the Company had a process of due diligence and wanted to expand it. He was

challenged by Mr Shaw that what this demonstrated was a tick box exercise, an attempt effectively to create an impression that proper due diligence was being carried out. The Respondent replied no and stated that it was an ongoing relationship.

60. A further example arose in relation to the reference sought from Mana's accountant, on 20 July 2006. This was again after all the trades in the period 10 April 2006 to 22 May 2006. The letter from Mana's accountant is dated 20 July 2006 and refers to a request for a reference dated 29 July 2006. There is clearly some error in relation to the date of the letter for the Company to the accountants, but in any event this was after the relevant transactions. Also, the letter states that the accountants themselves were only just appointed, on 6 July 2006. When it was put to him that this was a useless reference, the Respondent replied that he did not agree with that comment.

61. There is also a Company created document titled, 'On Site Due Diligence Checks' which states that on 20 (or 28) April 2006, the Company attended at the premises of Mana and checked various documents and took photos. Again, this clearly post dates some of the trades. In my judgment, I am not persuaded that robust procedures, or indeed any legitimate due diligence was in existence. By the date of this document alongside many others presented as being part of the robust procedures, the transactions had already taken place. The value of the three Mana transactions exceeded £6 million.

62. A letter sent by HMRC dated 11 May 2006 stated that the VAT numbers of certain companies, including Mana were valid. This again post dated two of the transactions which occurred on 10 April 2006. Additionally, the evidence demonstrates that in relation to the first transaction, the goods were released by Mana to the Company before payment was made by the Company.

63. The first two transactions were valued at in excess of £4 million. When Mr Shaw put to the Respondent the point that there was a failure even to obtain VAT number verification before these two transactions took place, the Respondent asserted that someone had called Redhill VAT office to confirm the VAT numbers. There was no evidence of any such call. The Respondent remained adamant during questioning that someone would have called before the transactions occurred. The Respondent then

asserted that references were not compulsory and that the Company was adding things continuously. The Respondent repeated that he was certain that a phone call would have been made. There is no documentary evidence to support what the Respondent asserted in cross examination. He also asserted that there was verbal communication with Mana prior to entering into the first transaction. There is no documentary evidence of notes taken of a call with HMRC, or of a call with Mana. The evidence presented by the Company and relied upon by the Respondent before me contained no such notes. In fact, the evidence is devoid of any notes of conversations, of negotiations or emails dealing with delivery dates, supplies etc. This is another astonishing feature and presents a different picture from what the Respondent seeks to assert were perfectly genuine transactions and that he was not aware were involved in any way with MTIC fraud.

64. It is in this context illuminating to consider the evidence filed on behalf of the Company in the Tribunal proceedings which commenced on 3 September 2008. The issue of the delay in relation to the current proceedings and memories fading is really not relevant in the Tribunal proceedings because they occurred much earlier and allowed the Respondent, on behalf of the Company, to present all the evidence which the Company relied upon in support of its case. In those proceedings, HMRC served its detailed statement of case alongside extensive written statements. The Respondent filed two witness statements in support of the Company's appeal, being one dated 23 June 2010 and the other dated 14 October 2010.

65. At paragraph 5 of the first witness statement, the Respondent denied that the chains of transactions were contrived for the purposes of committing MTIC fraud. The Respondent asserted that, *'However as far as JD Group/JD Net were concerned, genuine business has been conducted with the suppliers and customers following proper due diligence.'* So the issue of what was the due diligence carried out was clearly relevant in the Tribunal proceedings and formed part of the appeal on behalf of the Company.

66. The witness statement states that a lot of pre transaction communications took place between the Company, its suppliers and customer. (paragraph 8(b)). No evidence of these pre transaction communication were exhibited and no detail provided relating

to whether these were oral, in which case, in my judgment, there would have been notes or emails, for which nothing has been exhibited. As the Respondent accepts that he was aware of the risks the Company was taking, the potential liability of the Company and the frequent warnings provided by HMRC of trading in this area without checks, it would have been, in my judgment inconceivable that, in the event that oral checks occurred, that there would have been no written record of the same. The Respondent was well aware that documentary evidence of due diligence would be necessary in the event that HMRC raised an issue with a claim. This was clear from the contents of the Notice.

67. At paragraph 10, the Respondent states as follows:-

'HMRC refer to the appellant's knowledge of MTIC fraud and also the precautions that could reasonably be taken to avoid involvement in such fraud. It also mentions the appellant's failure to take reasonable precautions. However the reasonable precautions referred to clearly imply due diligence procedures that were already undertaken by JD Group and JD Net. Certainly all the recommendations of notice 726 had been carried out. Additional steps have also been taken in the form of inspection reports covering IMEI numbers. Furthermore due diligence have been carried out on both suppliers and customers and there have all been forwarded to HMRC. Therefore it is surprising that HMRC is of the opinion that reasonable steps were not taken.'

68. The witness statement does not exhibit or refer to any documents which demonstrate what is asserted in this paragraph by the Respondent. There is also in paragraph 14 a reference to the two transactions valued at £4.4 million being the two Mana transactions which occurred on 10 April 2006. At paragraph 14, the Respondent refers to the VAT validation request and asserts that the requests were made to Redhill by the Company on 11 April 2006. He then states, 'the deal was then subsequently completed on 19 April 2006 when payments were made to Mana.' Two points arise from this. Firstly, this witness statement makes no reference to there being any oral verification of the VAT position prior to the first two transactions with Mana on 10 April 2006. Secondly, this confirms that Mana released the goods before it received payment from the Company. This enabled the Company to sell the goods offshore, onto URTB, an entity with which the Company had not traded prior to this transaction.

69. In my judgment, the Respondent is not telling the truth when he asserts there were oral verifications. There is no evidence produced by him in support of such an averment and no evidence of such checks taking place prior to the transactions with Mana on 10 April 2006. The documents evidence a written request for VAT verification on 11 May 2006. I would have expected a reference being made to oral verifications and contemporaneous notes of the same if the Respondent was relying upon such verifications as part of the due diligence.

70. In his second witness statement dated 14 October 2010, the Respondent continues to make statements about the due diligence carried out but does not particularise what the Company actually carried out before the transactions. I should add, as must have been obvious to the Respondent, due diligence needs to be carried out before transactions are carried out. This is certainly obvious from reading the Notice and in any event would have been obvious to the Respondent, as an experienced businessman. At paragraph 13, he states, *'I have provided a full log of due diligence that I carried out in the various companies…'* Earlier in that paragraph, he states that Ms Andrews (to whose witness statement this one is a reply to) makes the point that during the verification period and subsequently she has seen no evidence that the Respondent actually did anything to ensure the Company was not trading MTIC goods. However whilst the Respondent comments that this is harsh, he produces no further documentation or refers to any further evidence of the due diligence carried out.

71. The Respondent was also questioned about the due diligence carried out in relation to Regal. The relevant transactions in relation to Regal are deal 3 (all on 15 May 2006), deal 4 (all on 15 May 2006) and deal 6 (all on 31 May 2006). Again, the evidence demonstrates that the Company had not completed any real due diligence before entering into these transactions which had a value of £4.6 million. The Trade Application Form is dated 19 April 2006. The application for a bank reference was made by the Company on 22 June 2006, after all these transactions had occurred. When questioned about these matters, the Respondent replied that the due diligence was an ongoing process. No other documents were presented by the Company or located in the deal pack. In my judgment, I do not believe that any real due diligence was carried out before the transactions. The explanation of the Respondent relating to 'ongoing' due

diligence being in some way an excuse is quite frankly lacking in credibility. This excuse of his, is, in my judgment, an attempt to divert from the compelling evidence that in the case of both Mana and Regal, there was no due diligence carried out prior to substantial transactions occurring.

72. When questioned about checks carried out in relation to Campagnie Internationale de Paris, the Respondent did not accept that the documentation demonstrated a lack of real due diligence. This offshore company was the ultimate buyer in deal 5, valued at over £2,2 million. The documents do not demonstrate that any trade references were taken up or that any reference was sought from the Bank. In reality, there was very little information obtained from Compagnie Internationale de Paris, beyond its registration number provided by it, its registered address and the names of two trade references. There is as I have stated, no evidence that these were actually taken up. The Respondent said that his team would have made a phone call. Again, there is no evidence to support this. This becomes a pattern in relation to the Respondent's credibility in his assertion that the Company had robust procedures relating to due diligence, or even as he declared in his Tribunal witness statements, that all the matters set out in the Notice were followed. I accept that I need to assess what the Respondent said before me, but at best this was a bare assertion. The written evidence he had filed both in the Tribunal and in the current proceedings are devoid of any detail relating to oral checks. Instead, the Respondent sets out in those statements very clear statements that there were robust procedures and due diligence which had been carried out. However, the documentary evidence does not, in my judgment support this. The Dun and Bradstreet report in relation to Compagnie Internationale de Paris is dated 16 June 2006 which means that this was also a post transaction report. It also sets out a view of the Compagnie Internationale de Paris representing a credit risk. A report from Veracis entitled 'due diligence report' on Compagnie Internationale de Paris was also in evidence. This report related to a visit on 14 June 2006, again after the transactions. In my judgment, this means that effectively no due diligence was carried out. The documents which do exist show this effectively to be a recently registered company with no trade history. This is exactly in my judgment the type of company which lends itself to being part of a MTIC fraud.

73. Checks carried out in relation to URTB Sarl, one of the other offshore entities at the end of deals 1, 2, 3, 4, and 6, demonstrate similar deficiencies. The standard introductory letter dated 10 April 2006 provides very basic information and is certainly, in my judgment, not the type of due diligence which is necessary for these types of transactions, or what would be expected in commercial transactions with a company overseas with no trading history. However, even this basic and in my judgment useless information was not relied upon, because on the same day, 10 April 2006, two transactions (within Deal 1) were entered into valued at in excess of £4.4 million. When the Respondent was asked about the fact that the Company entered into these contracts when it had no information about URTB Sarl and its ability to pay, the Respondent didn't really reply to the question. He stated that this was a deal done on that day and that there were formalities which he needed to have. He again referred to conversations and the deal being negotiated over the phone. He also stated that if they did not pay then the Company would not supply the goods. He didn't really engage in that scenario in which the Company would have to pay for the phones and having no buyer.

74. The Respondent was taken to the Company's due diligence files relating to Rakha SARL, the offshore entity in deal 7, a transaction with a value of in excess of £1.6 million. Again the same issue arose here as with the other due diligence relied upon set out above. The Respondent allowed the Company to enter into the transaction with Rakha without having any information about the company. The 'Customer Account Application Form' provided by Henning Ltd provides basic information such as date of incorporation and registration number. Whilst the document is itself undated, Mr Shaw took the Respondent to the fax header note which provides the date of 31 May 2006. This was the same day as the transaction itself. The Respondent was asked if this was all he had and he replied yes. The Respondent said that he always requested a report and he didn't see anything negative in the report. In my judgment, as with many of the other instances which were put to the Respondent in cross examination, the Respondent sought to avoid dealing with the issues being put to him. He accepted that he did not have any further information and stated that due diligence was an ongoing process.

75. The Respondent was asked about Pol Comm, being the sole supplier of the Company for all the import deals, being 8-12. Prior to the transactions, the Respondent

confirmed that the Company had not traded with Pol Comm. Again, the documents demonstrate the existence of a basic letter of introduction dated the same day as the import deals. Again, the Respondent had no real explanation concerning what is a complete lack of due diligence. The values of the transactions with Pol Comm on 31 March 2006, being the date of all five deals exceeds £7 million. Again, the Respondent sought to rely on oral verification but again there was no evidence at all of any other due diligence having been carried out.

76. As part of his written evidence, the Respondent was keen to emphasize that HMRC were present at the Company's offices many times and took copies of certain documents. In my judgment, that does not mean that the Respondent would not be held liable. The evidence demonstrates that HMRC chased the Company for documentation which was not provided. A letter dated 2 August 2007 addressed to the Company's solicitors, Needham Treon referred to unanswered letters dated 4 April 2007, 16 April 2007, 2 May 2007, 14 June 2007, 2 July 2007 and 17 July 2007 seeking information relating to the repayment claim (being the one which was then rejected by HMRC). The documentation sought by HMRC included the due diligence checks carried out on TEC, URTB Sarl, Compagnie Internationale de Paris, Rakha Sarl and Pol Comm. The letter requested the validation of VAT numbers both on suppliers and customers carried out by the Company with the Redhill Office. The letter also requested the original insurance policy and schedule. The Respondent asserted that his staff had replied to requests made, but the documentation requested was not produced. The documentation which exists and has been produced does not provide, in my judgment, as I have set out above, that due diligence was carried out, that there was insurance at the time or that VAT registration checks were carried out before the relevant transactions took place. It is clear from this correspondence that the Respondent was aware of the documentation which HMRC requested. There is no evidence that it is in existence beyond the material which I have referred to above which demonstrates no real due diligence carried out before the substantial transactions.

77. In my judgment, the Respondent was well aware that the due diligence he asserted was being carried out was not being carried out. There was, in my judgment, no genuine attempt to deal with the matters raised by HMRC in the Notice. In my judgment, the Respondent sought to create files which were designed to create an impression that due

diligence was carried out. His assertions in his witness statements about the due diligence and the Company having robust procedures were not truthful. This finding clearly has a bearing on what the Respondent knew and believed. He clearly knew that the due diligence carried out was pretty much meaningless and that he was allowing the Company to enter into substantial transactions which had all the hallmarks of being part of MTIC fraud. Mr Pettican submitted that none of the Company's suppliers were VAT defaulters and all that the Respondent could reasonably be expected to investigate are his own suppliers and customers. In my judgment, those points do not provide any defence to the Respondent in circumstances where MTIC fraud had been explained carefully to him by HMRC in documents and at meetings. The fact remains that no real due diligence was carried out, not even on the immediate suppliers or customers. This was clearly in my judgment deliberate. Based on the evidence, any proper due diligence would have exposed that there was a real lack of integrity in the supply chains and an open awareness that the chains were part of MTIC fraud. Instead the Respondent sought to disguise the lack of due diligence by relying on cursory checks carried out on the day of certain transactions or post dating the transactions themselves. There is really no explanation provided by the Respondent as to why the Company singularly failed to carry out proper due diligence before these high value transactions This is especially of concern in this case where the Respondent's level of knowledge about MTIC, steps to take, potential liability of the Company was extensive and where he had stated in his evidence that the Company had robust procedures and that it followed everything set out in the Notice. That was clearly not true.

78. There were other aspects of the transactions relied upon by the Liquidator in order to establish that these were not commercial transactions. There was an absence of any evidence of terms and conditions of purchase and supply, no terms of delivery, passing of risk, retention of title etc. When asked, the Respondent stated that the Company did have some terms and conditions but they were fairly rudimentary. He said upon request the Company would send these to the other party. I find this pretty astonishing bearing in mind the value of the trades with parties completely unknown to the Company. In the event that the goods were faulty, then terms would have to deal with the return of goods. None of this appeared to have perturbed the Respondent as the sole director of the Company in committing the Company to large transactions without any terms

having been agreed. This again goes towards the lack of evidence that these were commercial transactions.

79. Equally, there was no evidence of any negotiations between the Company, its suppliers and its buyers in relation to the price of the goods or any other conditions of the purchase and sale. There is no evidence in relation to even one price negotiation, no written communication over price, delivery dates, specifications or insurance. At one stage, during his cross examination on this topic, the Respondent sought to rely on the invoice as being the reference to the negotiations. In my judgment, the Respondent was effectively seeking to deflect from the fact that he was unable to demonstrate in reality that the transactions were genuinely commercial transactions. As I have already stated above, I have been careful not to lose sight of the fact that events relied upon took place many years ago. However, in this case, the Company pursued (until it abandoned subsequently) an appeal at a much earlier stage. The Company was still in existence and trading at the time that the Appeal was pursued and evidence was served and filed. In my judgment, the Respondent was well aware of the way that HMRC, in its decision to reject the VAT claim of the Company, relied upon the way the transactions occurred and the lack of due diligence. It is in my judgment, significant that no evidence of negotiations as to price, actual due diligence or any evidence demonstrating the pre transaction negotiations was submitted as part of the Company's case.

80. The Respondent was also asked about the uniformity as to mark up in relation to the units. Regardless as to the price of the relevant unit, the mark ups were the same even when the identical unit was acquired or sold on for a considerable price difference. In the period September to November 2005, in 99 deals, the Company made a profit of 50 pence per unit notwithstanding that the sale price on the phones varied from about £153 to £489. Mr Shaw put to the Respondent that the mark up was contrived on this evidence. The Respondent denied this and asserted that the Company was an agent for TEC and that the Company provided services and the mark up was 50p. This explanation, in my judgment really lacked credibility. The Respondent was also asked about the mark ups which have been extrapolated into a schedule at paragraph 50 of the Applicant's witness statement. In so far as these were commercial transactions for the acquisition and onward sale of phones, it is pretty extraordinary that there would have been uniformity of mark ups despite vast price differential in the unit prices of the same

phones. I do not believe the Respondent when he suggested that some of the units had certain 'extras' with them. In my judgment, coupled with the evidence of lack of negotiations of price and other details of contracts, this forms part of the evidence that the transactions were not genuine commercial transactions.

81. The Respondent was asked about the role of Interken, the freight forwarder in many of the chains I have dealt with above. The Respondent was challenged about whether the role of Interken was effectively orchestrating the chains. This was denied by the Respondent. In my judgment, it is clear that the freight forwarders were more involved and provided with more details than in a commercial trading arrangement. However, there is insufficient evidence for me to be able to consider the precise role of Interken in the relevant chains. In my judgment, I do not have to determine or really consider what role if any was carried out by Interken, because of the existence of the other evidence which I have set out in this judgment

82. When questioned about an inspection of goods and the fact that an inspection report post dated the transaction itself, the Respondent asserted that the date of inspection must have been incorrect. Again, I do not believe the Respondent. In assessing the veracity of his reply, I have taken into account the replies he has given to other questions and in particular the Respondent's attempt, when faced with evidence which he knows goes against his professed lack of knowledge and honest belief, he continuously sought to provide some reply for which there was no evidence beyond his own assertion.

83. The Respondent was also asked about earlier transactions, in 2005 and the lack of due diligence in relation to those earlier transactions. These included an export deal involving Tele Trading Wordlwide BV in August 2005. Again there was a lack of evidence of due diligence.

84. When asked by Mr Shaw about the failure to produce the insurance policy and certificate, the Respondent replied that this did not mean that insurance was not in place. There was no evidence of the payment of any premium. The Respondent then asserted that he was not responsible for obtaining the relevant documentation and that HMRC had written to Interken. He asserted that the insurance was obtained by Interken for the

Company. As I will deal with at the end of this judgment, after the trial had concluded and I had reserved judgment, the Respondent sought to place further evidence relating to insurance before me. However, the issue of whether there was insurance in place is simply one of many factors relied upon by the Liquidator in support of its case that these were not commercial transactions. There is no evidence that the Company paid any premium for the alleged insurance. In those circumstances, it is difficult to accept, even if it was Interlaken who arranged the insurance, that there was valid insurance when there was no evidence that the premium was paid. I should add that the issue of whether or not there was valid insurance was not treated by me as a determinative factor in relation to whether the Respondent knew that the transactions were part of the MTIC fraud. In light of the other available evidence which I have set out in this judgment, the issue of insurance, as whether there was or was not valid insurance in place, has made no difference to my assessment of the Respondent and his knowledge.

85. In relation to the first chain, it is clear on the evidence that the goods were released by Mana before being paid for by the Company. At paragraph 12 of the Respondent's second witness statement in the Tribunal proceedings (14 October 2010), he positively stated that the supplier would not release the goods until it had been paid. When asked about this, the Respondent really had no reply to this beyond asserting that it was a matter for Mana when they released the goods and that it was for Interken as forwarding agents to deal with. The evidence also demonstrated that in relation to the transaction dated 31 March 2006(within Deal 8), the goods were released by the Company to TEC before the Company had received payment for the goods. One payment was made 10 days after the goods had been released. Again this contradicts the statement made by the Respondent that no goods were released by the Company before it had received payment for the same. The Respondent asserted that decisions relating to whether to release goods before payment were matters for others in the Company and that the accountant, Mr Jain would have the details of these matters. In my judgment, this was another example of the Respondent seeking to evade what he perceived to be difficult questioning by trying to distance himself. I do not believe that he was unaware of the release of goods before payment in either of the two instances. He also asserted that there were other transactions so that this would have left the Company in credit but this of course, as Mr Shaw pointed out was not possible bearing in mind that TEC was a debtor of the Company. As Mr Shaw demonstrated based on the documents, the

aforesaid release of goods to TEC was not an isolated incident. This also occurred in relation to sales to TEC on 10 April 2006 within Deals 9 and 11; the Company's release of goods to TEC occurred before payment in full had been received from TEC. The payment in full was not made by TEC in its transaction with the Company dated 31 March 2006 until 12 days after the good were released. In the Deal 11 chain, the Company's 12 April 2006 payment to Pol Comm was made after the goods were released by the Company to TEC but before payments was made by TEC. The Respondent's reply when asked about this was that he had no comment and that there would have been a commercial explanation. As the sole effective director in relation to such a large sum of money which would be outstanding, the Respondent was clearly in my judgment aware that goods were being released before payment was made. The Respondent even at one stage asserted that payments had been made in advance. There was absolutely no evidence to support this statement made and in fact the evidence did not support this. All of this strengthens the Liquidator's case that the transactions were not commercial transactions. The replies given by the Respondent when questioned were, in my judgment, not truthful. I have reached the conclusion that the Respondent was well aware of all the matters being put to him and his replies were an attempt to try and maintain his position that these were normal commercial transactions and support his belief that he was not aware of the MTIC fraud chains.

86. Similar issues arose relating to lack of due diligence and the trades relating to Oman Trading LLC. Again, the evidence demonstrates that the goods were shipped before payment was received. Again, the Respondent's replies were not in my judgment truthful. He asserted that he knew people in the Middle East. He did not accept that the Company was taking a significant risk He could not point to any terms of business being agreed. In relation to a consignment to Oman Trading, the evidence demonstrated that in fact the goods shipped over were the same phones, or most of them, which had been shipped two weeks earlier. This evidence contains a report which sets out details of the phones with the same IMEI (being registration) numbers. The Respondent was adamant that the evidence produced was incorrect. However, he had produced no evidence in support of this attack on the evidence in existence, beyond his assertion. I do not believe him. This in my judgment was yet a further incidence of the Respondent seeking to deny evidence undermining his defence.

87. In re examination, the Respondent raised the issue that he had received some bad news in the morning and was concerned that this may have affected his ability to reply to questions. I appreciate that the bad news may have affected the Respondent to an extent, but during the entirety of his cross examination, I did not find the Respondent to be truthful. I am not persuaded that the bad news he received in the morning was such that he gave untruthful answers before me during the entirety of his cross examination.

88. I am satisfied that the Respondent had actual knowledge of the MTIC fraud. He was aware of and knew the following:-

(1) He had read the material and in particular the Notice and was fully aware of the warnings and what constituted MTIC fraud and the types of checks which a company needed to carry out so as not to be liable;

(2) The level of awareness and knowledge of the Respondent was extremely high by virtue of the written documentation and the information provided in meeting with HMRC;

(3) There was in reality no due diligence carried out before the Respondent caused the Company to enter into high value transactions with unknown parties. It is clear, in my judgment, that the Respondent was well aware of this and yet tried to pretend that due diligence was carried out. This is because he knew that a failure to carry out due diligence or to check the integrity of the chains would create a liability of the Company to HMRC;

(4) The trade arrangements were uncommercial in that

(i) There is no evidence of any terms and conditions between the parties;

(ii) The complete lack of due diligence being carried out by the Company prior to entering into transactions for substantial sums

(iii) Enabling goods to pass to a party who had not yet paid for the goods with no credible explanation relating to the risk to the Company

(iv) The deliberate lack of any knowledge relating to the import and the export parties to the chains.

(v) The lack of credibility that in some way there was no need to obtain references or carry out due diligence on the one hand and then the reliance by the Respondent on the so called, ‘on going’ due diligence which occurred after the transaction in general had been carried out;

(vi) The apparent lack of insurance in respect of the goods although, as I will deal with at the end of the judgment, there is an attempt by the Respondent to add to the evidence he gave before me

(vii) The fixed mark ups and complete lack of evidence as to any negotiation of price with a complete lack of any written record or communication over price, delivery dates, specification, risk or insurance. The Respondent's explanations here are, in my judgment, wholly unconvincing as I have set out above.

(viii) The back to back nature of the majority of these large transactions

(ix) The re circulation of some of the phone units.

89. Based on these factors, in my judgment, the Respondent was aware that these transactions formed part of MTIC fraud. I reject accordingly his evidence that he was unaware of the MTIC fraud and I also reject his evidence that he honestly believed that these were commercial transactions and that there was he believed no link to MTIC fraud. Such a stance is not credible in the light of my findings on the evidence set out above. In my judgment, as is clear from the authorities that I have referred to above, it is not necessary for me to be satisfied that the Respondent was aware of the identity of the other parties in the chain. In this case, the way in which the Company conducted its business, the lack of checks, the release of goods and the other matters set out above, establish that the Respondent was aware of this being a fraudulent enterprise. The Respondent deliberately elected not to carry out proper due diligence and other steps suggested by HMRC. This, in my judgment, was precisely because he was aware that the chains were part of a MTIC fraud. Accordingly, in my judgment, the Respondent knew that the Company was participating in a MTIC fraud. It is clear that such participation is dishonest under the objective standards applicable. The transactions were not genuine commercial transactions but were created and carried out exactly as described above in relation in the extracts from the various cases. Accordingly, in my judgment, the Respondent is liable pursuant to section 213 of the Insolvency Act 1986 in dishonestly causing the Company's participation in the MTIC fraud. Bearing in mind the findings I have made, there is no need for me to deal with blind eye knowledge.

Breach of duty – section 212 of the Insolvency Act 1986

90. In accordance with my findings relating to fraudulent trading, in my judgment, the case against the Respondent on the grounds of fraudulent breach of duty is also established. It is, in my judgment, a fraudulent breach of duty for the Respondent to carry out the business of the Company for the purpose of defrauding HMRC. Mr Pettican's submissions concentrated on the alternative to the fraudulent breach, being a negligent breach of duty. Mr Pettican submitted that if one of the alternative cases was a negligent breach of duty, then the Respondent had a limitation defence. As I have held that the Respondent is liable pursuant to section 213 of the Insolvency Act 1986 in relation to fraudulent trading as well as fraudulent breach of duty, then I do not need to consider the issues relating to a claim based on non fraudulent breach of duty. Mr Pettican appeared to accept that in so far as the Liquidator's case relating to breach of duty was based on fraud, then section 21(1)(a) of the Limitation Act 1980 applied and the action would not be subject to a limitation defence.

Loss

91. The loss claimed by the Liquidator differs in relation to whether I grant to the Liquidator the loss claimed by her on the basis of her established section 213 claim or the 212 claim. Mr Shaw invited me, on the basis that he succeeds on fraudulent trading and breach of fraudulent duty, to award the loss on the basis of section 212, being the higher amount of loss.

Section 213 loss

92. The basis of the loss is the loss suffered by HMRC under section 213, consists of:-

(1) £457,897 being the net VAT loss (after giving credit for the input tax withheld against First Talk), and

(2) £285,897 being the misdeclaration penalty.

Added to this is a claim for interest, but the parties have agreed that submissions, if any, relating to interest can await until the judgment has been handed down.

94. Mr Pettican disputed these sums as being a loss which the Liquidator could claim on the following grounds. A Respondent should be ordered to pay what reflects (and compensates for) the loss that has been caused to creditors as a result of the business

having been carried on in a fraudulent manner. The Respondent submits that this necessarily involves a comparison between (1) the position in which that creditor (HMRC) would have been in had the business not been conducted in the fraudulent manner; and (2) the actual position of the creditor. This, Mr Pettican submits, is the comparison is between (1) the position in which the creditor would have been in had the transactions not been undertaken; and (2) the actual position of the creditor. Unsurprisingly, Mr Shaw submits that the comparison is incorrect and it is the actual position of HMRC as compared with the position it would have been in if the transactions had been entered into genuinely and not part of a contrived fraudulent scheme.

95. Both the Counsel referred me to the Court of Appeal case of *Morphitis v Bernasconi [2003] EWCA Civ 289*. At paragraph 53, Lord Justice Chadwick stated,

'The power under section 213(2) is to order that persons knowingly party to the carrying on of the company's business with intent to defraud make "such contributions (if any) to the company's assets" as the court thinks proper. There must, as it seems to me, be some nexus between (i) the loss which has been caused to the company's creditors generally by the carrying on of the business in the manner which gives rise to the exercise of the power and (ii) the contribution which those knowingly party to the carrying on of the business in that manner should be ordered to make to the assets in which the company's creditors will share in the liquidation. An obvious case for contribution would be where the carrying on of the business with fraudulent intent had led to the misapplication, or misappropriation, of the company's assets. In such a case the appropriate order might be that those knowingly party to such misapplication or misappropriation contribute an amount equal to the value of assets misapplied or misappropriated. Another obvious case would be where the carrying on of the business with fraudulent intent had led to claims against the company by those defrauded. In such a case the appropriate order might be that those knowingly party to the conduct which had given rise to those claims in the liquidation contribute an amount equal to the amount by which the existence of those claims would otherwise diminish the assets available for distribution to creditors generally; that is to say an amount equal to the amount which has to be applied out of the assets available for distribution to satisfy those claims. In the present case there is nothing to suggest either (i) that the deception which the judge found to have been practised on Ramac led to the misapplication or misappropriation of the company's assets, or (ii) that the letter of 12 November 1993 led Ramac to make a claim in the liquidation that it would not otherwise have had. In my view there was no material on which the judge could have reached the conclusion that it was correct to order contribution of £17,500, or any other sum.'

96. Mr Pettican referred me to paragraph 55 which states,

'The judge had found that Mr Monti and Mr Bernasconi had been advised that they were entitled "to cause the company's assets to escape Ramac's claim to future rent" by applying those assets in payment of other creditors; they were entitled to think that preferring some creditors to others was not dishonest. The dishonesty lay in promising (in the letter of 12 November 1993) a payment of £10,000 which they did not intend to make. I accept that the dishonesty which the judge found deserved criticism; but, for my part, I cannot see that it compounded (or was compounded by) dishonesty which the judge did not find to have been made out. Be that as it may, I am not persuaded that there is power to include a punitive element in the amount of any contribution which, in the exercise of the power conferred by section 213(2) of the 1986 Act, a person should be declared liable to make to the assets of the company. As I have said, I think that the principle on which that power should be exercised is that the contribution to the assets in which the company's creditors will share in the liquidation should reflect (and compensate for) the loss which has been caused to those creditors by the carrying on of the business in the manner which gives rise to the exercise of the power. Punishment of those who have been party to the carrying on of the business in a manner of which the court disapproves —beyond what is inherent in requiring them to make contribution to the assets of a company with limited liability which they could not otherwise be required to make — seems to me foreign to that principle. Further, the power to punish a person knowingly party to fraudulent trading — formerly contained in section 332(3)of the 1948 Act — has been re-enacted (and preserved) in section 458 of the Companies Act 1985 . It could not have been Parliament's intention that the court would use the power to order contribution under section 213 of the 1986 Act in order to punish the wrongdoer. In my view, had the judge been right to find fraudulent trading in the present case, he would, nevertheless, have been wrong to include a punitive element in the amount of contribution which he ordered.'

97. In my judgment, the correct approach in this case is to consider the claims which HMRC has against the company. Those claims are not in my judgment seeking to assert some tortious approach on the basis that the transactions did not occur. The analysis is, as submitted by Mr Shaw, on the basis that the fraud had not occurred, in other words on the basis that these were legitimate transactions and VAT claims. This is not applying a punitive element, which I accept is not the basis for section 213 (or indeed section 212). In my judgment, the loss to HMRC is that which is caused by the fraud itself. Had the fraud not occurred, then the Company would not find itself liable because the transactions would have been genuine ones. This, in my judgment, is the approach envisaged in paragraph 53, when Lord Justice Chadwick states, '..where the carrying on of the business with fraudulent intent has led to claims against the company by those

defrauded. In such a case the appropriate order might be that those knowingly party to the conduct which had given rise to those claims in the liquidation contribute an amount equal to the amount by which the existence of those claims would otherwise diminish the assets available for distribution to creditors generally; that is to say an amount equal to the amount which has to be applied out of the assets available for distribution to satisfy those claims.' The difficulty with the approach proposed by Mr Pettican is that it treats the event as if it never occurred. However, tax arose because the transactions occurred. Moreover, Mr Pettican's approach simply defies logic because whatever the loss suffered by HMRC by reason of the fraudulent trading, this loss cannot be claimed as a loss because the comparison must be one where the transaction which caused the loss did not take place.

98. Mr Pettican also raised the issue of the misdeclaration penalty. This was raised pursuant to section 63 of the VAT Act 1994. Mr Pettican accepted that this created a debt but submitted that the Respondent should not be held liable for it as part of the loss. The effect of those VAT Act provisions is that the sum is recoverable by HMRC as if it were VAT. I agree with Mr Shaw that this is a statutory claim that HMRC has made as a consequence of the fraudulent trading scheme. Even if such penalty can be reduced by HMRC taking into account mitigation, this does not, in my judgment, alter the nature of what the penalty is, namely, a debt owed by the Company to HMRC. That debt can be appealed by the Company. In this case it was issued after the appeal brought by the Company was struck out. Accordingly, despite the submissions of Mr Pettican, in my judgment, there is no reason not to consider the misdeclaration penalty part of the overall loss. Making the Respondent liable for this loss does not mean that the Respondent is being 'punished'. The liability follows from the misdeclared return which under the relevant legislation creates a VAT debt.

Loss – section 212

99. Mr Shaw submitted that in so far as I was satisfied that the fraudulent breach of duty pursuant to section 212 was established, then it was appropriate to order that the loss be determined under that section rather than under section 213. The loss pursuant to section 212 are the losses suffered by the Company being (1) the VAT element of the payments made to suppliers in the 7 Export Transactions and (ii) the misdeclaration penalty. Therefore, this is not limited to the net VAT loss to HMRC, but is the net loss

to the Company, being the input tax paid to suppliers, £2,117,762 less the profits made, plus the misdeclaration penalty (£285,897). I have already dealt with the loss to the Company created by the misdeclaration penalty and in so far as I consider the loss should be that suffered under section 212, then this sum is part of that loss for the reasons I have set out above. The £2,117,762 is the total input tax as set out in the schedule to the Particulars of Claim. This schedule was not disputed by Mr Pettican. Mr Shaw accepted that from this total sum, the profits needed to be deducted. Mr Shaw relies upon the schedule prepared by Mr Paul Russell, a Higher Officer of HMRC which was relied upon in the Tribunal proceedings. It shows the gross profit less the shipping costs and insurance costs for each of the 7 export deals. Although there is an issue relating to insurance, for the calculation of the net profits, the Liquidator is prepared to accept an insurance charge be included which reduces the profits. The Respondent's case is that there was insurance in place and the Liquidator maintained that there was no insurance. As I have set out below, I have not found it necessary to determine this issue due to the overwhelming evidence which I have set out. As the Respondent's case is that there was in some way insurance, this reduction of the insurance expenses from the gross profits, seems in my judgment to be correct. After taking into account the total shipping and insurance costs, the Company's net profit on the 7 export transactions was £615,767 plus the misdeclaration penalty (£285,897) i.e. £1,785,892. It is clear that the fraudulent conduct of the Respondent has caused significant loss to the Company. As to whether I award loss based on section 213 or 212, there is no reason to restrict the quantification of the loss to the smaller of the two alternatives. In my judgment, providing I am satisfied that the sums claimed are the loss suffered, then I can award the higher of the two alternatives. The Company operated a babywear business for many years. It was a business which appeared to be well operated. The Respondent then decided that the Company was going to embark in what he knew was a risky and illegitimate business because effectively it was a business the purpose of which was to defraud HMRC. That caused a loss to the Company. In those circumstances, I will order that the Respondent is liable to pay the sum of £2,117,762, less the profits and including the misdeclaration penalty for the reason I have set out above. The Respondent is ordered to pay £1,785,892 to the Liquidator. I will hear the parties on the issue of interest at the day when the judgment is handed down.

100. I should briefly return to the issue as to whether there was any further claim of value which the Liquidator was bringing against other parties. This is an issue which really affects an assessment of loss pursuant to section 213, but I accept it could potentially also be relevant in relation to section 212. However, in this case, I accept the evidence of the Liquidator that the Transworld assigned claim is of no value. I am not prepared to reject her evidence on this point. I accept that it is unfortunate that the Liquidator did not provide better details of the claim and why she had reached that view. However, I do not disbelieve her evidence in that I am sure if there were other potential likely recoveries into the estate, she would have informed the Court.

Addendum

101. After the trial had finished on 28 October 2021 and I had reserved judgment, I received a letter dated 15 November 2021 from Messrs Treon Law, solicitors acting on behalf of the Respondent. The letter sought permission to adduce additional evidence on the basis that the Liquidator had challenged the authenticity of the Certificate of Insurance dated 11 April 2006 and that this challenge was raised for the first time in cross examination and that the issue of authenticity of the certificate could be potentially determinative in the context of the Liquidator's claim. The letter continues in submitting that the proposed further evidence which the Respondent is seeking to adduce including exhibiting further documentation obtained from Interken following from the conclusion of the trial. The letter then states that the evidence is capable of being confirmed by the Respondent if necessary. The letter submits that allowing the Respondent to rely on this additional evidence would be in accordance with the overriding objective, namely permitting the Respondent to adduce evidence to rebut the challenge to the authenticity of the certificate. The evidence is the witness statement of Rajan Ghai plus exhibits.

102. I also have a note from Mr Shaw opposing the application to adduce further evidence. I do not have any formal application seeking relief or any other explanation relating to the basis of this application. The trial before me lasted three days with an additional judicial pre reading day. In my judgment, it was clear from the Particulars of Claim and the Defence, the evidence as well as skeleton filed by Mr Shaw, that the issue of insurance was an issue between the parties. Accordingly, I do not accept what is set out in the letter dated 15 November 2021, that the issue as to the authenticity of

the certificate was the first time the issue of whether or not the Company had valid insurance arose. The issue of lack of valid insurance was one of the factors relied upon by the Liquidator as to why the deals were not commercial transactions. It is important to note that it was not the only factor relied upon. As will be noted above, I considered and determined many other factors relied upon by the Liquidator. In my judgment, as I have noted above, the existence or otherwise of valid insurance was not and is not determinative of the findings I have made above. There is, as I have set out, overwhelming evidence in support of the Liquidator's case.

103. There is no explanation provided as to why the evidence which the Respondent is now seeking permission to adduce could not have been obtained with reasonable diligence. I have read the statement of Mr Ghai and I can see nothing in its contents which provides any indication that the evidence could not have been obtained from him prior to the trial.

104. As Mr Shaw has pointed out in his note, there is no provision for the Respondent to seek to adduce further evidence in this case. The time limits set out in the orders made by this court for the filing and serving of evidence have long passed. Despite that being the case, there is no actual application for relief in accordance with the principles in *Denton v White*. In my judgment based on what is in this new evidence as well as what is set out in the letter, the evidence could have been obtained with reasonable diligence. The letter does not provide any evidence to the contrary. Additionally, the timing of this application is not satisfactorily explained or dealt with in the letter. There is no explanation as to why the issue of further evidence was not raised before me during the trial. That would of course also have been extremely unusual, but then I could have considered it before the trial was completed and judgment reserved. The trial lasted three days in Court. The cross examination of the Respondent finished on day two. Day three was closing submissions. There was no application made or even referred to on day three about seeking to adduce further evidence. No such issue was raised. Mr Pettican made his closing submissions and dealt specifically with the issue of insurance being in place. Mr Pettican's submissions provide no explanation as to why no attempt was made to raise this issue on day three beyond asserting that the witness needed to be contacted. That in my judgment is not satisfactory.

105. Having considered the findings I have made which are set out above, the issues as to (1) whether the certificate of insurance is valid and (2) that Interken is not complicit in the MTIC fraud, makes no real difference to my findings about the evidence given by the Respondent. The second point is really not relevant to my assessment of the Respondent. I have set out above in some detail the evidence given by the Respondent and the findings I have made. I have considered whether taking the new evidence as a whole, it would have made any difference to my findings and assessment of the Respondent and the reply is no. I have deal with this above at paragraph 84 in relation to the existence or otherwise of insurance.

105. I am not prepared in all those circumstances to allow this further evidence to be adduced. The issue was in my judgment clearly before me at the trial. It was also a matter raised in the evidence filed by both parties in the Tribunal proceedings. There could have been, in my judgement, no doubt that the issue would be raised and relied upon by the Liquidator. The overriding objective in this case is not served by allowing this evidence to be adduced. Parties need to ensure that they comply with orders of the court relating to filing and serving evidence. Whilst there may be cases of some exceptional nature where a court may well decide to re-open a case, I cannot see on the facts I have set out above any exceptional grounds to re-open the case. It would have to be re-opened, if I accede to the application, because the Liquidator would need to have an opportunity to reply to the evidence and then consideration would need to be given to cross examination. The overriding objective points in my judgment clearly to refusing the application being made before me on the grounds which I have set out above.

Dated