TC01483

Appeal number LON/2008/0738
LON/2009/0194

VAT – alleged MTIC fraud – whether the Appellant knew or ought to have known that its transactions were connected with the fraudulent evasion of VAT- appeal dismissed on basis that the Appellant ought to have known and on the balance of probabilities knew that its transactions were connected with fraud

FIRST-TIER TRIBUNAL

TAX

MARTEM LIMITED **Appellant**

- and -

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

TRIBUNAL: S.M.G.RADFORD (TRIBUNAL JUDGE)
M. TEMPLEMAN

Sitting in public at Field House, Breems Buildings, London from WC1 from 27 June to 8 July 2011

Geoffrey Cox QC instructed by DASS solicitors for the Appellant

Jonathan Kinnear and Amy Manion, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against the refusal by HMRC of the claim by the Appellant to deduct input tax in the sum of £2,966,530.16. This was communicated by way of two letters from HMRC dated 14th March 2008 and 24th November 2008 (subsequently amended by letter dated 22nd March 2010).

2. The refusal related to seventeen deals over four monthly VAT periods:-

(i) February 2006 (02/06) – 4 deals - £534,882.25;

(ii) March 2006 (03/06) – 4 deals - £705,775.00;

(iii) April 2006 (04/06) – 5 deals - £800,419.81;

(iv) May 2006 (05/06) – 4 deals - £925,453.10.

3. It is HMRC's case that each of the seventeen deals carried out by the Appellant, in the four periods, can be traced back to a loss of VAT which is connected with fraud and that the Appellant either knew or should have known that that they were so connected.

The Contra-trader Scheme

4. It is HMRC's case that the seventeen deals purportedly carried out by the Appellant in the four VAT periods were part of a larger contra-trading scheme, the sole purpose of which was to cheat HMRC. These contra-trades utilised a number of contra-traders in an attempt to disguise or shift the apparent point of the tax loss, so as to frustrate HMRC's anti-fraud measures. The contra-traders took part in two series of fraudulent transactions, the combination of which was designed to cause and disguise a tax loss.

5. The three contra-traders were Digikom Limited ("Digikom"), Casa Communications Limited ("Casa 1") and Casa Commodities Limited ("Casa 2").

6. In the first series of transactions Digikom's, and a number of the transactions involving Casa 1 and Casa 2, have been traced back, sometimes directly and sometimes through a chain of UK companies, to defaulting traders who had purported to import the goods from the EU in zero-rated transactions. The defaulting trader's purported onward sale created a liability to account for output tax. The defaulting trader never accounted for this output tax. Digikom, Casa 1 and Casa 2 then purported to export the goods outside the UK. These transactions were zero-rated for VAT and as a result, in normal circumstances, they would have been entitled to reclaim their input tax.

7. A second series of transactions was inserted to shift the repayment away from the exporting companies at the end of the chains (i.e. Digikom, Casa 1 and Casa 2) containing the defaulting trader, to a number of exporting companies in a second series of transactions, that in this case included the Appellant.

8. In the second series of transactions the contra-traders (Casa 1, Casa 2 and Digikom) purported to purchase goods from a Portuguese based trader, Dunas and Pinheiros ("Dunas"). These purported transactions were zero rated for VAT. All three contra traders then purported to sell the goods to a number of other UK based traders (including the Appellant), charging output tax, which they were obliged to account for on their VAT return. However, this output tax, payable on their second series of transactions, was offset against the input tax reclaimable on their first series of transactions. As a result the contra-traders were left in a, broadly, tax neutral position.

9. The Appellant and the other traders then exported the goods from the UK to a trader based in Cyprus, Phista Trading ("Phista"), in a purported sale that was zero rated for VAT and the Appellant has sought a repayment of the input tax that they had paid to their UK based suppliers (Digikom, Casa 1 and Casa 2).

10. The contra-trading scheme therefore involved a default in the payment of output tax at the beginning of the first series of transactions and the claim for the repayment of input tax at the end of the second series of transactions. It was this combination of events that caused the tax loss to HMRC.

11. In an extension of the fraudulent scheme the contra traders, Casa 1 and Casa 2, utilised the larger tax loss in the Digikom chains, by purchasing goods from Digikom and then exporting them to Phista, again creating a deduction in respect of their input tax. They were acting as second line double contra traders.

12. HMRC's case is that the two series of transactions were part of an overall contrived and fraudulent scheme and that each party involved in the scheme, including the Appellant, either knew or should have known that they were contrived and fraudulent. The whole purpose of the scheme was to cheat HMRC. The scheme involved a large number of trading entities playing a pre-ordained role to ensure that the goods were always sold to the right person, at the right time for the right price. The payments for purported purchase and sale of the goods were often circular, with the money starting and ending with the same trading entity.

Background and facts

13. The Appellant) was incorporated on 20 March 2002. The directors, appointed on 4 April 2002, are Martyn Thackwell and Emrys Matthews. Mr Thackwell was primarily responsible for the Appellant's trading, being largely responsible for carrying out the purported purchases and sales of the goods which are the subject matter of this appeal.

14. The Appellant was registered for VAT with effect from 14 April 2002, as an "Electrical Wholesaler". The VAT 1 application for registration was signed by Mr Thackwell. At all material times the Appellant was responsible for submitting monthly VAT returns.

15. In all seventeen deals that are the subject of these appeals the Appellant purchased the goods from one of three contra traders, Casa 1, Digikom or Casa 2. The evidence concerning the three contra traders and their connection with tax losses was

contained in a series of witness statements from the relevant officers of HMRC. With the exception of Mr Charles who gave evidence concerning Casa 2, Mr Cox QC, counsel for the Appellant declined to cross-examine any of these witnesses indicating that their evidence was accepted by the Appellant.

16. At the outset of the hearing, Mr Cox indicated that the Appellant accepted that there was a fraudulent conspiracy involving Casa 1, Digicom and Casa 2 together with their supplier, Dunas, and the customer of all seventeen deals, Phista. The Appellant however denied being a knowing participant.

17. All the participants in the chains had accounts with the First Curacao International Bank (FCIB) and the Dutch authorities gave access to the records of the FCIB to other governments following its closure in October 2006.

02/06 VAT Period

18. During this period, the Appellant purported to conduct four wholesale deals. Each of these deals shared significant similarities. Each chain of transactions took place on a single day; all involved a purported purchase and sale of mobile phones; the mobile phones in each deal were purportedly sourced from Casa 1; and the mobile phones in each deal were purportedly sold to Phista.

19. The total input tax value of the four deals in this VAT period was £534,882.25.

20. All of the Appellant's purchases from Casa 1 in 02/06 have been traced back to Dunas.

21. On the evidence provided by HMRC officers Ms Sadler and Mr Monk which was uncontested by the Appellant we were satisfied that in respect of the period 02/06 the Appellant's deals could be traced through the contra traders Casa 1 and Digicom to tax lost in respect of the hijack of the VAT number for Lets Talk and the defaulter, Termina Computer Services Ltd.

03/06 VAT period

22. During this period the Appellant purported to conduct four wholesale deals. Once again each of the purported deals shared significant similarities. Each chain of transactions took place on a single day and involved the purported purchase and sale of mobile phones; the mobile phones in each case were purportedly sourced from Casa 1; and the mobile phones were purportedly sold to Phista.

23. The total input tax value of the four deals in this VAT period was £705,775.

24. All of the Appellant's purchases from Casa 1 in the 03/06 VAT period have been traced back to Dunas.

25. On the evidence provided we were satisfied that in respect of the period 03/06 all the Appellant's deals could be linked through the contra traders Casa 1 and Digikom

and traced either through Digikom or directly to tax lost through the hijack of the VAT number for Lets Talk and the defaulter, Termina.

04/06 VAT period

26. During this period the Appellant purported to conduct five wholesale deals. Once again these trades shared significant similarities. All the activity took place on just two days, 3 and 4 April; each transaction chain was completed in a single day; the goods in each case were purportedly purchased from either Digikom or Casa 2; the goods in each case were purportedly sold to Phista.

27. The total input tax value of the 5 deals in this VAT period was £800,419.81.

28. All of the Appellant's purchases from Digikom and Casa 2 in 04/06 have been traced back to the Portuguese trader Dunas.

29. Digikom operated as a contra trader for the period to 30 June 2006. There were 118 export deals with a total value of £212m all purchased from UK traders and 109 deals purchased from EU traders and then sold to UK traders with a total purchase value of £161 million.

30. Casa 2 also operated as a contra trader in the period to 30 June 2006. Mr Charles gave evidence in respect of Casa 2. In cross examination Mr Cox concentrated on the location of many of the companies involved with the Casa companies which were in or around Stoke-on-Trent. He did not challenge the evidence of the activities of Casa 2 as a contra trader.

31. On the evidence provided by Ms Sadler and HMRC officers Ms Matthews, Mr Charles and Mr Spackman which was unchallenged by the Appellant we were satisfied that all the deals carried out by the Appellant in the period 04/06 can be linked through the contra traders Digicom and Casa 2 to tax lost through the hijack of the VAT number of Pentagon (UK) Ltd and the defaulter, UR Traders Ltd.

05/06 VAT period

32. During this period the Appellant purported to conduct four wholesale deals. Once again these trades shared significant similarities. All the activity took place on just two days, 16 and 17 May; each transaction chain was completed on a single day; the goods in each case were purportedly purchased from either Digikom or Casa 2; and the goods in each case were purportedly sold to Phista.

33. The total input tax value of the four deals in this VAT period was £925,453.10.

34. All of the Appellant's purchases from Digikom and Casa 2 in 05/06 have been traced back to the Portuguese trader Dunas.

35. Following the evidence provided by the HMRC officers we were satisfied that the Appellant's deals could be linked through the contra traders Casa 1 and Digikom and

traced to the tax lost by the hijack of the VAT number of Pentagon (UK) Ltd and the defaulter UR Traders Ltd.

Mr O'Reilly

36. Mr O'Reilly of HMRC gave evidence and on cross-examination confirmed that he was a member of the MTIC fraud team. His involvement with the Appellant first started when he checked the Appellant's VAT returns from February 2006 onwards. In May 2006 he was seconded to the MTIC team doing work on extended verification.

37. On 13 December 2006 he and HMRC Higher Officer Gallagher visited the Appellant as part of an extended VAT verification exercise. He confirmed to Mr Cox that previously apart from Mr Thackwell being given general warnings concerning VAT fraud he had not been told that features of his trades presented a problem to HMRC.

38. Mr O'Reilly however stated that he would have thought that the amount of visits the Appellant was receiving and the interest which HMRC were taking in the mobile phone industry would have alerted Mr Thackwell to the fact that there were problems.

39. Mr Cox pointed out to Mr O'Reilly that Mr Matthews was married to a serving HMRC officer and therefore it was most unlikely that any conscious transgression of the law could have taken place. Mr O'Reilly however did not believe that that could be used as an indicator of credibility.

40. The notes taken at this meeting recorded that the Appellant had not traded since June 2006 as it was awaiting the outcome of the extended verification exercise. The notes also stated that the officers had been told that with regard to its deals payment was normally received from the customer before the Appellant paid its supplier.

41. Mr Thackwell told the officers that insurance was not required as he regarded it as the responsibility of the customer. He had previously worked for First Choice and had extensive experience in the business.

42. The Appellant had no assets and at the time owed £2.3 million to its suppliers due to the freezing of its FCIB account. Mr Thackwell had stated that he had met the majority of the Appellant's eighteen to twenty suppliers.

43. Mr O'Reilly said that Mr Thackwell had stated that there were no written contracts with suppliers or customers because that was the nature of the industry. In order to preserve the integrity of the business he only dealt with people he had dealt with for years.

44. There were no stock control mechanisms because the Appellant only had title to the stock for hours at the most. He was unaware who had paid for storage of the goods. The customer was responsible for insuring the goods in transport and the freight forwarder during storage. Mr Thackwell told the officers that on occasions he had inspected the goods but normally this was done by the freight forwarder.

45. In his witness statement Mr O'Reilly noted that throughout the deals in February and March there was a pattern whereby Casa 1 would sell a type of phone to the Appellant and then purchase the same type of phone from them just a few days later or vice versa. This was demonstrated in a schedule comparing the sales prices of several of the different makes of phones.

46. In three February deals and two May deals the Appellant purchased from Digikom and sold to Casa 1 who in turn sold to Phista. Mr O'Reilly stated that the Appellant could have sold directly to Phista who were one of their main customers. In four February deals and four March deals the Appellant bought from Casa 1 and sold to Phista.

Mrs Essex

47. We received two witness statements from Mrs Essex. The first was produced when access was limited to the FCIB statements without the narrative descriptions indicating the purpose of each payment. Her second statement dated 24 June 2011 was made after she had been given access to the Paris Server which includes these narrative comments. It was agreed that the second statement replaced the first.

48. Mrs Essex also exhibited the bank statements for all the participants in the payment chains. Mrs Essex was able to trace twenty circular payments in relation to fifteen of the seventeen deals under appeal. Mrs Essex produced diagrams which showed the circularity of the payments going to and from the Appellant.

49. On 1 March 2006 Mrs Essex traced six payments made during the day from Phista to the Appellant with identical amounts passed on to Casa 1. In each case the money started with Dunas and moved via Phista to the Appellant and then via Casa 1 back to Dunas. These payments related to part payments concerning invoices 139,140, 141 and 144.

50. On 13 April 2006, Mrs Essex traced four circular payment chains which related to four of the Appellant's buffer deals, invoices 142, 145, 150 and 151. In all cases the money moved from Phista to Casa 1, then to the Appellant and from them to Digikom and via Dunas back to Phista. It was notable that none of the payments were for the full amount of the price shown on the invoices. For example in invoice 145 the price payable to the Appellant by Casa 1 was £1,603,052.50 and the amount due from the Appellant to Digikom was £1,601,407 but the payments were for £1,000,000. This meant that in none of these buffer transactions did the Appellant receive the small margin to which it was entitled.

51. On 27 July 2006 there were six separate payments from Phista to the Appellant. They apparently were payments in respect of invoices 162, 164, 171 and 172. The first two deals involve purchases from Casa 1 and the second pair was in respect of purchases from Casa 2. Mrs Essex found that in deal 162 the payments moved from Phista to the Appellant and then to Casa 1 but could not find the corresponding receipt in Phista's accoumt. The answer seemed to be that the series of payments on this day were triggered by a payment of £1,000,000 from Casa 1 that obviously was used in

other chains and came back to Casa 1 from the Appellant. Deals 164 and 171 were shown to be circular with a new player, CV Van der Holdings having replaced Dunas in respect of all payments after the end of May 2006. Mrs Essex was unable to trace that Casa 2 had ever made a payment to anyone else for the goods shown on this invoice.

52. On 14 August. Mrs Essex identified two payments from Phista to the Appellant, one of £710,000 and another of £910,750. These were identified as payment for invoice 175. However the Appellant received four other payments from Phista on this day, one of £312,500, this was identified as the remaining part payment for deal 170. The others of £152,123, £936,000 and £538,750 were linked to invoice 173. In addition the corresponding payments to Digikom have been allocated to part payments of invoices 170 and 169. Again these payments to the Appellant were part of 15 separate payments from Phista, all preceded by receipts from CV Van der Holding.

53. Mrs Essex confirmed that having been able to obtain a second set of ledgers for the companies in question from the Paris server she had been better able to match payments to purported deals.

54. On cross-examination she confirmed that the information in her witness statement was confined to what she could see on the ledgers which told nothing of the circumstances as a result of which the payments were made.

55. She confirmed that on the whole the circular payments moved through four parties, the supplier to the Appellant, Dunas, Phista and the Appellant.

56. She again agreed with Mr Cox that it was fair to say that she could not possibly know how these payments were arranged to take place on any particular day.

57. Other than this Mr Cox did not challenge Mrs Essex's charts or the evidence showing the circularity of the payments.

Mr Thackwell

58. Mr Thackwell confirmed that he had been a director of the Appellant since its formation in 2002. In this position he had responsibility for completing the deals, the corresponding paperwork, dealing with HMRC and keeping the other director of the Appellant, Mr Matthews, informed as to what was going on in the business.

59. Mr Thackwell gave evidence that between 1993 and 1994 he had worked for Eurotel Limited as the company accountant. Among the products this company traded were mobile phones which he said was when he first began to make contacts in the mobile phone industry. As a regular exporter and VAT repayment trader the company received regular visits from HMRC.

60. From this experience he realised that there were substantial profits to be made from exporting mobile phones and he learned how to create a deal pack.

61. In 1998 he was approached by Gareth Griffiths who he had met while working at Eurotel. Mr Griffiths asked him to join him at First Choice Mobiles Limited in the mobile phone business. As he believed that he understood the mobile phone business he decided to do so.

62. He worked there from 1998 to 2002 and from 2000 was the main dealer at First Choice. Most of his contacts were made during this period. Mr Thackwell said that this company received phone calls on a daily basis offering stock and it was his job to make various calls to discover if he could dispose of the stock with a profit margin.

63. In evidence he said that on the export deals it was possible to make a profit of three percent. He confirmed that the company regularly applied for VAT repayments and that the transactions carried out by this company were virtually the same in structure and pattern as those being dealt with at the Tribunal. The deal packs which he prepared at First Choice were the same as he subsequently prepared at the Appellant.

64. As the business opportunities declined at First Choice due to Mr Griffiths's personal problems he decided to form the Appellant with his friend Mr Matthews and to specialise in the buying and selling of electrical goods including mobile phones. Mr Matthews had an on site spraying business and needed an accountant to draw up the management accounts. It was decided that Mr Matthews would concentrate on his current business with Mr Thackwell doing the accounts for him and looking after the mobile phone business. They met once a week to discuss the business.

65. When the Appellant first started trading it did not have the capital to export and so concentrated on UK to UK sales.

66. He remembered receiving and reading a copy of Customs Notice 726 from which he took note of what had to be done to keep trading. He understood that all parties were responsible for tax losses, carrying out due diligence and obtaining verification from HMRC's Redhill office.

67. He observed that IMEI numbers should be kept but had found the cost of a scanner prohibitive. He stated that their inspection reports were completed by their freight forwarders to ensure that any stock exported was as described on the sales invoice.

68. He stated that their approach to due diligence was that they had to ensure that the entities with whom they dealt "were who they said they were".

69. When trading the Appellant would provide a purchase order to their supplier requesting certain goods. A confirmation of stock and inspection report would be requested from the freight forwarder holding the stock once a purchase order had been received from the overseas customer. The Appellant would receive an invoice from the supplier and once they had received the inspection report from the freight forwarder the Appellant would issue its invoice to its customer. The Appellant would then receive funds from the customer which enabled the customer to take delivery of the stock.

70. Mr Thackwell stated that he had first come across Rory Venables from Casa 1 and Casa 2 whilst he was working at First Choice. At the time Mr Venables was working for another company which supplied goods to First Choice. He would phone Mr Thackwell virtually every day if he had any stock and quote a price and Mr Thackwell would try to find a buyer. He stated that he had never had any problem with the deals he had done at that time and nobody had ever warned him that any of those deals had gone sour or resulted in a connection with a fraudulent trade.

71. At the time he was setting up the Appellant he phoned Mr Venables to inform him and was told that Mr Venables was also thinking of setting up another company.

72. For about the first three years the Appellant did only UK to UK trades but in late 2005 it was decided to start exporting as the profits were considerably better.

73. He finally met Mr Venables in 2003 when Mr Venables came to Cardiff. At that time First Choice had been dealing with Mr Venables for some four years and Mr Venables told him that he had now set up his own company. Mr Thackwell however could not remember the name of the company but stated that it was not Casa 1 or Casa 2 which came much later. Mr Venables appeared to Mr Thackwell to be a very honourable gentleman.

74. Mr Venables was however a principal in Casa 1. Mr Thackwell was never aware of with whom Casa 1 traded or from whom it purchased its stock. He stated that the Appellant's due diligence consisted of a Redhill check, the provision of a letter of introduction, certificate of incorporation and provision of Casa 1's bank details.

75. He was not aware of to whom else Casa 1 was selling mobile phones. When the Appellant sold goods to Phista Casa 1 would only be paid by the Appellant once payment had been received from Phista and only then would the goods be released.

76. The goods were moved at the customer's risk and therefore the Appellant did not think it necessary to insure the goods which Mr Thackwell regarded as an unnecessary cost which would have increased the price of the phones.

77. He stated that he had been informed that as Casa 1 had not paid its supplier the Appellant would not be chased for the outstanding VAT.

78. The Appellant had no written contracts. As it was dealing back to back Mr Thackwell did not think that they were necessary. As soon as the CMR was received he had no further interest in the destination of the phones and did not think it necessary to ask Phista as it might have made Phista suspicious.

79. He met Philip Stavrou of Phista in London in the latter part of 2005. He believed that Mr Stavrou contacted him as a result of his asking Mr Venables whether he knew anyone abroad with whom the Appellant could deal. Mr Stavrou appeared knowledgeable about the products and sent him the Greek VAT registration, certificate of incorporation and some other documents which he sent to Redhill.

80. On 1 February 2006 the Appellant was offered Motorolas A780s by Casa 1 which Phista agreed to buy from the Appellant. On the same day he was offered 2,000 and 3,000 LGP 7200s from Casa 1 and again called Phista who after negotiation agreed to buy them with a three percent mark up to the cost from Casa 1.

81. Nothing struck Mr Thackwell as odd about these deals and the Appellant carried out further deals with the same parties on 6 and 9 February. He stated that Phista did not always accept the stock the Appellant offered to them.

82. The Appellant's invoice included a retention of title clause which Mr Thackwell stated that he had copied from First Choice.

83. The Appellant opened an FCIB bank account because his banking facilities were withdrawn by the High Street banks which he believed was as a result of the intervention of HMRC. After the FCIB accounts were frozen he was no longer able to access the Appellant's account information which was only available via computer screens. Typically he would receive a phone call from Phista to say that the monies had been paid into the Appellant's FCIB account.

84. He could access his bank account by way of his computer terminal in his office and he made payments to his supplier by internet once he could see that the money had been received from his customer.

85. Mr Cox questioned Mr Thackwell concerning a new company formed by him and Mr Mattthews called Trimstar. Mr Thackwell stated that they had formed the company to trade in other items. He stated that Trimstar was still trading and it had done a number of deals with a company called DBX Distribution. On being informed by Mr Cox that this company had a customer that was connected to or was Mr Stavrou Mr Thackwell stated that he was not aware of this.

86. On questioned by Mr Cox Mr Thackwell denied that he had ever responded to a direction to pay money to anyone else.

87. Mr Thackwell gave evidence concerning Digikom. He had a telephone call from someone called Mike who introduced himself and his company and subsequently sent details. He didn't actually ever meet any of the Digikom principals. Mike appeared to have extensive knowledge of the products and so they decided to trade. Mr Thackwell sent the details to Redhill and was informed by them that the VAT number was valid.

88. On cross- examination however he clarified that by saying that he had received a faxed introduction and then he phoned Digikom.

89. A fax was produced to the Tribunal which was from Mr Thackwell to Mark at Digikom but Mr Thackwell said that the contact's name was in fact Mike.

90. The letter of introduction which was produced to the Tribunal was generic and not addressed to the Appellant but was however from a Mark Quibell. Mr Thackwell confirmed that he had not taken up the references and that the Appellant had

completed deals with Digikom before their VAT number had been verified by Redhill.

91. Later Mr Thackwell had checked on Digikom, Phista and Dunas. On questioned he said that he had checked on Dunas because he had some paperwork sent to him.

92. On cross-examination he said that he had not thought it strange that Phista, a Cyprus company had wanted the phones shipped to Spain.

93. He confirmed that Mr Venables had given him Mr Stavrou's name and thought that this was to help the Appellant get started in the export market although Mr Venables through Casa 1 could have sold the phones direct to Phista and made a larger profit.

94. Mr Thackwell confirmed that although Phista at times kept the Appellant waiting some time before paying, the Appellant nevertheless continued to sell to Phista and in turn kept Casa 1 waiting for payment. Even although at the beginning of March the Appellant owed Casa 1 some £552,952 on 9 March Casa 1 sold the Appellant further stock. Mr Thackwell believed that this was because he had known Mr Venables for so long.

95. On questioned Mr Thackwell stated that, although the Appellant's turnover had been quoted as some £78 million, to him that was irrelevant because all he cared about was the bottom line of profit. He believed that at First Choice the turnover was in excess of £48 million.

96. He confirmed that before his meeting with HMRC in December 2006 he had phoned both his suppliers and customers to ask them whether they had been visited by HMRC and if anything was wrong.

97. Although he had been told by letters from HMRC in September and October 2006 that deals involving Phista and Casa 1 had been traced back to tax losses he stated that he had decided as a businessman to continue to trade with them. He stated that to his knowledge there had been no indication that they were at fault in any way.

98. Before examining Mr Thackwell Mr Cox put into evidence a schedule of payments made to the Appellant. On cross- examination Mr Kinnear questioned Mr Thackwell on a payment of £750,000 received from 385 North Ltd. Mr Thackwell stated that he had regarded it as part payment for goods although he admitted that in fact the deal had not gone ahead. He said that as a businessman he had utilised part of it while waiting for the VAT repayment.

99. He confirmed that neither 385 North Ltd nor their solicitors had asked for the return of the money and so he just kept it. He thought that it might have been an oversight on their behalf. He considered that by doing nothing he was being a prudent businessman. Mr Thackwell also confirmed that the Appellant was still owed some £1.2 million by Phista and had not taken any legal action for payment although the money had been owed to the Appellant for some five years.

100. At the same time the Appellant had owed some £2 million to Casa 2 for the same amount of time and had not been chased for the money by them or by Digikom to which the Appellant was also in debt.

101. Mr Thackwell admitted that he was unable to produce any proper accounting records of payments being made and received. He had relied on the information concerning the Appellant's bank account which he could access on line but he had not printed any of this information. This meant that when the bank account was frozen he was unable to provide the necessary information for the Appellant's accounts. Until the account was frozen he had checked it on a daily basis online.

102. He admitted that when asked by Mr O'Reilly to provide bank statements from the Transatlantic bank which was used by the Appellant after its FCIB account was frozen he had not done so although they could have been printed from the internet.

103. Although Mr Venables was shown to be a director of the new bank Mr Thackwell denied that it had been Mr Venables who advised him to open an account there. However he could not remember who had so advised him.

104. On being cross-examined concerning his meeting with HMRC in December 2006 Mr Kinnear pointed out that Mr Thackwell had told the HMRC officer that he had visited Casa 1 at their place of business and that his main contact there was Michael without mentioning Mr Venables at all who was in fact his main contact.

105. Mr Thackwell repeatedly told Mr Kinnear that he was a businessman who trusted people although he was about to launch into deals with them that ran into millions of pounds and indeed extend them credit for millions of pounds. Mr Thackwell stated that this was the norm in the industry.

106. Mr Thackwell did not appear sure who had told him that the banks were closing the accounts of mobile traders as a result of pressure from HMRC. He told Mr Kinnear it had been the bank but in his witness statement he had said that it was what he had understood from speaking to other traders.

107. Contained within the Appellant's bundle was a document from Phista which had "for the attention of Mick Smith" written at the bottom but Mr Thackwell was unable to recall seeing the document.

108. Mr Thackwell repeatedly stated that his decisions to trade had been made as a businessman making a commercial decision. Every businessman was in business to make a profit and he used his experience gained from working at First Choice.

109. He used JD Freight as freight forwarders because the goods were being held there but he carried out no checks on them. He didn't check whether they had insurance because the freight companies had been around for many years and he had had no problems at First Choice,

110. Mr Kinnear pointed out that JD Freight had not even been registered for VAT when the Appellant started using them and Mr Thackwell admitted that there was still

an outstanding amount of some £14,000 owed to JD Freight. All they had done to chase the Appellant for the money owed had been one phone call and as a businessman he held on to money as long as he could.

111. Mr Kinnnear questioned Mr Thackwell concerning title to the goods and pointed out that whilst his supplier continued to hold title to the goods the goods had gone to Spain and could have been released from there without his knowledge. Although according to the documents the goods were not to be released without payment Mr Thackwell admitted that in fact the Appellant had given Phista credit.

112. Mr Kinnear pointed out that it made no commercial sense to release millions of pounds worth of goods without payment. He also referred to Mr Thackwell's witness statement which stated that the goods had not been released without payment.

113. Mr Thackwell said that he had contacted Mr Venables to ask for more time to pay and this had been agreed subject to payment being made as soon as possible.

114. Looking at the March deals Mr Kinnear pointed out that at that time the Appellant owed his supplier some £3 million and was owed a similar amount by Phista. Nevertheless he proceeded to conduct another deal in amount of £5 million with Phista because he said that he had made a commercial decision that they would pay him. He based this trust on several phone calls. By the end of 4 April 2006 Phista therefore owed the Appellant some £8 million.

115. On 16 and 17 May 2006 the Appellant then sold another £5.5 million worth of goods to Phista whilst still being owed some £8 million. Mr Kinnear pointed out that at this stage the Appellant was owed some £13 million by Phista and owed almost £15 million to its suppliers.

116. Mr Thackwell admitted that he could not recall whether Mr Matthews knew this.

117. Mr Kinnear pointed out that Mr Thackwell had not mentioned in either of his witness statements that Phista still owed the Appellant over £1 million.

118. Mr Thackwell was unable to give a reason for not trying to build up a relationship with authorised suppliers of mobile phones in order to be placed on their distribution lists.

119. He told Mr Kinnear that he had not contacted any other entity in Europe to try to sell phones because Phista was prepared to buy the phones he was offering.

120. Mr Kinnear questioned Mr Thackwell concerning the FCIB evidence which showed that on 1 March 2006 £500,000 travelled six times round in a circle and stated that the transfers must have taken place very quickly. He suggested that Mr Thackwell must have known it was happening and either allowed someone else to do the transfers or was himself a willing participant. Mr Thackwell denied this.

121. Mr Kinnear cross-examined Mr Thackwell concerning Trimstar. He reminded him that on a visit by HMRC on 18 June 2009 he had told the HMRC officers that

thus far Trimstar had not traded as it did not have a VAT registration number. However there were invoices raised to DBX in January 2009.

122. On 25 June 2009 however at a subsequent visit by HMRC Mr Thackwell told HMRC that he had made a mistake and Trimstar had in fact traded in January and completed three deals to the value of £506,000. Mr Kinnear told Mr Thackwell that he found it strange that he could have forgotten those deals.

123. On redirect examination by Mr Cox Mr Thackwell stated that he had done further deals with Phista although it owed the Appellant a considerable sum of money because he had built up a rapport with Mr Stavrou and trusted him and Mr Stavrou had paid for earlier deals.

124. On a direct question by Mr Templeman Mr Thackwell, in contradiction to what he had told Mr O'Reilly during the visit by HMRC in December 2006, denied that he had ever inspected the goods.

125. Mr Matthews gave evidence that he took a back seat in the Appellant's business as he was hard at work to establish the Abbey Coatings business. He did not examine the Appellant's bank accounts.

126. He knew that the Appellant was owed a large amount of money by its customers but was not concerned because he knew that Mr Thackwell was looking after the account. He confirmed that his wife had worked for HMRC for some twenty years.

127. Mr Fletcher and Mr Attenborough gave evidence concerning the grey market trade in mobile phones.

128. Mr Attenborough is a professional economist and confirmed that the mobile phone market was very competitive in 2006.

129.On cross-examination he confirmed that as a general business point it was important to know from whom you are buying and to whom you are selling. You would want to know that the customer could pay and would keep track of the goods at all times.

130. Mr Kinnear referred to the periodical Mobile News and pointed out that the most successful mobile phone company was 20:20 Mobile. RP Europe, a grey market trader, which was second in the table, had some 21 employees.

131. Mr Attenborough confirmed with reference to an article on RP Europe that even the shrewdest operator could make losses because the market moved so quickly.

132. Mr Attenborough said that for a grey market trader to be successful he needed to have a very good knowledge of the market.

The Legislation

133. The Court of Appeal's judgment in *Mobilx (in Administration) v. HMRC, HMRC v. Blue Sphere Global Limited, Calltel Telecom Ltd and Anr v. HMRC* [2010] EWCA Civ 517 (hereinafter "*Mobilx*") was handed down on 12 May 2010. The *Mobilx* appeal was concerned with the domestic application of the test set out in the leading European Court of Justice Case, *Axel Kittel v. Belgium; Belgium v. Recolta Recycling* [2006] ECR 1-6161.

134. *Kittel* was concerned with the application of the Sixth Council Directive (77/388/EEC of 17/5/77) concerning the treatment of VAT in member states and, specifically, the right to deduct VAT payments from VAT liability. The *Kittel* test stated that "...where it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, it is for the national court to refuse that taxable person entitlement to the right to deduct."

135. Moses LJ, giving the judgement of the Court of Appeal in *Mobilx*, approved the *Kittel* test and rejected the proposition that it required domestic legislation or further elaboration. Moses LJ stated at paragraph 47 of the judgement

> "the objective criteria which form the basis of concepts used in the Sixth Directive form the basis of the concepts which limit the scope of VAT and the right to deduct under ss 1, 4 and 24 of the 1994 Act. Applying the principle in Kittel, the objective criteria are not met where a taxable person knew or should have known that by his purchase he was participating in a transaction connected with the fraudulent evasion of VAT. That principle merely requires consideration of whether the objective criteria relevant to those provisions of the VAT Act 1994 are met. It does not require the introduction of any further domestic legislation."

136. The objective criteria, set out in the Sixth directive and in the VAT Act 1994, determine the scope of the right to deduct.

> "...*Kittel* did represent a development of the law because it enlarged the category of those who themselves had no intention of committing fraud but who, by virtue of the fact that they knew or should have known that the transaction was connected with fraud, were to be treated as participants. Once such traders were treated as participants their transactions did not meet the objective criteria determining the scope of the right to deduct." (paragraph 41 of Mobilx) "By the concluding words of paragraph 59 [of *Kittel*] the Court must be taken to mean that even where the transaction in question would otherwise meet the objective criteria which the Court identified, it will not do so in a case where a person is to be regarded, by reason of his state of knowledge, as a participant." (para 42 of *Mobilx*.)

137. At paragraph 43 of *Mobilx* the parameters of the test for those who do not meet the objective criteria were set out as follows by Moses L.J:

> "A person who has no intention of undertaking an economic activity but pretends to do so in order to make off with the tax he has received on making a supply, either by disappearing or hijacking a taxable person's VAT identity, does not meet the objective criteria which form the basis of those concepts which limit the scope of VAT and the right to deduct.....A taxable person who knows or should have known that the transaction which he is undertaking is

connected with fraudulent evasion of VAT is to be regarded as a participant and, equally, fails to meet the objective criteria which determine the scope of the right to deduct".

138. The Court of Appeal in *Mobilx* gave guidance on the "should have known" test. The test was defined by Moses LJ at paragraph 52 of the judgement not in terms of negligence, but in terms of reference to the objective criteria for the test

> If a taxpayer has the means at his disposal of knowing that by his purchase he is participating in a transaction connected with fraudulent evasion of VAT he loses his right to deduct, not as a penalty for negligence, but because the objective criteria for the scope of that right are not met".

139. The Court of Appeal's conclusion was that a "should have known" trader is to be treated as a participant in the fraud. This conclusion was arrived at in the face of express contrary argument advanced by the traders, as recorded in paragraph 48 of the Mobilx judgement:

> "The traders contend that to enlarge the category of participants in the fraud to those who should have known that by their purchase they were taking part in a transaction connected with fraud is to impose a new accessory liability for fraud which does not exist in domestic law; it imposes, so they assert, a negligent standard for fraud by the back door"

140. This contention was rejected by the Court of Appeal in paragraph 49 of the Mobilx judgement:

> "The denial of the right to deduct in this case stems from principles which apply throughout the Community in respect of what is said to be reliance on Community law for fraudulent ends. It can be no objection to that approach to Community law that in purely domestic circumstances a trader might not be regarded as an accessory to fraud"

141.The *Mobilx* judgement provided elucidation of the "should have known" test: At paragraph 51 of the judgment it was stated:

> "The [ECJ] must have intended the phrase "knew or should have known" which it employs in paras 59 and 61 of Kittel to have the same meaning as the phrase "knowing or having the means of knowing" which it used in Optigen (Para 55)"

At paragraph 59 of the judgement it was stated

> If a trader should have known that the only reasonable explanation for the transaction was that it was connected with fraud and it turns out that the transaction was connected with fraudulent of evasion of VAT then he should have known of that fact"

At paragraph 60 it was stated :

> "The trader is a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was connected to fraud"

Further at paragraph 64 of the judgement:

> "If it is established that a trader should have known that by his purchase there was no reasonable explanation for the circumstances in which the transaction was undertaken

other than that it was connected with fraud then such a trader was directly and knowingly involved in fraudulent evasion of VAT".

142. At paragraph 55 of the judgement the Court stated:

> "If HMRC was right and it was sufficient to show that the trader should have known that he was running a risk that his purchase was connected with fraud, the principle of legal certainty would, in my view, be infringed. A trader who knows or could have known no more than that there was a risk of fraud will find it difficult to gauge the extent of the risk; nor will he be able to foresee whether the circumstances are such that it will be asserted against him that the risk of fraud was so great that he should not have entered into the transaction. In short, he will not be in a position to know before he enters into the transaction that, if he does so, he will not be entitled to deduct input VAT. The principle of legal certainty will be infringed"

143. At paragraph 56 of the judgement the Court stated:

> "It must be remembered that the approach of the court in *Kittel* was to enlarge the category of participants. A trader who should have known that he was running the risk that by his purchase he *might* be taking part in a transaction connected with fraudulent evasion of VAT, cannot be regarded as a participant in that fraud. The highest it could be put is that he was running the risk that he might be a participant. That is not the approach of the Court in *Kittel*, nor is it the language it used. In those circumstances, I am of the view that it must be established that the trader knew or should have known that by his purchase he *was* taking part in such a transaction".

144. At paragraph 75 Moses LJ stated:

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

145. In paragraph 68 Moses LJ stated that in relation to a given transaction the question was whether:

> "….there was no reasonable possibility other than that it was connected with fraud".

146. In paragraph 80 the Court of Appeal concluded that:

> "…Mobilx ought to have known that the only realistic possibility ... was that its purchases would be connected with fraudulent evasion of VAT…

147. In assessing the evidence as to whether an appellant "should have known", in paragraph 82 of the judgement Moses LJ warned against an undue focus on the question of whether a trader had acted with due diligence.

148. The Court of Appeal cited with approval the approach of Christopher Clarke J in *Red 12 Ltd v. HMRC* [2009] EWHC 2563. Paragraphs 81 to 85 of the *Mobilx* judgment set out guidance in approaching the "should have known" issue.

"81. HMRC raised in writing the question as to where the burden of proof lies. It is plain that if HMRC wishes to assert that a trader's state of knowledge was such that his purchase it outwith the scope of the right to deduct it must prove that assertion. No sensible argument was advanced to the contrary

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

83. The questions posed in BSG by the Tribunal were important questions which may often need to be asked in relation to the issue of the trader's state of knowledge The questions posed in BSG were, (1) Why was BSG, a relatively small company with comparatively little history of dealing in mobile phones, approached with offers to buy and sell very substantial quantities of such phones> (2) How likely in ordinary commercial circumstances would it be for a company in BSG's position to be requested to supply large quantities of particular types of mobile phone and to be able to find without difficulty a supplier able to provide exactly that type and quantity of phone? (3) Was Infinity already making supplies direct to other EC countries? If so, he could have asked why Infinity was not making supplies direct, rather than selling to UK traders who in turn would sell to such other countries. (4) Why are various people encouraging BSG to become involved in these transactions? What benefit might they be deriving by persuading BSG to do so? Why should they be inviting BSG to join in when they could do so instead and take the profit for themselves? I can do no better than repeat the words of Christopher Clarke J in Red 12 v HMRC [2009] EWHC 2563:-

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

> 84. Such circumstantial evidence.....will often indicate that a trader has chosen to ignore the obvious explanation as to why he was presented with the opportunity to reap a large and predictable reward over a short space of time……
>
> 85. In so saying I am doing no more than echoing the warning given in HMRC's Public Notice 726 in relation to the introduction of joint and several liability. In that Notice traders were warned that the imposition of joint and several liability was aimed at businesses who "know who is carrying out the frauds, or choose to turn a blind eye. (3.3) They were warned to take heed of any indications that VAT may go unpaid (4.9). A trader who chooses to ignore circumstances which can only reasonably be explained by virtue of the connection between his transactions and fraudulent evasion of VAT, participates in that fraud and, by his own choice, deprives himself of the right to deduct input tax.

149.The question of the where the burden of proof lay was raised in the Court of Appeal and was answered, unambiguously, in paragraph 81 of the Mobilx Judgment:

> "It is plain that if HMRC wishes to assert that a trader's state of knowledge was such that his purchase is outwith the scope of the right to deduct it must prove that assertion"

150. The standard of proof was not considered by the Court of Appeal. Lord Hoffman stated in the House of Lords in the case of *In Re B*:

> "….the time has come to say, once and for all, that there is only one civil standard of proof, and that is proof that the fact in issue more probably occurred than not".

151. The *In Re B* approach was confirmed by the Supreme Court in *S-B Children* UK SC 17 when Lady Hale confirmed that:

> "…there is no necessary connection between the seriousness of an allegation and the improbability that it has taken place. The test is the balance of probabilities, nothing more and nothing less"

The Appellant's Submissions

152. Mr Cox QC submitted that the central issues for the Tribunal to decide were was it proved by HMRC that the Appellant had knowingly conspired with others in the fraudulent evasion of VAT or was it proved by HMRC that the Appellant should have known that by his actions he was facilitating the fraudulent evasion of VAT because on the facts known to it "the only reasonable explanation" for the trades in which the Appellant was involved was that it was connected with such a fraud?

153. Mr Cox submitted that the Appellant's directors, Martin Thackwell and Emrys Matthews were men of good character who had had long and unblemished careers in employment and business. He submitted that it was inherently unlikely that either or both would knowingly engage in serious criminal activity in their late 50s and early 60s respectively.

154. Mr Thackwell who was responsible for the trading of the company, was an unqualified accountant at Eurotel in the 1990s where he had observed regular export

and U.K. trading by that company on the same lines as he employed at the Appellant. At First Choice, once he had been required to take over the trading of the company, he had inherited from Griffiths a similar pattern and method of trading which had generated large turnovers. In each case, no problem had arisen that had suggested either that the company's specific trades were connected to fraud or that the style and pattern of trading could only have been attributable to fraud.

155. Mr Cox submitted that the impugned trades were connected to a clever, sophisticated and very large scale fraud operated by Venables, Stavrou, and others. It encompassed many satellite companies, mainly based in and around Stoke on Trent. It therefore seemed reasonable to conclude because of such factors as common directors, common business addresses, directors with other shared business interests, or family connections that the deals were controlled by the organisers and included a tailor-made Freight Forwarder, Casa Freight Ltd. He submitted that it was to be expected they would make use of both knowing and unknowing parties.

156. Mr Thackwell had formed a business acquaintance with Venables while at First Choice. He had traded with him regularly; they had got on well together and had developed a friendly relationship over the phone. None of the trading that First Choice had conducted with him had ever gone wrong or resulted in a problem for the company. When the Appellant had been set up he had contacted Venables among others and told him about the new venture. In due course, probably in 2003, Venables had come down to Cardiff and they had met over dinner. Mr Thackwell had come to regard Venables as a friend whom he trusted.

157. The Appellant had continued to trade with Venables without incident or difficulty between 2002 and 2005.

158. When in 2005 Messrs Thackwell and Matthews had been considering going into exporting, Mr Thackwell had contacted Venables and asked him if he could direct him to anyone overseas with whom he might be able to trade. Venables had eventually provided him with Stavrou's phone number.

159. Mr Thackwell had contacted Stavrou and they had exchanged details by fax. Eventually Stavrou had telephoned Mr Thackwell to tell him he was to visit London and to suggest they met. They had dinner together and discussed possible trade.

160. Mr Cox submitted that it did not follow from the facts established that Mr Thackwell was a knowing party to the fraudulent intentions of Venables and others. On the contrary Mr Cox submitted that the insertion of an innocent party such as the Appellant was of real value to the organisers of the fraud.

161. Had the Appellant sold the goods to another party, it was not axiomatic that the scheme would immediately have broken down as contended by HMRC. On the contrary, the fraud would no longer possess the goods but it would have benefited from an injection of genuine money which was not provided by the fraud itself, and been able to apply that new money to circulate in fresh chains to create more tainted transactions.

162. Mr Cox submitted further that the circularity of funds did not have to be explained by the Appellant's knowing involvement in fraud. All that had to be expected by the organisers was that Mr Thackwell could be trusted to pay them when he was paid. Indeed, there was no logical reason to suppose that the risk of non-payment to the organisation would necessarily be less from someone dishonestly involved than from a trading partner whose record of reliable dealing had been demonstrated over the years.

163. Mr Cox submitted that the timing of the payments was not critical. The same circularity within the four parties to the chain would have been achievable had the Appellant made its payments within several days or even weeks. However, after some years of regular trading, the relationship with Mr Thackwell was such that Venables would have known that Mr Thackwell would habitually pay his supplier very soon after he received payment. If he did not, since he would have known from Phista that the Appellant had been paid, he would have been able to make a well timed chasing phone call.

164. The use of the Appellant would have afforded advantages to the fraud. Firstly there was no reason to suppose that Venables would not have believed that the Appellant was able to finance the VAT on the exports itself. If so, the fraud would have realised a profit without a VAT repayment application. The purchase price of the goods, including the VAT, would have been funnelled back up the chains to the missing trader who disappeared with it. Further, even if the Appellant could not pay immediately, Venables would have been able to assume from his knowledge of Mr Thackwell that he would pay his debts even if he had to wait for HMRC's repayment to do so.

165. Secondly the Appellant provided useful geographical and other camouflage for the fraud. Its involvement diminished the VAT repayment applications that would otherwise have to be made by the Casas and Digikom.

166. Mr Cox submitted that these benefits would have substantially outweighed the modest three percent mark up that the Appellant's innocent involvement necessitated on each trade. It could not be assumed that the organisers of the fraud did not have to pay its fraudulent partners as much or even more since they would have been conscious of taking greater risks. Such a mark up for exporting was common in the industry and had been the norm when Mr Thackwell was at Eurotel and First Choice and thus conformed to his expectations.

167. In other words Mr Cox submitted that there was a very little, and perhaps even smaller, risk to the fraud from the involvement of the Appellant rather than a dishonest trader, and potentially significant advantages.

168. Mr Cox addressed the question of the retention of title clauses used by the Appellant. He said that HMRC appeared to suggest that the fact that in all seventeen deals the Appellant had not been paid by Phista at the time when the goods were shipped, nor had they paid anything to their suppliers was completely at odds with the terms included on the invoices. On this basis, HMRC had contended that the invoices

were no more than a function of the fraud and in reality the terms meant nothing. Mr Cox said that this was a basic misconception. Such retention of title clauses were precisely intended to apply to the situation in which the shipment and delivery of goods took place before payment and were designed to ensure that property did not pass on delivery.

169. Mr Cox said that HMRC had further argued in order to discredit the Appellant's invoices as functions of the fraud that since, for example, only part payment had been made for the goods on invoice 170, with £181, 021.25 still outstanding, it was unclear who had title to the goods at what point and when it passed. In fact he submitted there was nothing unusual either in the terms used or the apparent problem identified by HMRC. He submitted that such issues were very familiar and arose often in the case law on so-called "*Romalpa*" clauses.

170. Mr Cox submitted that particularly since the Appellant's invoices were mainly designed for trades within the U.K., it was difficult to see how HMRC's criticisms that the clause was useless can possibly be fair or justified. The clause in the Appellant's invoices which was a standard *Romalpa* clause would have ensured that the goods could be recovered in the event of the liquidation or bankruptcy of the buyer. Further, a seller could claim title to goods in the possession of a sub-purchaser if the sale and sub-sale were both made subject to a retention of title provision. There therefore seemed a perfectly sound commercial reason for its use.

171. HMRC had contended that an honest trader with the Appellant's knowledge of MTIC fraud would have wanted to physically inspect the goods to ensure they really existed. It was notable that this measure was not advised by Notice 726. However HMRC had not suggested in these cases that the goods did not exist.

172. The Appellant had not been in the habit, during all the years of his trading at First Choice and the Appellant, of inspecting the goods himself. He had relied on the reports of the freight forwarder that he would receive in writing and orally when he would invariably telephone them. He had also relied on the fact that his customer would be likely to tell him if the goods had not been received at all. Finally, it would have seemed particularly implausible to an honest trader that the customer would pay him for goods that did not exist.

173. Mr Cox QC submitted that the level of the Appellant's turnover was consistent with the turnover First Choice had achieved. Despite the fact that the broad figures would have been visible to the VAT inspectors of First Choice and of the Appellant, Mr Thackwell had never been warned by them that these levels indicated that his trade must have been connected with fraud. Similarly, this factor was not included in the advice and information contained in Notice 726.

174. The Appellant was therefore habituated to the expectation that such turnover figures were not uncommon within the trade in which he operated. Turnover would not and did not seem to be a particularly relevant factor. What mattered was profit. The profit mark up, at around three percent was in line with what he had seen and experienced in the industry with the same method of trading since the late 1990s. The

only difference was that Griffiths and First Choice had possessed a capital fund to finance the export trades.

175. HMRC had criticised the Appellant on the grounds that it was earning good profits for apparently no risk and without capital. However, there was plainly risk involved. In order to finance the export trades, it was necessary to carry the VAT until HMRC issued the repayment. Mr Fletcher, HMRC's expert witness, had accepted that the exporter's carriage of the VAT represented the addition of value. In this case, the Appellant took a risk that it could manage the cash flow of the company while awaiting the VAT repayment.

176. Mr Cox submitted that the fact that the Appellant sold goods to, as well as purchased from, Casa was consistent with Mr Thackwell's evidence that on numerous occasions Phista refused goods he offered them. He would not have known that on some of these occasions Casa had sold the same goods to Phista, nor was there evidence to suggest he did. No doubt it depended on the exigencies of the fraud and the calculation of its organisers which company was chosen to be a repayment trader at any particular time.

177. Mr Cox submitted that it was not surprising that once the Appellant was introduced to Digikom, a fraud factory, its thirteen U.K. trades with and through that company led back to a defaulting trader. Further, the fact that the remaining eleven deals not connected with Digikom also led back to a variety of missing traders was consistent with Mr Fletcher's evidence that by early 2006 a very substantial part of the trading in the unofficial or grey market was generated by fraud.

178. He submitted that HMRC's case would, in effect, have required the Appellant to question its very existence within the trade and the fundamental conditions and characteristics of its trading as they had been established in Mr Thackwell's experience for nearly a decade. Yet, neither the advice Mr Thackwell received from the HMRC inspectors of First Choice and the Appellant nor the information, recommendations and advice set out in the various written communications the Appellant received in 2004 and 2005 suggested that it should do that. On the contrary, each of them clearly implied that trading was possible provided care was taken. The knowledge now assembled and available to HMRC was not available in 2006 and certainly not to an individual trader.

179. Further on the evidence before the Tribunal, in many years of involvement with the trade only a single deal which was not mobile phones had ever been reported to Mr Thackwell as being connected in any way with fraud. Therefore, it was reasonable for Mr Thackwell to suppose that, despite the presence of fraud in the industry, his own contacts and methods were not putting him regularly in harm's way such that he should question his involvement in the trade.

180. Mr Cox submitted that in *Mobilx* :

> 14. Mobilx had been trading for over two years using the same small circle of suppliers. It had been informed, one and a half years before, that seventeen out of twenty-four chains in two months had been traced to a defaulter and had later

received similar information, indicating lack of improvement (see Tribunal findings § 106). The Tribunal concluded that it should have been apparent to Mobilx by the beginning of April 2006 that if it continued to deal in CPUs as it had been doing for the last two years its transactions were more likely than not to be connected with fraud (§ 108). There was, as the Tribunal put it, a marked lack of curiosity about the identity of the suppliers who had sold tainted goods (§ 107). The approach of the Tribunal may be exemplified:-

"…but there must come a time when a trader, told repeatedly that every one of his purchases followed a tainted chain, is compelled to recognise that without a significant change in his trading methods every one of his future purchases is more likely than not also to follow a tainted chain – in other words, he cannot possibly be satisfied, on the balance of probabilities, that each transaction he enters into will not be connected with fraud." (§ 105) 15.

15. Floyd J [2009] EWHC 113 (Ch) concluded that HMRC was entitled to find that Mobilx should have known, on the balance of probabilities, that all its transactions were leading back to defaulting traders (§ 80) and that all of its chains were likely to lead back to defaulting traders unless it ceased trading or significantly changed its manner of doing trade (§ 83). Floyd J concluded that two of the bases on which the Tribunal relied had not been put to the witnesses. But he concluded that there was ample evidence that Mobilx was well aware that its business was one where it was easy to become involved in MTIC fraud (§84) and that it ought either to have altered its method of trading radically, or "ceased to involve itself in that trade altogether" (§85)

181. Mr Cox submitted that the Appellant had no such experience. Further, Mr Thackwell, had he been other than straightforward with the Tribunal, could have suppressed the fact that it was Venables who recommended Phista to him as a potential overseas customer. However, the fact that Venables had done so did not mean that Mr Thackwell would inform him when offered goods by Casa that he was going to sell to Phista. Mr Thackwell assumed it was a friendly gesture and, it was submitted, that in Mr Thackwell's mind there would have been perfectly legitimate reasons that would account for why Venables might not be concerned about letting him have the contact and why Casa might not wish to export goods they offered him.

182. HMRC had attacked the Appellant's efforts at due diligence as inconsistent with the rigorous measures an honest trader would have taken. It was said that such a trader would want to protect itself from becoming involved in chains connected to fraud and from the subsequent risk of losing its right to reclaim input tax. Yet a fraudulent trader would have exactly the same interest. Indeed, one might expect such a trader, conscious of his fraud, the risk of denial of the repayment, and the need to ensure that was seen to have done all that he could to insulate himself against it, and a possible investigation, to parade the thoroughness of his due diligence. If the Appellant's due diligence was carried out with a view to trick HMRC officers, on HMRC's own case it was not a very good trick.

183. A genuine trader particularly one not preoccupied with the appearance of compliance, and without the benefit of hindsight, might take a different approach. Aware that traders such as he would not attract a good credit rating, Mr Thackwell did not find credit checks useful. He had not been used to scanning IMEI numbers at First Choice but at Mr. Williams' suggestion he investigated doing so in mid-2005, finding

the expense to be prohibitive. Had he indeed been intending to trick Mr. Williams, as is suggested, Mr Cox submitted that it was likely that Mr Thackwell would have made some provision, even if the bare minimum, to implement his suggestion. He did not do so. He depended as he had always done, on Companies House information, on Redhill checks on the VAT registered numbers on Golden Yonder/ Casa 2, Casa 1 and Digikom and, albeit received late, Phista; on conversations with the prospective trading partner to sound out commercial knowledge; and on a long standing relationship with the principal of Casa 1 and Casa 2 whom he believed on the evidence of approximately six years of dealing with him that he could trust and who had also recommended Phista to him. As Mr Thackwell testified to the Tribunal, he thought the latter to have been a helping hand from a man he also regarded as a friend. He was deceived.

184. Mr Cox submitted that this was at the heart of the Tribunal's decision in this case. To establish the first ground on which deduction can be denied - knowledge, HMRC must prove that the evidence of Martin Thackwell in this fundamental respect, that he was deceived, is not true. On this basic matter of credibility, Mr. Thackwell is entitled to ask the Tribunal to take into account the fact that he is 58 years of age and throughout his life has never been accused, let alone charged or convicted, of dishonesty.

185. Mr Cox submitted that it was also inherently unlikely that he or Emrys Matthews would turn to crime at this stage of their lives. On the contrary, as Emrys Matthews said in his evidence, they would have "run a mile", had they known of Venables' fraudulent activities. He submitted that in Mr Thackwell's evidence before the Tribunal it was plain that Mr Thackwell was genuinely both hurt and embarrassed by the realisation that he had been taken in. He submitted that the Tribunal could and should conclude that Mr Thackwell was telling the truth on this issue.

186. Mr Cox submitted that it was important to take into account the nature of the evidence relied upon by HMRC in this case to prove the contrary. The overwhelming majority of the evidence adduced was either multiple hearsay attacks on Mr Thackwell's conduct as inconsistent with what HMRC asserts to be that expected of an honest trader, or said to arise from what were said to be deductions and inferences as to the nature of the scheme and the fraudsters' intentions.

187. Mr Cox submitted that HMRC had suggested without any credible basis that the lack of printed bank statements meant that Mr Thackwell did not have access to the Appellant's bank account with FCIB. Mr Cox contended that this was not put to Mr Matthews who he submitted would have relevant knowledge and been able to answer.

188. He submitted that it was reasonable for the Appellant to consider there would have been no benefit to having paper copies of the entries in the bank account when on the evidence of Mr Thackwell the Appellant was able to gain access to the account at any time online. When it was necessary it would have been possible to print them off. Once FCIB was frozen in the autumn of 2006, it was not possible to gain access online. No evidence was offered to the contrary nor was Mr Thackwell challenged on this point in cross-examination.

189. Mr Cox said that it was put to Mr Thackwell in cross examination but not Mr Matthews that at the meeting with Mr O Reilly, on 13 December 2006, it had been said that the Appellant normally received payment from the customer before paying their supplier and that stock was released when the Appellant was paid. The Appellant had title for only a matter of hours and did not require credit from the supplier, although at the time the Appellant currently owed their suppliers £2.3 million. HMRC had contended that was inconsistent with what happened in these deals.

190.However Mr Cox submitted that had these men intended to mislead they would not have told the officer that they owed, in consequence of the extended verification, £2.3million to their suppliers, and it would have been futile to do so since HMRC was likely to be able to gain access to the suspended FCIB accounts and discover the payments made. Mr Thackwell and Mr Matthews were describing the Appellant's normal trading pattern not these deals, which required the VAT to be carried.

191. Mr Cox contended that it was put to Mr Thackwell that in his witness statement in these proceedings, dated 21 January 2009, he had stated that the Appellant would only be paid once Phista had paid. It was suggested that he had done so to mislead. However, again, Mr Thackwell had no reason to suppose that HMRC would not be able to gain access to the bank account. It was submitted that it was more likely that Mr Thackwell, as he said, had simply forgotten how the payments had been made without access to the bank accounts for over two years.

192. Mr Cox submitted that the FCIB evidence, with the detailed narratives, had only been available recently, from which Mr Thackwell was able to refresh his memory. The Appellant's schedule was prepared with Mr Thackwell who has confirmed he believed it to represent an accurate reconstruction of how the payments were made. It was plain that the intention was to manage the cash flow by pressing the customer to pay and securing time from the supplier while awaiting the VAT repayment that would, according to Mr O' Reilly, normally have been paid within 30 days. Phista had paid millions of pounds and there was no reason for the Appellant to suppose that this would not continue. He was told by Stavrou that the latter was having difficulty with his customer but was expecting to pay. Mr Cox submitted that this explanation would have seemed perfectly plausible.

193. Mr Thackwell managed to secure time from Casa 1 and was able to use money coming in from another U.K. deal with North 385 to help pay outstanding invoices. There is no evidence that at the time when he used that money to pay Casa 1, he thought that deal would not go ahead or that he would be unable to pay his supplier in the North 385 deal. Mr Cox submitted that this was a reasonable commercial approach. It was wholly misconceived to characterise Mr Thackwell’s action in law as theft. It was manifest that the money was not received by the Appellant under any obligation to hold it in trust.

194. Mr Thackwell was asked why he had not pursued Phista for the money owed. However, Mr Thackwell said in evidence that he had chased Phista for the money by telephone. Mr Cox submitted that it was unrealistic to suggest Mr Thackwell should have done more. The prospect of practical enforcement in the Cypriot courts at a

viable expense by the Appellant was fanciful. As for Casa, he submitted that it was reasonable for the Appellant to have expected to be repaid the VAT and to be in a position to pay its supplier at least until the refusal decision in 2008.

195. If the Appellant through Mr Thackwell was deceived, then the Tribunal must decide whether on the facts then known to Mr Thackwell the only reasonable explanation was that the transactions were connected to fraud and he should have realised it. Mr Cox however submitted that it was a perfectly reasonable assumption that Venables, given their relationship, was to be trusted and had genuine intentions in assisting Mr Thackwell once the Appellant had decided to go into the export trade.

196. Mr Cox submitted that it was a normal and logical incident of commercial dealing that businesses place additional reliance on those with whom they had strong personal relationships and with whom they had successfully traded for a long time. It had not been suggested by HMRC that, had Mr Thackwell not done so, any reasonable checks would have detected the fraud that lay distantly removed from the deals in which the Appellant participated.

197. Mr Cox submitted further that it was reasonable in the circumstances for Mr Thackwell to assume that the methods and structure of the trade against which much of HMRC's attack was directed, and in which he had been directly and indirectly involved for the previous decade, had not been based on fraud or a figment of his imagination. This was not a case like *Mobilx*, where the company had been warned its previous trading had led back time after time to fraud, or like *BSG* where the principals had little history of trading in mobile phones.

198. He submitted that it was contended by HMRC that the fact that the Appellant did not insure the goods was inconsistent with the practice to be expected of an honest trader. Yet, this was exactly as Mr Thackwell had been used to doing at First Choice, a system he had inherited and which had been commercially tested. Further, the practice had a perfectly sound legal and commercial basis. In reality, the Appellant was selling the goods as a type of sub-agent of the original seller (*Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd.* (1976) 1 WLR 676). The Appellant did not own the goods, title to which had been retained. Therefore, they were not the Appellant's to insure. It was not clear why, once the goods had been released by the Appellant, it should have been concerned to know what the customer had done with them. At that point, as with many export businesses, the Appellant had to trust that the customer would pay.

199. After HMRC's communications of 25 September and 19 October 2006, Mr Thackwell had made enquiries with and received assurances from Venables and from Stavrou that they had not been involved in fraudulent dealing and had not been visited by HMRC. There was no reason to suppose that either had been involved in planning and organising a fraud. Mr Thackwell still believed in the relationship with Venables. Therefore, the Appellant carried out some further trades in January 2007 with Casa. Had the Appellant been conscious of the fraud, this would have been an astonishing thing to do.

200. Mr Cox submitted that the Trimstar evidence amounted to Mr Thackwell and Mr Matthews setting up a new company on or about 6 April 2009 to trade in items other than mobile phones. Three deals were done, not for mobile phones, with a customer called DBX Distribution. DBX had a customer called TL Recycling in Cyprus whose contact was Phillipos Stavrou and used a freight forwarder called SWC Worldwide whose company secretary was Darren Wade, allegedly Venables' brother-in-law. Trimstar's supplier was Acorn properties (North) Ltd. One of their main suppliers was CL Textiles in Cyprus whose contact was Stavrou. They also banked with Transatlantic Bancorp and used a freight forwarder, called Harleys Group, whose director claimed not to have moved any goods.

201. Mr Thackwell denied any knowledge whatsoever of these apparent connections of Acorn, DBX or of Transatlantic Bancorp or of having been involved with Harleys' Group, He had been faxed details and he had followed them up. It was not suggested that Acorn and DBX were connected to Venables or Stavrou other than by dealing with companies connected to them. Mr Cox submitted that it was unrealistic to suggest that Mr Thackwell must have known the trading partners of a company with which he did business. He had not spoken to Venables for some three years.

202. Mr Cox submitted that given the nature of the allegations, the Tribunal should conclude that the criminal standard of proof is appropriate.

203. He submitted that in both *In Re B* (2009) 1 AC 11 and in *In Re S-B (Children) (Care Proceedings: Standard of Proof)* (2010) 1AC 678, the Supreme Court identified the following relevant categories of cases:

> In the first were cases which the law classed as civil but in which the criminal standard was appropriate. Into this category came sex offender orders and anti-social behaviour orders: see B v Chief Constable of Avon and Somerset Constabulary [2001] 1 WLR 340 and R (McCann) v Crown Court at Manchester [2003] 1 AC 787. In the second were cases which were not about the standard of proof at all, but about the quality of evidence. If an event is inherently improbable, it may take better evidence to persuade the judge that it has happened than would be required if the event were a commonplace one. This was what Lord Nicholls was discussing in *In re H (Minors)* [1996] AC 563, 586.

In *In re H (Minors)* Lord Nicholls had observed:

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A step-father is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

"Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

HMRC's Submissions

204. In all of the seventeen deals which are the subject of this appeal the goods started with Dunas, and finished with Phista. Yet in between the Appellant bought from three different sources. Mr Kinnear submitted that this was no coincidence but rather a reflection of the contrived nature of the trade.

205. This pattern also encompassed a number of other traders. Goods would start with Dunas, be sold to Digikom and the Casa's, who in turn sold to a large number of UK brokers, who in turn all sold to Phista. Mr Kinnear submitted that this could not have happened without collusion.

206. Mr Kinnear submitted that the key evidence in the case was that of Mr Thackwell. It was his state of knowledge at the time the deals were conducted that was the key issue. Mr Kinnear submitted that Mr Thackwell's evidence was untruthful and unsatisfactory and that the Tribunal could conclude that this was due to Mr Thackwell's desire to conceal his knowledge of the connection with fraud.

207. Mr Kinnear submitted that the Tribunal could infer from the following paragraphs that Mr Thackwell knew that the deals he was conducting on behalf of the Appellant were connected with fraud.

208. Mr Thackwell was unable to demonstrate any real knowledge or basic understanding of the mobile phone market or the grey market in mobile phones. He constantly referred to what he had done or experienced at First Choice, but was unable to provide the type of detail or clarity to be expected from a legitimate trader operating in such a competitive market.

209. He was unable to state which sector of the grey market he operated in**.** He had no idea of the market. He was unable to name a single Authorised Distributor (AD), save for Orange, who in fact are a Mobile Network Operator (MNO) and not an AD. He had not really even heard of 20:20, the biggest player in the market. His evidence on this topic was quite incredible**.** It was commonsense, and indeed it was the evidence of Mr Attenborough, that for a trader operating in such a competitive and fast moving market to be successful it would require a good knowledge of the market, for example who the ADs were, and constant research of the market to find opportunities. The Appellant had little knowledge and conducted little research.

210. In stark contrast the Appellant's export deals were based on a single customer (Phista) who was provided to them by their supplier (Casa 1), and another supplier (Digikom) from whom they received a fax offering stock. Mr Thackwell never

attempted to find other EU customers. There does not appear to have been any active marketing or deal making of the type one would expect in legitimate grey market trading. Mr Thackwell accepted that he had no website and did not advertise. No attempt was made to contact the AD or MNO who would have been selling the cheapest stock, indeed Mr Thackwell appears to have been unaware as to who they even were. When asked why he was not building relationships with AD, ringing them for stock, getting on distribution lists etc. he stated "I can't answer that".

211. Mr Thackwell's case was that he received numerous faxes with offers to trade. He had received one such fax from Digikom, he called them and had lengthy conversations on the phone. Mr Kinnear submitted that it was beyond coincidence that out of all of the companies sending him faxes and offering to sell him stock that he should independently choose the one company that was deeply involved in the exact same fraudulent scheme with which his other transactions were also connected. Mr Kinnear submitted that the truth was that he knew exactly the roles of Digikom and the Appellant.

212. Mr Thackwell asserted that deals would be struck with reference only to the model of the phone. There was never any mention of the specification of the phone, its features or whether it was new or returned stock. Mr Kinnear submitted however that it is clear from the evidence of both Mr Fletcher and Mr Attenborough that such detail was required. The purported conversation with Stavrou of Phista, when he met him in London, was simply "I would like some mobile phones". Such a lack of clarity and detail in respect of deals worth hundreds of thousands or even millions of pounds was simply incredible. It was indicative of contrived deals within which commercial reality played no part.

213. In the year ended 30 September 2006 the Appellant managed to turnover in excess of £78 million. It had only one active member of staff (Mr Thackwell), no capital, a small office (shared with Abbey Coatings), no vehicles, no website and it did not advertise.

214. A turnover of £78 million would have placed the Appellant as one of the largest distributors of phones in the UK in 2008. Its structure bore no comparison to those of the legitimate traders. Mr Attenborough had provided articles and information in relation to one of the industry grey market trader success stories RP Europe. It had a turnover of £160 million in 2008 which was up 114% from 2007, twenty-one core staff, a warehouse, a head office, a fleet of vehicles, accountancy software and had made significant investment. This was the type of infra-structure to be expected and required by a business with such a large turnover. RP Europe was hailed as being a success on the basis of such a healthy turnover with relatively limited resources and a low cost base. It was clear that they were constantly scouring the market for opportunities. Even they, unlike the Appellant, suffered losses on occasions. The operation of RP Europe was far removed from that of the Appellant. It highlighted the inherent improbability of the Appellant achieving such a turnover legitimately.

215. Given the substantial warnings about the existence of fraud that had been given to the Appellant by HMRC and the substantial guidance given in relation to good

practice, the actions that the Appellant took, or more accurately did not take, before it completed a deal demanded consideration. Trading with new entities, using offshore bank accounts and being asked for delivery to different countries to the customer's country of origin amongst other things would have caused a legitimate trader in the Appellant's position to have proceeded with the utmost care. It would not have proceeded, risking millions of pounds and potential financial catastrophe, on the basis of "trust" of individuals of whom Mr Thackwell apparently had only scant knowledge, for example the officials of Digikom and Phista.

216. The due diligence carried out by Mr Thackwell on behalf of the Appellant was very poor, in some cases almost non-existent. Mr Kinnear submitted that because Mr Thackwell knew that the transactions were connected with fraud, there was no commercial reason to complete due diligence. The little that he did complete was nothing more than window dressing. In relation to Casa 1 the only due diligence was a Redhill check conducted on 16 June 2005. Mr Thackwell did not know what, if any trading background it had**.**

217. In relation to Casa 2 Mr Thackwell was unable to provide a reason as to why Rory Venables had two companies doing exactly the same thing. In re-examination he produced documents that established that he had completed some due diligence of a company called Golden Yonder, which later changed its name to Casa 2. This check was carried out at a time when Venables was not a director. He was unable to provide any information as to why the name of the company had changed. There were no checks made following the change of name**.**

218. At a visit by officers on 13 December 2006 Mr Thackwell stated that his contact at Casa was Michael but he could not remember his surname. There was no mention of Rory Venables, the man now touted as playing a key role in the formation of the deals under appeal. Mr Kinnear submitted that the failure to mention Mr Venables was indicative of a story that had been made up after the event to fit the evidence.

219. In relation to Digikom Mr Thackwell produced a limited amount of documentation. The VAT number was not verified by Redhill until 22 February 2006, by which time the Appellant had completed three substantial purchases, to the value of £3.4 million, from them. He was unable to provide any useful information about the trading history of Digikom and had not taken up trade references.

220. Mr Kinnear submitted that in short the Appellant, through Mr Thackwell, was prepared to deal with companies in deals involving millions of pounds, in the absence any real due diligence and often without even the verification of their VAT number. His continued assertion that he trusted these traders operating in a market that he knew contained substantial fraud is extraordinary. He was prepared to proceed because he knew of the connection with fraud.

221. Mr Thackwell claimed that he had been provided with Phista's details by Rory Venables in late 2005. This account was contradicted by the limited due diligence material produced by Mr Thackwell, which suggested contact as far back as July 2005. Amongst these documents was a document marked "FAO Mick Smith". Mick

Smith was a company officer of Casa 1. Initially Mr Thackwell stated that he had not seen this document before. Mr Kinnear submitted that Mr Thackwell recognised the severe difficulties that this document caused the Appellant. Mr Kinnear contended that the Tribunal could conclude that this was a document that had initially been provided to Mr Smith, who then forwarded it to Mr Thackwell. Mr Kinnear submitted that Mr Cox had tried valiantly, but ultimately to no avail, to address this problem in re-examination by suggesting to Mr Thackwell that this document might have been provided to him by Casa so that he would have the contact number for Phista.

222. Other than stating that Venables was his friend, Mr Thackwell was unable to provide any cogent reason why Venables would provide him with the name of a customer to whom he would be able to sell goods bought from Casa 1 (Venable's own company) at a substantial profit when Venables could have sold the goods directly himself and kept the profit. Mr Thackwell's own case was that there was more profit in the export market. Mr Thackwell did not consider why he was being offered this lucrative opportunity**.**

223. The limited due diligence provided no insight into the background or trading history of Phista, other than to reveal that it was a very new company. Mr Kinnear submitted that it was in fact a classic example of the sort of company which a legitimate trader would approach with caution and check with care before trading. The Appellant took no such extra care. There was no credit check and no trade references were obtained.

224. Mr Thackwell had no idea if Phista had ever carried out a deal before or whether they were going to be able to pay for the goods. Indeed, despite his claimed extensive experience he had heard of neither Phista nor Mr Stavrou before. The Appellant completed very substantial deals with Phista before its VAT number was verified by HMRC on the 22 February 2006 which was particularly suspect as a previous attempt to verify the VAT number had proved unsuccessful. Mr Kinnear submitted that, in the absence of knowledge of the connection with fraud, this would have amounted to commercial suicide, a risk that no honest and prudent businessman would have taken.

225. At the December visit Mr Thackwell made it clear to the officers that the goods were not released until payment had been made, "Stock is released when Martem is paid". At the same visit he stated that the Appellant did not require credit**.** In his witness statements, provided in advance of the hearing, he clearly stated that the goods were not released until payment had been received.

226. As at the date of his first witness statement there was no banking evidence, either from the Appellant or HMRC. Mr Kinnear contended that Mr Thackwell believed, in the absence of banking evidence to establish the contrary, that he could safely advance this totally untruthful account. When pressed in cross-examination about why he had given this account in his statement he stated "I can't comment, I can't remember that"**.**

227. By the time of his live evidence Mr Thackwell's position in relation to the release of goods and credit was completely the opposite. He stated that the goods were released without payment, but that title remained with his supplier at all times. His understanding was that this would remain the case even after they had been purchased by a consumer. This evidence exploited the submissions that Mr Cox had made in relation to *Romalpa* clauses. Such clauses or issues, relating to transfer of title, had never been previously mentioned by Mr Thackwell at either the December visit or in his witness statements. Mr Kinnear submitted that Mr Thackwell's change of stance was indicative of the untruthful account that he gave. Mr Thackwell simply changed his evidence in an attempt to fit the facts, particularly the banking material, as they were now known.

228. It was submitted by Mr Kinnear that Mr Thackwell had no real idea what happened to the goods or when title passed. It did not appear to be a topic that he discussed with either his suppliers or his customer. He did not take any legal advice. His evidence in relation to this topic was muddled. If it is to be suggested that Mr Thackwell protected himself with a *Romalpa* clause, the question which begged to be answered was why he never attempted to avail himself of that protection, action the clause and seek return of the goods at a time when he might have recouped some funds from reselling them.

229. Mr Thackwell's assertion at the December visit that the Appellant did not give credit could not have been further from the truth. The February deals were not settled until March/April, the March deals were not settled until July and the April and May deals were not settled until August. Even then there was, and still is, over £1 million outstanding. If Mr Thackwell is to be believed he extended a line of credit running into millions of pounds to Phista, without anything in writing, basing his assessment on trust of someone he had met once, and Mr Stavrou's assertion in telephone calls that he would pay soon.

230. Mr Kinnear submitted that this account lacked any credibility, commerciality or commonsense. As Mr Thackwell accepted in his cross-examination the situation was such that a financial controller would have said "Absolutely not". Mr Kinnear contended that this was the clearest evidence that Mr Thackwell knew that the transactions were connected with fraud. The invoices, the payments etc. were nothing more than a function of the fraud. They needed to be in place to fool HMRC but in reality they had no commercial function in Mr Thackwell's mind.

231. Mr Kinnear submitted that Mr Thackwell demonstrated a lack of knowledge and understanding in relation to the way in which the payments had been made. He was muddled and confused in relation to the contents of the schedule that had been produced by his solicitors. He struggled to provide even basic details of the information contained within it.

232. Mr Thackwell did not mention the debt of £1.032 million owed to the Appellant by Phista at the December visit or in either of his witness statements. Mr Kinnear submitted that Mr Thackwell was mute in relation to this, and other topics concerning payment, because at the time he believed that HMRC would not have access to the

Appellant's FCIB bank statements and he realised that the failure to chase this debt did not make sense.

233. Mr Thackwell accepted that, aside from several phone calls to Mr Stavrou of Phista, he had done nothing to try and secure the payment of this debt. He was unable to provide any reason why the debt had not been pursued. Likewise neither Casa 1 nor Digikom had done anything to chase the substantial debts owed to them by the Appellant which amounted to approximately £2.8 million in total.

234. Mr Thackwell stated that he would make contact with the suppliers to repay the outstanding sums to them if the Appellant received its VAT repayment. Mr Kinnear contended that this was quite incredible given that it was Mr Thackwell's case that the people behind Casa 2 and Digikom were fraudsters whom he claimed had duped and tricked him. He accepted that he had not spoken to Venables for two to three years and to Mr Jones of Digikom since Digikom had been deregistered in August 2006. Mr Kinnear asked how or why would he contact and pay money to people whom he now considered to be fraudsters. Mr Kinnear submitted that the answer was that Mr Thackwell knew that the deals were connected with fraud and he would have to pass to the money up the chain to finalise the agreement that he had.

235. The Appellant had been unable to produce any business or accounting records relating to the payments for the goods. It had no sales or purchase ledgers and no basic accounting package. Mr Kinnear contended that this was incredible in relation to a company that turned over in excess of £78million in the year ending 30 September 2006 and which was receiving numerous part payments for goods. Such records would have been required to keep track of what was owed and what was owed.

236. The Appellant was unable to produce a single page of FCIB bank statements or payment advices. Mr Kinnear contended that this too was incredible given the size of the turnover, the way in which the payments were purportedly being made, often as part payments, and the experience that Mr Thackwell had as an accountant and financial controller. Mr Kinnear submitted that Mr Thackwell's account in relation to this did not stand up to scrutiny. He submitted that from this, and other, evidence it was open to the Tribunal to conclude that Mr Thackwell was not in fact controlling the account held with FCIB in the name of the Appellant.

237. Mr Thackwell had stated that the Appellant had opened a bank account with FCIB after telephone conversations with other phone traders and because his other account had been closed. After the FCIB account had been closed the Appellant opened a bank account with the Transatlantic bank. No checks were made to establish who or what the bank was. Mr Thackwell stated that he had never heard of it before and that he had opened an account with it following a telephone call from somebody whose name he could not now remember. This lack of checks was particularly surprising given that the previous offshore bank, FCIB, had been shut down at short notice, leaving the Appellant without access to its statements and latterly accounts that the auditor had to qualify.

238. Rory Venables was the director of this bank. Mr Kinnear submitted that this was no coincidence as Mr Thackwell would have the Tribunal believe. He submitted that the Tribunal could be satisfied that Mr Thackwell lied when he stated that he had not known that Venables was a director when he opened the account. This was further evidence of the close dishonest relationship between Mr Thackwell and Venables.

239. The fraudulent scheme required the funds to travel in a circle. The scheme did not require new money. The funds did travel in a circle, often many times on the same day. This complex and repetitive circularity of funds could not have occurred without careful preparation and complicity on the part of all the traders in the chain, including the Appellant, to ensure a structure that resulted in the funds flowing back to the starting point. The money had to move quickly and to the right person. Mr Kinnear contended that it was more likely than not that these transactions were all being carried out by one person controlling all of the accounts.

240. Mr Kinnear submitted that Mr Thackwell was untruthful in relation to the payment and use of £750,000 received from 385 North. The issue had not previously been raised in his witness statements. It was clear that 385 North was a key player in the operation of the scheme designed to cheat HMRC and moreover its director Lea Tindall was also director of the defaulting trader Bluestar and it operated from the same premises. Mr Kinnear produced to the Tribunal a tracing exercise which showed that on 25 April 2006 the Appellant had received the payment from 385 North. It had received the money from Casa 1 on the same day and on receipt of the money the Appellant had paid £544,000 to Casa 1.

241. Mr Thackwell's assertion that he received this payment in relation to a deal that was then cancelled, but that he was never asked, or considered it proper himself, to repay the money and that he was simply allowed to keep it, was incredible**.** Mr Kinnear submitted that this payment must have formed part of the overall scheme of payments, related to the circularity of funds that was put in place to further the dishonest scheme.

242. Mr Kinnear submitted that Mr Thackwell's evidence in relation to the failure to repay 385 North was in stark contrast to Mr Thackwell's assertion that he would pass the money received from his customer on to his supplier as soon as it was received. Further Mr Thackwell accepted that he had not paid JD Freight and had not taken any steps to do so.

243. The Appellant purportedly conducted substantial additional trade with Casa 2 and Phista in VAT period 01/07. This led to a reclaim of £346,000 of input tax. At the time when the trade was purportedly carried out the Appellant had been informed that its previous transactions involving Casa 2 and Phista were connected to fraud. Despite this the Appellant carried out no additional due diligence and proceeded to carry out additional trade. At the time the Appellant was owed over £1 million by Phista and owed Casa 2 over £2 million.

244. Mr Kinnear submitted that in these circumstances no honest trader would have entered into these additional deals. These transactions demonstrated the Appellant's willingness to get involved in transactions whatever the circumstances.

245. The Appellant was asked to provide documentation and information to HMRC in support of its claim for the repayment of input tax. Despite several requests this was not provided. The requests included requests for the Transatlantic bank statements. Initially in cross-examination Mr Thackwell claimed that he could not recall why he had not provided the information. He later retreated behind the unsubstantiated suggestion that he had not done so on the advice of a previous legal team.

246. At a visit by officers of HMRC on the 25 June 2009, when asked again for the bank records, Mr Thackwell stated that he was unable to log onto the account as the system was down. Mr Kinnear submitted that it was open to the Tribunal to conclude that Mr Thackwell was unable to provide copies of the bank statements or log on to the account because the account was in fact controlled by somebody else. Mr Kinnear submitted that the situation was strikingly similar to the position as regards the inability to provide any of the FCIB bank statements. The Appellant had not provided a single page of bank statements or any other document relating to its bank accounts.

247. The deals involving Trimstar were again connected to Venables and Stavrou. Mr Kinnear submitted that this was no coincidence and could only have been by design. This established Mr Thackwell's continuing propensity to deal with people whom he knew were connected with fraudulent tax losses.

248. Mr Kinnear submitted that there was cogent evidence that Mr Thackwell was acting as a front for others. When he was visited by HMRC on the 18 June 2009 he was adamant that Trimstar had not yet traded. When the officers returned on the 25 June 2009, Mr Thackwell apologised that he had made a mistake and that Trimstar has actually carried out 3 deals to the value of £506,000 that he had forgotten about. In cross- examination Mr Thackwell initially challenged the note made by the officers, because he clearly recognised how damaging this was to the Appellant's case, but he later recanted and accepted that the officer's note was correct. Once again he did not complete any due diligence in relation to the Trimstar deals.

249. Mr Kinnear contended that given the way in which the deals were constructed, with approaches by suppliers and suppliers providing the name of the customer, the profits achieved were simply incredible. The Appellant stood to make gross profits of almost £500,000 from the seventeen deals conducted on just eight trading days. An examination of what the Appellant actually had to do to achieve these profits reveals that it was not much. It created a few pieces of paper, it did not have to pay until it was paid, it did not know at any time where the goods were. It is submitted these were profits for doing virtually nothing, with virtually no risk.

250. Mr Kinnear submitted that all forty-one deals conducted by the Appellant in the 02/06-05/06 period were connected with fraud. This included the seventeen export deals that are the subject of this appeal, but also the 24 UK-UK deals that were conducted in the same period. In a number of the UK-to-UK deals the Appellant

purchased from traders other than the Casas and Digikom. In February, eleven deals were purchased from Armada Logisitcs, all of which trace back to defaulting traders and in March four deals were purchased from Armada or Dreamlife Productions that trace back to defaulting traders. So even in the fifteen deals that did not involve Casa or Digikom the deals were connected with fraud. This cannot have happened by coincidence. The Appellant, and in particular Mr Thackwell, cannot have been duped by Casa, Digikom, Armada and Dreamlife.

251. Mr Kinnear submitted that there was an irresistible inference from all the facts of the overarching scheme that the Appellant and Mr Thackwell in particular, must have known that its deals were connected with fraud. The fraud was well organised and managed. Its single goal was to obtain payments from HMRC. It involved many companies each playing their preordained role. It required the goods to start with Dunas and end with Phista. It required the money to start with and end with Phista and travel round in a circle many times in a single day.

252. Mr Kinnear contended that the suggestion by Mr Cox that the fraudsters would deliberately have involved "innocent" parties was ludicrous. The fraudsters would not have risked their carefully orchestrated scheme by involving an innocent party, when they had plenty of willing and knowing participants. The exporter performed the vital task of receiving the VAT repayment. The scheme depended on the Appellant passing the VAT repayment back up the chain and Mr Kinnear submitted that it was interesting to note that the amount of input tax denied was very close to the amount purportedly owed to the suppliers. There were many inherent risks in involving an innocent party such as selling goods to the wrong persons, paying money to the wrong person at the wrong time and an innocent party reporting the suspicious activity to the authorities. All these events would have adversely affected the fraudulent scheme.

253. Mr Kinnear submitted that if the Tribunal concluded that there was no actual knowledge on the part of the Appellant, and in particular, Mr Thackwell it should then go on to consider the second limb. This was whether in all the circumstances, the Appellant and Mr Thackwell, as a director, shareholder and signatory on the bank account, should have known that the transactions were connected to fraud.

254. Mr Kinnear submitted that in assessing the features of the Appellant's trade, the only reasonable explanation was that they were connected with fraud. If Mr Thackwell had stopped and considered the circumstances of the deals which had been presented to him he would have known that they were connected with fraud. He was operating in a sector rife with MTIC fraud yet he had not apparently heeded the warnings of HMRC to undertake careful commercial checks, nor had he carried out even the most cursory examination of the circumstances of his trade and trading partners before he signed off the deals. As is now clear, the trade was too good to be true, and Mr Kinnear submitted that the most basic attention would have made that apparent.

255. Mr Kinnear submitted that it was only if the Tribunal rejected HMRC's primary submission that the Appellant through its director Mr Thackwell knew that its

transactions were connected with fraud that it needed to go on to consider the secondary limb that the Appellant so should have known. He submitted that what is said in respect of the Appellant's alleged knowledge applied to a consideration of whether in any event it should have known.

256. Mr Kinnear said that the authority of ***Mobilx*** made clear that the Tribunal must assess what the Appellant should have known from an evaluation of the whole circumstances of the Appellant's trade, including what the trader asked and did not ask and the notice he took of the answers he obtained.

257. It was submitted by Mr Kinnear that the Appellant omitted to ask the questions of its trade which any appropriately cautious business would. These included:

- Why it was able to obtain, in a competitive market, a supplier and customer for every deal in a day with little or no effort?
- How did it never suffer from a collapsed deal or otherwise end up with left over stock; why would its main supplier chose to provide it with an EU customer particularly since according to the Appellant more profit can be made on export deals?
- Why didn't Casa 1 maintain its exclusive relationship with that customer; why would that EU customer always want all stock it had to offer?
- What benefit was there to Casa 1 and Casa 2 in including the Appellant in these chains of transactions?
- How was it always able to source stock from a very small pool of traders?
- Why did it never need to approach or try to develop a relationship with an authorised distributor who must logically have a lower selling price, allowing the Appellant the best chance of maximising profit?
- Why would its customer wish to seek goods in such volume from the Appellant who was overseas, rather than itself approaching and developing a relationship with a local authorised distributor?
- Why was it able to obtain an approximately identical percentage mark up in every deal?
- Why would its customer who had claimed a desire to supply phones to the Cypriot market be seeking shipping to Spain?
- Why would its customer be so vague as to the product it required, offering no specification as to colour, quality, language, plug pins etc.?
- Why would due diligence material for its customer arrive with its supplier's details thereon?

- Why would its customer agree to trade without contracts or any other method of establishing liability for insurance or recourse in the event of default?

- Why did the Appellant 'not care what happened to the goods once they were shipped'? Particularly given that the Appellant now claims title during this time and hadn't been paid for the goods

- Why did Benal Logistics (or Phista) never seek release notes to transfer the goods?

- Why was it never chased for money by its supplier?

- Why has it never been chased for money by the freight forwarders?

- Why would 385 North pay it £750,000 and not make any attempt to seek its return?

- Why were the Appellant's suppliers prepared to offer it credit in extremely generous terms and without seeking any protection in writing as to payment timetables or terms or obtaining security? In particular, why was Digikom, who Mr Thackwell claims to have met only via a general faxed introduction, prepared to act in this way?

- Why its suppliers further were prepared to be generous with credit without seeking protective terms or security at times when the Appellant owed them such significant sums?

- Why would Venables seek to trade with the Appellant through two companies, Casa 1 and Casa 2?

- How was it able to obtain a turnover of £78 million without needing to increase staff or facilities or to advertise?

- How was it able to operate a huge business – extending credit of several million pounds for extended periods of time with no capital?

- How was it able to generate a profit of £500,000 for little or no work over just a few days trading?

258. Mr Kinnear submitted that the marked lack of curiosity shown by the Appellant in respect of all of the above questions was astounding. That it was apparently so unquestioning whilst trading in a sector known to suffer huge problems with fraud was galling, but further it ignored the risk factors apparent in its trade to do so. Moreover, the Appellant was aware of the warnings about MTIC fraud and even faced with this information, failed to ask the questions.

259. Mr Kinnear submitted that the only reasonable explanation for the Appellant managing to trade so successfully with so little work in such unusual circumstances

was that its trade was connected with fraud. The Appellant should have known it, and as a result, should not be entitled to rely upon the right to deduct VAT in the circumstances.

260. The Appellant had submitted that "Although the proceedings are civil, the courts should apply a criminal, or something like it, standard", and in particular that this is the standard which should be applied to these proceedings. A secondary submission appeared to be that, due to the seriousness of the offence, 'stronger' evidence was required than might otherwise have been required.

261. Mr Kinnear submitted that there was a single standard of proof in civil case, the balance of probabilities. A very large number of similar cases had been considered by this Tribunal, the High Court, the Upper Tribunal and the Court of Appeal. Each had been decided on this single standard of proof.

262. HMRC submitted that the appropriate standard was the civil standard, no more no less. These proceedings were not criminal, quasi-criminal or anything approaching that. The appeal was about whether the Appellant had complied with all the conditions for claiming input tax. The category of 'quasi criminal' matters was a small one and this case did not fall into it.

263. HMRC submitted that also the Appellant's fall back interpretation was wrong: it fell into the trap their Lordships were keen to close in *In re B*, suggesting baldly, 'the more serious the allegation the stronger the evidence must be'. If Mr Cox's submission was in fact that the Appellant's involvement in MTIC fraud was 'inherently improbable' this was refuted: an examination of the circumstances made clear that a claim of 'inherent improbability' ill fitted the Appellant, which was knowingly operating in a sector rife with fraud, whose transactions were all connected with fraud, and in circumstances where it accepted that its co-traders were knowing parties if not the organisers of a complex scheme to defraud HMRC.

264. In *In re B* [2008] UKHL 35, Baroness Hale, delivering the headline judgement and with whom all their Lordships agreed, in particular Lord Hoffman who confirmed that he was "in complete agreement with her reasoning, analysis of the authorities and conclusions", confirmed that the standard of proof in civil proceedings was the balance (or preponderance) of probabilities, approving Lord Nicholls in *In re H* [1996]AC 563 at paragraphs 73 and 74:

> 73. "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

74. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J. expressed this neatly in In re Dellow's Will Trusts [1964] 1 W.L.R. 451, 455:
"The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.

265. Mr Kinnear submitted that Baroness Hale was concerned though that Lord Nicholl's nuanced explanation (which continued, using the phrase 'more sure') had allowed the "nostrum" (the word means 'quack remedy') to take hold that:

> "the more serious the allegation the more cogent the evidence needed to prove it."

266. He submitted that at paragraph 69 Baroness Hale stated that, although there are some proceedings, though civil in form, whose nature is such that it is appropriate to apply the criminal standard, care proceedings which were the focus of *In re B*, were not of that nature. She explained why:

> "They are not there to punish or deter anyone. The consequences of breaking a core order are not penal. Care proceedings are there to protect the child from harm. The consequences for the child of getting it wrong are equally serious either way"

267. Mr Kinnear noted as an aside that, of course, care proceedings can (and in that instant case did) involve serious allegations of a criminal nature.

268. He submitted that Baroness Hale continued at para 70, still talking of care proceedings but again the parallels are helpful:

> "Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies"

269. She concluded :

> "As to the seriousness of the allegation**,** there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable**.** Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog."

270. Mr Kinnear submitted that HMRC could do no better in analysis of the *In re B* authority than that undertaken by (then) Lady Hale in December of 2009 in *S-B Children* [2009] UKSC 17:

10. The House of Lords was invited to revisit the standard of proof of past facts in Re B (Children) (Care Proceedings: Standard of Proof) [2008] UKHL 35, where the judge had been unable to decide whether the alleged abuse had taken place. […]. The House also reaffirmed that the standard of proof of past facts was the simple balance of probabilities, no more and no less.

11. The problem had arisen, as Lord Hoffmann explained, because of dicta which suggested that the standard of proof might vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned (para 5). He pointed out that the cases in which such statements were made fell into three categories. In the first were cases which the law classed as civil but in which the criminal standard was appropriate. Into this category came sex offender orders and anti-social behaviour orders: see *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340 and *R (McCann) v Crown Court* at Manchester [2002] UKHL 39. In the second were cases which were not about the standard of proof at all, but about the quality of evidence. If an event is inherently improbable, it may take better evidence to persuade the judge that it has happened than would be required if the event were a commonplace. This was what Lord Nicholls was discussing in *Re H (Minors),* above, at p 586. Yet, despite the care that Lord Nicholls had taken to explain that having regard to the inherent probabilities did not mean that the standard of proof was higher, others had referred to a "heightened standard of proof" where the allegations were serious. In the third category, therefore, were cases in which the judges were simply confused about whether they were talking about the standard of proof or the role of inherent probabilities in deciding whether it had been discharged. Apart from cases in the first category, therefore, "the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that that the fact in issue more probably occurred than not" (para 13).

12. This did, of course, leave a role for inherent probabilities in considering whether it was more likely than not that an event had taken place. But, as Lord Hoffmann went on to point out at para 15, there was no necessary connection between seriousness and inherent probability:

> "It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely. If, for example, it is clear that a child was assaulted by one or other of two people, it would make no sense to start one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so. The fact is that one of them did and the question for the tribunal is simply whether it is more probable that one rather than the other was the perpetrator."

271. Lady Hale made the same point at para 73:

> "It may be unlikely that any person looking after a baby would take him by the wrist and swing him against the wall, causing multiple fractures and other injuries. But once the evidence is clear that that is indeed what has happened to the child, it ceases to be improbable. Someone looking after the child at the relevant time must have done it. The inherent improbability of the event has no relevance to deciding who that was. The simple balance of probabilities test should be applied."

13. None of the parties in this case has invited the Supreme Court to depart from those observations, nor have they supported the comment made in the Court of Appeal that *Re B* "was a 'sweeping departure' from the earlier authorities in the House of Lords in relation to child abuse, most obviously the case of *Re H*" [2009] EWCA Civ 1048, para 14). All are agreed that *Re B* reaffirmed the principles adopted in Re H while rejecting the nostrum, "the more serious the allegation, the more cogent the evidence needed to prove

it", which had become commonplace but was a misinterpretation of what Lord Nicholls had in fact said.

Re B was not a new departure in any context. Lord Hoffmann was merely repeating with emphasis what he had said in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, at para 55. A differently constituted House of Lords applied the same approach in *Re D* (Secretary of State for Northern Ireland intervening) [2008] UKHL 33.

272. Mr Kinnear submitted that the standard of proof in the MTIC type of cases is the civil standard and this has been universally the approach of the Tribunal to date. Some examples were *Telement Limited v The Commissioners for Her Majesty's Revenue and Customs* [2010] UKFTT 470 (TC) where it was said:

> 8. In relation to the standard of proof, it used to be said that the more serious the allegation the less likely it is that the event occurred and the stronger (or more cogent) should be the evidence before a court concludes that the allegation is established on the balance of probability. The House of Lords in *In re B* [2009] AC 11 has clarified this.
>
> 9. Our understanding is that the dangers of the old formulation were first, that it could be misunderstood to be increasing the civil standard of proof to something above the balance of probability; and secondly, that it was illogical to start with considering the seriousness of the allegation in a vacuum and assume that all serious allegations were unlikely and therefore needed cogent proof. Now one starts with determining the likelihood of the allegation having regard to the surrounding circumstances and not in a vacuum. Having done so the only question is whether the allegation is proved to the balance of probabilities. In other words, the inherent probability itself includes the particular circumstances.

273. Another example was *Xentric Limited v The Commissioners for Her Majesty's Revenue and Customs* [2010] UKFTT 620 (TC) where Judge Malachy Cornwell-Kelly held at paragraph 179 that:

> "It remains only to note that the contention that there must be some specially refined standard of proof in civil cases where the allegation is in essence that the taxpayer knowingly etc. took part in a transaction connected with fraud has been finally disavowed at the highest level. In *In Re B* [2009] 1 AC11 , Lord Hoffman said at paragraph [13]:
> I think the time has come to say once and for all that there is only one standard of proof and that is proof that the fact in issue more probably occurred than not.

274. Mr Kinnear submitted that some of the Tribunal's decisions have now been considered and carefully reviewed by the higher courts. Most recently, ***Brayfal***, in which Lewison J assessed the test applied by the First Tier Tax Tribunal. He confirmed the correctness of the Tribunal's approach to the law and the test applied. In particular, in paragraphs 21 and 22 the application of a balance of probabilities test by the Tribunal in respect of knowledge was approved, subject to confirmation that the burden rested on HMRC to prove the allegation. These passages made clear that no unfairness could be said to fall to the Appellant by the operation of the balance of probabilities test.

275. Mr Kinnear also drew the Tribunal's attention to *Euro Stock Shop Limited* [2010] UKUT 259 (TCC) in which the Arnold J accepted a submission which included the suggestion that applying a balance of probabilities test to actual knowledge was appropriate (paragraph 21). It was again clear throughout the judgment that the standard of proof applied is the ordinary civil standard.

276. Mr Kinnear said that the Appellant's submission appeared to be that the First Tier Tribunal's approach hitherto has been wrong, and the Upper Tribunal and High Court are equally incorrect in affirming decisions which applied a simple civil test of proof. However, there was no solid basis for the Appellant's submission that a criminal standard should apply. Returning to Baroness Hale's dicta in respect of care proceedings for guidance, he noted that there serious allegations, even criminal in nature, were in issue. However in this case the Tribunal was simply charged with deciding whether the objective criteria for the right to reclaim VAT had been met. If they had not because the Appellant knew or should have known its transactions were connected to fraud the right does not arise in the Appellant's case. The purpose of these proceedings is not to punish or deter anyone. The consequences are not penal.

277. In response to the Appellant's submission that the case against the Appellant is so inherently improbable that very strong evidence would be called for to discharge the burden of proof, Mr Kinnear contended that the burden of proof was and remained the preponderance of probabilities. Submissions based on the seriousness of the allegation against the Appellant had little merit: the Appellant's trade, in its entirety, was connected to fraud. The inherent unlikelihood of its being connected to something so serious as a carefully constructed scheme to defraud HMRC had passed: it was so connected. The issue, whether it knew or should have known, was to be decided to the civil standard taking into account all of the circumstances of the case.

278. The Appellant's basis for the submission was that it was inherently unlikely that its agents would be knowing participants in fraud was that they were men of good character in their late 50s. However, they were men of experience operating in a sector rife with fraud, and moreover in the midst of a complex scheme designed and run solely to operate a fraud. On his own case Mr Thackwell was a close friend of the fraud's likely orchestrator, Rory Venables. When one looked at the scheme it was simply not inherently unlikely that the Appellant would be knowingly involved.

279. Mr Kinnear referred again to the example given by Lord Hoffman in *In Re B:*

> "It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely. If, for example, it is clear that a child was assaulted by one or other of two people, it would make no sense to start one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so. The fact is that one of them did and the question for the tribunal is simply whether it is more probable that one rather than the other was the perpetrator".

280. Mr Kinnear submitted that it was clear that in this case a fraud had taken place. It was accepted, and clear, that the Appellant's supplier and customer was involved knowingly in that fraud. It was not inherently unlikely, therefore, that the Appellant

was too. The questions for the Tribunal were simply, was it more probable that not, having regard to all the circumstances, that the Appellant knew of the fraud? Alternatively, if the Appellant did not know, was it more likely than not that it should have that is was the only reasonable explanation for the trade, on the balance of probabilities, that it was connected to fraud.

Findings

281. We found that the standard of proof is in the words of Lord Hoffman in *In Re B*

> "There is only one rule of law namely that the occurrence of the fact in question must be proved to have been more probable than not".

282. Mr Cox had submitted that given the nature of the allegations the criminal standard of proof was appropriate but the civil standard of proof has been universally applied in the MTIC cases and justification for its use in such cases was eloquently enunciated by Judge Avery-Jones in paragraph 9 of *Telement Limited.* These proceedings are not criminal or quasi-criminal, but are rather whether the Appellant had complied with all the conditions for claiming input tax.

283. We found that by omitting to ask the questions set out by Mr Kinnear in paragraph 257 above the Appellant, through Mr Thackwell, ought to have known that its transactions were connected to fraud. As stated by the Court of Appeal in *Mobilx* we found that Mr Thackwell ought to have known that the only realistic possibility was that the transactions were connected to fraud.

284.We have carefully assessed Mr Cox's submissions on behalf of the Appellant. We found that like Mr Thackwell he too frequently referred to Mr Thackwell's previous experience in the trade and the periods before December 2005 when the Appellant, through Mr Thackwell, had traded with Venables without incident or difficulty. However we found that the test to be applied was whether having regard to the totality of the circumstances presented to Mr Thackwell at the time, a director of reasonable competence would have concluded that a connection with fraud was the only reasonable explanation for the transactions.

285. Whist we accepted Mr Cox's suggestion that an innocent party might have been of value to the organisers of the fraud we found that considering all the features of the transactions as a whole they should not have been regarded by a reasonable person in the Appellant's position as compatible with legitimate arm's length trading.

286. Further, we found that it was more probable than not that the Appellant knew, through Mr Thackwell, of the fraud.

287. We found Mr Thackwell's evidence on cross-examination by Mr Kinnear to be faulty. Mr Cox asked the Tribunal to take into account the fact that Mr Thackwell had never been charged or convicted of dishonesty and emphasised the good character of the Appellant's directors and their long unblemished careers in business.

288.However we found Mr Cox's submission concerning the £750,000 from 385 North kept and used by Mr Thackwell despite the fact that it was for an order which was not completed most unsatisfactory. Mr Thackwell's action in making no attempt to repay this amount seemed to us strange for a prudent and honest businessman. On the other hand it made more sense if he knew that it was part of a scheme to enable him to finance payments due to Casa 1 until he received the VAT repayment. £750,000 is a substantial sum of money. We found Mr Thackwell's suggestion that 385 North might not have sought its return because of an oversight on their behalf simply not credible.

289. We found it strange that Mr Thackwell did not find it questionable that, as noted by Mr O'Reilly, throughout the deals in February and March Casa 1 would sell a type of phone to the Appellant and then purchase the same type of phone from them just a few days later or vice versa.

290. We noticed that with respect to the six payments made by Phista to the Appellant on 1 March 2006 as traced by Mrs Essex the same money was used for each payment and no one in the circle had sufficient funds to pay the full amount of any of the invoices. On this day Phista not only made the six payments to the Appellant but also another six to Casa 1, each one after the receipt of a payment from Dunas.

291. Assuming they all travelled round the circle, possibly with another player added instead of the Appellant in the chains that went first to Casa 1, it seems unbelievable that forty-eight separate payments could be made in a single day, each being required to be made when the money from the previous step in the chain had arrived, without either one person being authorised to operate all the accounts or all the participants sitting by their computers moving money.

292. This applied too to the six payments traced by Mrs Essex which the Appellant received on 27 July 2006 and the further six payments on 14 August 2006 which were linked to a total of fifteen payments from Phista, which together with payments to and from the other participants amounted to a total of sixty separate movements, each of which had to be made in sequence.

293. In respect of several of the UK to UK deals the Appellant did not seem to make any profit. It is difficult to understand why Mr Thackwell entered into these transactions unless he knew that they were part of the wider fraudulent scheme.

294. Mr Thackwell was an experienced businessman and had worked for some years as an accountant and financial controller. He knew what was necessary to produce the end of the year accounts yet he omitted to print out copies of the bank statements from FCIB before the Appellant's account was frozen and even after having experienced this was unable to produce statements from his new bank for HMRC.

295.Contrary to Mr Cox's contention Mr Matthews was asked by Mr Kinnear whether he had ever examined the Appellant's bank accounts and replied in the negative. The Appellant was unable to produce any business or accounting records relating to the payment of the goods yet had a turnover in excess of £78 million in the year ending

30 September 2006. We therefore rejected Mr Cox's submission that it was reasonable for Mr Thackwell to consider that there would be no benefit in having paper copies of the entries in the bank account.

296.We found that the Appellant in fact knew very little about mobile phones, their distributors or the networks. Mr Thackwell admitted he had never seen any of the goods in which he purported to trade. The only evidence of their existence was the inspection reports completed by JD Freight.

297. Mr Thackwell stated that he had received numerous faxes with offers to trade yet he chose to deal with Digikom, the one company that was deeply involved with the fraudulent scheme and make three substantial purchases from before verifying their VAT number with Redhill.

298. The Appellant owed some £3 million in total to Digikom and Casa 2 and yet it appeared that no serious attempt was made by them to enforce payment. Similarly the Appellant made no serious attempt to collect the some £1.3 million owed to it by Phista. Mr Thackwell said that JD Freight was owed £14,000 or so by the Appellant. If JD Freight was a genuine business then one would have expected that it and Digikom and Casa 2 would have made some efforts to collect the money owed, either using debt collectors or seeking to wind up the Appellant. There was no suggestion that this was done and yet as an experienced businessman Mr Thackwell did not question this.

299. Mr Cox submitted that it was unrealistic for the Appellant to pursue Phista in the Cypriot courts yet he found it acceptable for the Appellant to rely on its *Romalpa* clause in order to retain title to the goods.

300.Mr Cox made much of the Appellant's retention of title clause but other than confirming that he had used the same clause whilst working at First Choice we found that Mr Thackwell did not appear to have considered how difficult it would have been to enforce once the goods had been transported overseas. Even when Phista owed the Appellant a considerable amount of money neither Mr Thackwell nor his supplier ever attempted to action the clause and seek the return of the goods in order to recoup some funds by reselling them.

301. Despite Mr Thackwell's repeated assertion that he acted at all times as a prudent businessman we found that his decision to sell a further £5.5 million's worth of phones to Phista at a time when Phista owed the Appellant over £8 million far from a commercial one. This was not a commercial decision made by a businessman with years of experience in finance. Nor did it conform to Mr Thackwell's original witness statement made before the FCIB evidence was available that the Appellant did not release the goods until payment was made. Mr Thackwell claimed that he had decided to make the further deal with Phista because he knew Phista would pay the Appellant. At the same time the Appellant owed its suppliers £15 million.

302. Despite owing and being owed large sums of money and having been warned by HMRC that Casa 2 and Phista were connected with fraud the following year the Appellant carried out further trade with them.

303. Mr Thackwell was unable to provide any cogent reason as to why Venables would have given him the name of a customer, Phista to whom he could sell goods at a substantial profit which had been bought from Venable's company. We also found it strange that when questioned by HMRC concerning Casa 1 Mr Thackwell only referred to Mick Smith and did not mention Venables.

304. The Government announced in December 2005 that it intended to apply to the EC for derogation to introduce a reverse charge for mobile phones and computer chips to reduce fraud. This received substantial press publicity up to March 2006. Given the further substantial warnings about the existence of fraud given to the Appellant by HMRC and the guidance given in relation to good practice, we found that the actions that the Appellant took or did not take before completing a deal showed very little care or concern.

305. Mr Thackwell constantly referred to what he had done at First Choice and Eurotel but this was before the publicity concerning the frauds. The Appellant traded with new entities, used offshore bank accounts and arranged for the goods to be delivered to countries other than the customer's country of origin. A legitimate trader would not have proceeded risking millions of pounds on the basis of trust in individuals such as the officials of Digikom and Phista of whom Mr Thackwell had scant knowledge.

306. For these reasons we find that the Appellant, through its director, Mr Thackwell, ought to have known and on the balance of probabilities did know that all of its deals were connected with fraud.

Decision

307. The appeal is dismissed.

Costs

308. Prior to the hearing the parties had made a joint application that Rule 29 of the Value Added Tax Tribunals Rules 1986 should apply as the case is a transitional one which commenced under these rules. At that time both parties conducted the litigation on the basis that these rules would apply and costs would follow the event unless there were any good reason to the contrary.

309. At the conclusion of the hearing both parties confirmed their agreement that costs follow the event and accordingly it is hereby directed that the Appellant shall pay the costs of HMRC of and incidental to and consequent upon this appeal on the standard basis to be determined on detailed assessment by a costs judge.

310.This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal

against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

TRIBUNAL JUDGE
RELEASE DATE: 4 October 2011