# TC02667

**Appeal number: LON/2008/1471**

***VAT – input tax – right to deduct – MTIC fraud alleged – Mobilx guidelines – standard of proof – knowledge of fraud needed – contra-trading – admissibility of evidence – adequacy of circumstantial evidence – evidence as to grey market trading patterns - independence of expert witnesses - appeal allowed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**CCA DISTRIBUTION LIMITED (in administration)** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY**
**JOHN AGBOOLA ACCA**

**Sitting in public in London on 15 March to 4 April 2012**

**Mr James Pickup QC and Mr Simon Taylor instructed by Smith & Williamson LLP for the taxpayer**

**Mr Christopher Kerr and Mr Ben Hayhurst instructed by the Solicitor and General Counsel to Her Majesty's Revenue & Customs for the Crown**

## DECISION

*Introduction*

1 These are appeals against the following decisions made by the commissioners:

(i) a decision, communicated by way of a letter dated the 13th of July 2007, to deny CCA the right to deduct input tax of £6,320,368 in relation to deals conducted in the VAT periods 04/06 and 05/06. (The sum denied in the original decision letter was £6,935,084, but the amount of the 05/06 denial was revised to £2,865,308 in a letter dated the 5th of September 2007, and the amount of the 04/06 denial was revised to £3,455,060 in a letter dated the 27th of April 2010.)

(ii) a decision, communicated by way of a letter dated the 13th of August 2007, to deny CCA the right to deduct input tax of £3,553,886.54 in relation to deals conducted in the VAT period 06/06.

2 The grounds for the commissioners' decisions were that the deals were connected with the fraudulent evasion of VAT, and CCA knew of the connection or should have known of the connection. The issue is therefore whether the Crown has proved, on the balance of probabilities, that CCA knew that its transactions were connected with tax fraud or whether for CCA the only reasonable explanation of them was that they were so connected. It is common ground that Mr Ashley Trees was the guiding mind in control of CCA.

3 As is usual in this type of case, we have received voluminous documentary evidence, and the particular evidence of Mr Ashley Trees, Mr Vincent D'Rozario, Mr Allyn Cunningham, Ms Jayne Holden, Ms Judith Clifford, Mr Andrew Tidey, Mr Roderick Stone, Mr Kenneth Rhodes, Mr Peter Birchfield, Mr Simon Devine, Mr Douglas Armstrong, Ms Vivien Parsons, Mr Peter Goulding, Mr Peter Cameron-Watson, Mr Rupinder Kandola, Ms Rita Coelho, Mr John Foy, Mr Andrew Siddle, Ms Erika Carroll, Mr Nigel Attenborough, Mr John Fletcher and Mr Martin O'Neill.

4 From the very substantial quantity of evidence received, we have distilled what we consider to be the salient facts and we find those stated to have been proved on the balance of probabilities; thus, where we mention statements of fact by witnesses (but not opinions or allegations) we have accepted them as proved unless the contrary is indicated.

5 As will be seen, the hearing took place in March and April of 2012. At the close of proceedings, it was indicated that criminal proceedings which were potentially related at least in part to these appeals were yet to take place, but were expected to do so in the summer of 2012. With the agreement of both counsel, we made a direction accordingly adjourning the case pending further application by either party. Following the criminal proceedings, it was indicated to the tribunal office on 13 August that the parties wished to conclude matters by a final oral hearing. Repeated difficulties were encountered in finding a suitable date for such a hearing, and the parties indicated on 16 November 2012 that they wished the tribunal to proceed to a decision without a further hearing. This decision has been further delayed for reasons which appear below.

6 For the three periods at issue, CCA's trading activity involved buying mobile phones from UK suppliers and immediately exporting them to another state in the EU. There were 39 transactions in all; they are summarised in the appendix on the basis of the deal sheets we received. The goods were purchased with VAT at the standard rate, and sold with VAT at the zero rate. CCA's VAT periods 04/06, 05/06 and 06/06 were the calendar months of April, May and June 2006 respectively.

*The legal framework*

7 The various uncertainties and issues which had built up in this area of the law have fortunately been resolved by the recent decisions of the European Court in *Axel Kittel v Belgium; Belgium v Recolta Recycling Sprl* [2006] ECR 1-6161 and of the Court of Appeal in *Mobilx Limited (in administration) v HMRC & Ors.* [2010] All ER (D) 104, interpreting *Kittel*. In view of this very helpful clarification of the position, it suffices to draw the essential features of the law as it affects these appeals from the judgment of the Court of Appeal, delivered by Moses LJ, as follows[1]:-

> *The legal basis of the right to deduct input tax*
> [46] S.1 of the Value Added Tax Act 1994 provides that VAT should be charged, in accordance with the provisions of the 1994 Act, on, amongst other things, the supply of goods in the United Kingdom, and s.1(2) establishes that liability to account for VAT on the supply of goods within the United Kingdom is on the supplier. S.4 provides that VAT should be charged on any taxable supply of goods made by a taxable person in the course or furtherance of a business carried on by him. S.24 defines input tax:-

[1] The italicised headings are supplied.

"(1) Subject to the following provisions of this section, 'input tax', in relation to a taxable person, means the following tax, that is to say –

(a) VAT on the supply to him of any goods or services;

(b) VAT on the acquisition by him from another Member State of any goods; and

(c) VAT paid or payable by him on the importation of any goods from a place outside the Member States,

being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him."

S.25(1) sets out the obligation on taxable persons to account for and pay VAT in respect of supplies made by them for each prescribed accounting period and also provides for credit in respect of input tax (see s.25(2)(3)).

*The fraud may not be in the proximate link in the chain*

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

> "56. *In the same way*, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.
>
> 57. That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.
>
> 58. In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them."
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> 59. *Therefore*, it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person *knew or should have*

> *known* that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity'. [emphasis added]"

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

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

*Economic activity contrasted with fraudulent activity*

[43] 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 (see *Halifax* § 59 and *Kittel* § 53). 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.

[47] Accordingly, 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 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.

*The nature of the fault*

[48] 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.

[49] It is the obligation of domestic courts to interpret the VATA 1994 in the light of the wording and purpose of the Sixth Directive as understood by the ECJ (*Marleasing SA* 1990 ECR 1-4135 [1992] 1 CMLR 305) (see, for a full discussion of this obligation, the judgment of Arden LJ in *Revenue and Customs commissioners v IDT Card Services Ireland Limited* [2006] EWCA Civ 29 [2006] STC 1252, §§ 69-83). Arden LJ acknowledges, as the ECJ has itself recognised, that the application of the *Marleasing* principle may result in the imposition of a civil liability where such a liability would not otherwise have been imposed under domestic law (see *IDT* § 111). 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. In a sense, the dichotomy between domestic and Community law, in the circumstances of these appeals, is false. In relation to the right to deduct input tax, Community and domestic law are one and the same.

*Knowledge of the details of the fraud not required*

[52] If a CCA 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 losses his right to deduct, not as a penalty for negligence, but because the objective criteria for the scope of that right

are not met. It profits nothing to contend that, in domestic law, complicity in fraud denotes a more culpable state of mind than carelessness, in the light of the principle in *Kittel*. A trader who fails to deploy means of knowledge available to him does not satisfy the objective criteria which must be met before his right to deduct arises.

[59] The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who "should have known". Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud, and if it turns out that the transaction was connected with fraudulent evasion of VAT and he should have known of that fact, he may properly be regarded as a participant for the reasons explained in *Kittel*.

*The need for certainty as to the existence of fraud*

[56] It must be remembered that the approach of the court in *Kittel* was to enlarge the category of participants. A trader who should have known that he was running the risk that by his purchase he *might* be taking part in a transaction connected with fraudulent evasion of VAT, cannot be regarded as a participant in that fraud. The highest it could be put is that he was running the risk that he might be a participant. That is not the approach of the Court in *Kittel*, 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, as the Chancellor concluded in his judgment in *BSG*:-

> "The relevant knowledge is that *BSG* ought to have known by its purchases it was participating in transactions which were connected with a fraudulent evasion of VAT; that such transactions might be so connected is not enough." (§ 52)

[60] The true principle to be derived from *Kittel* does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction was connected with fraudulent evasion. But a trader may be regarded as a

participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion.

*The time factor in identifying a connected fraud*

[62] The principle of legal certainty provides no warrant for restricting the connection, which must be established, to a fraudulent evasion which immediately precedes a trader's purchase. If the circumstances of that purchase are such that a person knows or should know that his purchase is or will be connected with fraudulent evasion, it cannot matter a jot that that evasion precedes or follows that purchase. That trader's knowledge brings him within the category of participant. He is a participant whatever the stage at which the evasion occurs.

*The irrelevance of tax loss computations*

[65] The *Kittel* principle is not concerned with penalty. It is true that there may well be no correlation between the amount of output tax of which the fraudulent trader has defrauded HMRC and the amount of input tax which another trader has been denied. But the principle is concerned with identifying the objective criteria which must be met before the right to deduct input tax arises. Those criteria are not met, as I have emphasised, where the trader is regarded as a participant in the fraud. No penalty is imposed; his transaction falls outwith the scope of VAT and, accordingly, he is denied the right to deduct input tax by reason of his participation.

*The role of 'due diligence' in the analysis*

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

*The burden of proof*

[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 is outwith the scope of the right to deduct it must prove that assertion. No sensible argument was advanced to the contrary.

*The relevance of the surrounding circumstances*

[82] But that is far from saying that the surrounding circumstances cannot establish sufficient knowledge to

treat the trader as a participant. As I indicated in relation to the BSG appeals, Tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected 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 taking part in a transaction connected with fraudulent evasion of VAT. The circumstances may well establish that he was.

[83] The questions posed in BSG (quoted here at § 72) by the Tribunal were important questions which may often need to be asked in relation to the issue of the trader's state of knowledge. I can do no better than repeat the words of Christopher Clarke J in *Red12 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.
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> 110 To look only at the purchase in respect of which input tax was sought to be deducted would be wholly artificial. A sale of 1,000 mobile telephones may be entirely regular, or entirely regular so far as CCA is (or ought to be) aware. If so, the fact that there is fraud somewhere else in the chain cannot disentitle CCA 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 CCA has participated and in each of which there has been a defaulting trader. A tribunal could legitimately think it unlikely that the fact that all 46 of the transactions in issue can be traced to tax losses to HMRC is a result of innocent coincidence. Similarly, three suspicious involvements may pale into insignificance if the trader has been obviously honest in thousands.
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> 111 Further in determining what it was that CCA knew or ought to have known the tribunal is entitled to look at the totality of the deals effected by CCA (and their characteristics), and at what CCA did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them."

*The standard of proof*

8 It remains to note that the contention that the proposition, that there must be some specially refined standard of proof in civil cases where the allegation is in essence that a person knowingly took part in a transaction connected with fraud, has been disavowed at the highest level. In *In Re B* [2009] 1 AC11, Lord Hoffman said at [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.

*Contra-trading*

9 Since this case involves 'contra-trading', it will be useful to record the judicially accepted description of it. In *Blue Sphere Global* [2009] STC 2239 the Chancellor, at [4], had adopted the description of contra-trading given by Dr Avery Jones at first instance in *Olympia Technology*:

> [4] Contra-trading is the name given to a method by which the fraudulent evasion of VAT may be concealed from the Revenue authorities of Member States. It is clearly described in paragraphs 3 to 6 of the decision of the VAT and Duties Tribunal (Dr Avery-Jones and Ms Sandi O'Neill) in *Olympia Technology Ltd v HMRC* [2008] UKVAT 20570 in the following terms:
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> > 3. We start with a simple example of an import of goods by X who sells them to Y who exports them. The tax on acquisition (import) by X is cancelled by input tax of the same amount, and the output tax charged on sale by X will be cancelled by input tax repaid to Y on the export, so that the United Kingdom exchequer receives no net tax. If both X and Y are fraudsters Y will have to finance

the output tax charged by X, which is recovered by X not paying the output tax to Customs. The only gain by the fraud is if Customs pay the input tax to Y when the exchequer is left with a loss of the amount of the input tax; the non-payment of output tax by X is merely the recovery of what Y put in. If X is a fraudster and Y is innocent, Y finances the output tax charged by X and is entitled to repayment of this input tax even though this represents tax never paid by X. The non-payment of the output tax by X is the benefit of the fraud, and the exchequer is left with the same loss of the amount of the input tax.

4. In contra-trading there are, in its simplest theoretical form, two chains of transactions. First, the "dirty chain," in which there is a defaulting trader ("defaulting trader" for short), comprising A (the defaulting trader) who is the importer of goods into the UK, who sells them to B (the buffer company), who sells them to C who exports the goods, and is thus in a VAT reclaim position. (For simplicity we shall use the expressions import and export for intra-Community trade, acknowledging that these are not the proper labels.) Secondly, the "clean chain," in which there are no missing traders, comprising C, who is this time the importer of other goods, who sells to D, who sells to E, the exporter (CCA in this appeal is in the position of E in relation to the three alleged contra-trading deals). The effect of the clean chain is that the net input tax position of C in the dirty chain is cancelled by output VAT in the clean chain. There is no direct financial benefit to C in this as C has paid the input tax to B, and therefore C could be in league with the defaulting trader, or could be a trader who is controlled (possibly without knowing it) by a "puppet master" to enter into the cancelling transactions to disguise A's involvement a fraud, or a trader who happens to carry out both import and export transactions unconnected with any fraud,. The effect of the contra-trades is that C does not excite Customs' attention as it is not applying for a repayment; the non-payment of tax by A is less noticeable since without a return Customs do not know how much tax A owes. The input tax reclaim that C had in the dirty chain has moved to E who is at the end of a clean chain. The only way for Customs to refuse repayment of E's input tax is to show that E knew or ought to have known of A's fraud in a completely different chain, and of C's involvement in the fraud.

5. The nature of contra-trading is easy to state in the above way but the problem in real life is that there is no logical connection between the clean and dirty chains. First, the VAT accounting periods for C and E will not coincide; E may be on a monthly accounting period as it is an habitual exporter, but C may be on a three-monthly period, and C need only arrange that the net tax is nil

> during that three-monthly period by entering into transactions after E's transactions. Secondly, the goods dealt in may be different in the two chains. Thirdly, for a particular C there may be many different equivalents to A and E, and for a particular E there may be many equivalents of C, each with more than one equivalents to A. Fourthly, C may not have deliberately entered into imports in the clean chain in order to cancel the input in the dirty chain; C may merely be both an importer and an exporter whose outputs in relation to the former happen roughly to cancel its inputs in relation to the latter. Fifthly, there may be many Bs and Ds in between the importer and exporters.
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> 6. The fraud in a simple MTIC fraud is that the defaulting trader always intends to default. It will normally be the case that he defaults later than the dates the deals in the chains are executed because he fails to pay the tax due for the period in which the deals occur. One of the problems is that C, the exporter in a simple MTIC fraud, is always separated from the defaulting importer by one or more Bs and may not know of the existence of A. If C enters into a deal that is too good to be true it can be said that he ought to know of the fraud even though he does not know of A's identity. In a contra-trading fraud the question is whether E knows or ought to have known that C entered into the clean chain transactions to cover A's intention to default. Again the problem is that E may be separated from C by one or more Ds (although in this case C, the alleged contra-trader sells directly to E, CCA).

10 In *Blue Sphere* the Chancellor was considering an appeal from a decision of the first instance tribunal in which the tribunal had applied the test that the due diligence carried out by the taxpayer "was not sufficient to protect [it] from the risk of involvement in transactions which might turn out to have undesirable associations". Referring to that test, Sir Andrew Morritt said:

> **[52]** In my view, this test is misleading for two reasons. First the burden is on HMRC to prove that BSG ought to have known that by its purchases it was participating in transactions connected with fraudulent evasion of VAT. It is not for BSG to prove that it ought not. Second, it is not sufficient to demonstrate that BSG was involved in transactions which 'might' turn out to have undesirable associations. The relevant knowledge is that BSG ought to have known that by its purchases it was participating in transactions which were connected with the fraudulent evasion of VAT; that such transactions might be so connected is not enough.
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> **[53]** Similar considerations apply to the formulation of the case for HMRC. The contention is that BSG ought to have known of the connection, through Infinity, between its transactions and

the fraudulent evasion of VAT by the defaulting traders in the dirty chain. This formulation involves two separate questions, knowledge of the connection and knowledge that the connection was with the fraudulent evasion of VAT. Clearly BSG would have known that its transactions would, for the purposes of VAT, be connected with other transactions with which Infinity was concerned in the sense that Infinity's output tax, paid by BSG, would have to be set against input tax payable by Infinity in respect of other transactions. But that is not enough. HMRC must also prove that BSG ought to have known that those other transactions involved the fraudulent evasion of VAT.

**[54]** The tribunal rejected any allegation of conspiracy involving BSG or Infinity. It rejected the suggestion that BSG had been manipulated. It acquitted Infinity of fraud. If Infinity did not know of the fraud when it happened and was not party to any arrangement that it should happen, how could BSG have known of any fraud before it happened? No amount of due diligence undertaken in respect of Infinity, Universal or Allimpex could have revealed it. And if BSG could not have known, how could there be circumstances from which it could properly be concluded that BSG ought to have known?

**[55]** In my view it is an inescapable consequence of contra-trading that for HMRC to refuse a reclaim by E it must be in a position to prove that C was party to a conspiracy also involving A. Although the fact that C is party to both the clean chain with E and dirty chain with A constitutes a sufficient connection it is not enough to show that E ought to have known of the fraudulent evasion of VAT involved in the subsequent dirty chain. At the time he entered into the clean chain there was no such dirty chain of which he could have known, nor was the occurrence of such dirty chain inevitable in the sense of being pre-planned.

11 A pre-*Mobilx* decision on contra-trading was given in *RCC v Livewire Telecom Limited* [2009] STC 643, where Lewison J said at [102] – [106]:

> [102] In my judgment in a case of alleged contra-trading, where the taxable person claiming repayment of input tax is not himself a dishonest co-conspirator, there are two potential frauds:
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> i) The dishonest failure to account for VAT by the defaulter or missing trader in the dirty chain; and
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> ii) The dishonest cover-up of that fraud by the contra-trader.
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> [103] Thus it must be established that the taxable person knew or should have known of a connection between his own transaction and at least one of those frauds. I do not consider that it is necessary that he knew or should have known of a connection between his own transaction and both of these frauds. If he knows or should have known that the contra-trader

is engaging in fraudulent conduct and deals with him, he takes the risk of participating in a fraud, the precise details of which he does not and cannot know. As Millett J put it in *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 295, [1992] 4 All ER 385, [1989] 3 WLR 1367 (in the context of dishonest assistance in a breach of trust):

> In my judgment, however, it is no answer for a man charged with having knowingly assisted in a fraudulent and dishonest scheme to say that he thought that it was 'only' a breach of exchange control or 'only' a case of tax evasion. It is not necessary that he should have been aware of the precise nature of the fraud or even of the identity of its victim. A man who consciously assists others by making arrangements which he knows are calculated to conceal what is happening from a third party, takes the risk that they are part of a fraud practised on that party.

[104] This conclusion is, I think, consistent with what Burton J said in *Just Fabulous* (para 24):

> *whether or not* Evolution knew of the precise nature of the defaulter chain or of the goods purportedly dealt with in that chain or the identities of the participants in that chain, Evolution *knew of the fraudulent aim of Blackstar* in acquiring, through the off-set on the contra-trading transaction, the opportunity to receive, by such off-set, VAT which it would not be able to recover direct from the Revenue. (Emphasis added)

[105] In other words, if the taxable person knew of the fraudulent purpose of the contra-trader, whether he had knowledge of the dirty chain does not matter.

[106] However, if the contra-trader is not himself dishonest, then there will only have been one fraud, namely the dishonest failure to account for VAT by the defaulter in the dirty chain. In that situation, the taxable person will not, in my judgment, be deprived of his right to reclaim input tax unless he knew or should have known of that fraud. But if the taxable person knew or ought to have known of that fraud, then he will be deprived of his right to reclaim input tax, even if the contra-trader is wholly innocent (as, for instance, where the missing trader and the taxable person between them dishonestly orchestrate a sale to and purchase from an innocent intermediary, which appears to have happened in *Recolta*).

12 In *Brayfal Ltd v RCC* [2011] UKUT 99 (TCC) Lewison J, sitting in the Upper Tribunal explained, at [19], [20] and [22], that in applying the *Mobilx* principles to contra-trading situations the question is necessarily focussed:-

> [19] The essence of contra-trading is that transactions in the clean chain are used to mask transactions in the dirty chain. There is no fraud in the clean chain. The dirty chain is where the fraud takes place. Accordingly, in order for a trader in the clean chain to know or have the means of knowledge that his transaction is connected with fraud, he must either know or have the means of knowledge that the contra-trader is a fraudster; or he must know or have the means of knowledge of the fraud in the dirty chain. The members [of the First-tier Tribunal] accepted Mr Kibbler's evidence that he could only check Brayfal's own customers and suppliers (§ 158). In other words they found that he had no knowledge or means of knowledge of the dirty chain.
>
> [20] So the question was: did Mr Kibbler have the means of knowledge that Future Communications was a fraudster? Having considered a number of different points the members summarised their conclusion as follows:
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> > Summing up, in the members' opinion, Mr Kibbler is an experienced businessman with many years experience of exporting mobile phones. He visited Future Communications on a number of occasions and found what appeared to be a perfectly respectable business with premises appropriate to the level of business he conducted with them. He was aware that some of the staff had experience in trading mobile phones and also that Future Communications had taken over a company, Unique Distribution, which was formerly part of the British Leyland Group, which he knew from his experience was a reputable company. He asked questions on where they sourced their supplies and was given acceptable answers although not names of actual suppliers. The members believe that no supplier would be prepared to disclose the actual source of its supplies and no reasonable customer would expect him to. For this reason the members conclude that Brayfal did all it could reasonably be expected to do to ensure the integrity of its supply chain.
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> [22] The [tribunal] members' ultimate conclusion dealt with both actual knowledge and the means of knowledge (i.e. both limbs of the *Kittel* test). If anything, the way in which the members formulated their conclusion imposed a higher burden on Brayfal than they should have done. They found that Brayfal had proved that it did not have actual knowledge or the means of knowledge, whereas we now know from *Mobilx* that the burden of proof lies on HMRC to prove that Brayfal did have knowledge or the means of knowledge. The appeal must be dismissed.

13 In *POWA (Jersey) Ltd v HMRC* [2012] UKUT 50 TCC, Roth J considered an appeal based on the submission that "on a proper

analysis of the ECJ jurisprudence, even if a trader should have known that there was fraud in a transaction or transactions higher up in the chain, that was not a ground on which its claim for repayment of input tax could be denied since in those circumstances it was not sufficiently involved in the frauds" [para 20]. Roth J made the following observations concerning the application of the *Mobilx* test:

> [32] Accordingly, I consider that the judgment there made clear that when the trader claiming deduction of input tax was not itself fraudulent, the material consideration was whether it knew or had the means of knowing that there was another transaction in the chain characterised by fraud, irrespective of whether that fraudulent trader was one with which the taxable person dealt directly.
>
> [34] I consider that, if PJL should have known that the transactions in which it was engaged were part of a chain in which one or more earlier transactions were fraudulent, albeit that its immediate supplier was not dishonest, that test is satisfied."

[36] The ECJ held that although the VAT regime imposes obligations on suppliers to act as tax collectors for the State and in the interests of the public exchequer, those obligations must be proportionate. After referring to paras 65-66 of the judgment in *Teleos* , the court concluded (at para 27):

> It follows that a supplier must be able to rely on the lawfulness of the transaction that he carries out without risking the loss of his right to exemption to VAT, if, as in the case in the main proceedings, he is in no position to recognise – even by exercising due commercial care – that the conditions for the exemption were in fact not met, because the export proofs provided by the purchaser had been forged.

[41] in articulating the test to be applied at the outset of the decision, the FTT stated (at para 11):

> . . . while knowledge, or the means of knowledge, of some fraud connected with VAT must be established (the burden of doing so being on the commissioners), it is not necessary to show that the trader concerned knew (or could have known) of the details of the fraud, including the identity of the fraudster. It is enough that he knew, or had the means of knowing, or should have known, that his transaction was, on the balance of probabilities, connected with fraud.

[42] For PJL it is submitted that this is not the correct test. It is not sufficient that the transaction was on the balance of probabilities connected with fraud; the question is whether he should have known that it was connected with fraud.

> [43] Although it is understandable that the First-tier Tribunal expressed the test as it did at the time of the decision, the Court of Appeal's judgment in *Mobilx* has established that it is insufficient to show that the trader knew or should have known that it was more likely than not that the transaction was connected with fraud: see at [53]-[60]. Accordingly, a balance of probabilities in this sense does not form part of the test and HMRC accepted on this appeal that the statement by the FTT at para 11 *was* incorrect.
>
> [44] If the FTT had proceeded to reach its conclusions on that basis, it would have been necessary to consider, as in *Mobilx* itself, whether on the primary facts found by the FTT the same conclusion would have been reached applying the correct test. I am satisfied that the FTT did in fact apply a test involving the higher standard of knowledge.
>
> [45] Paragraph 11 forms part of the introductory section of the decision. As pointed out by Mr Puzey for HMRC, when the FTT came to consider its conclusions, under the heading "The legal tests" it formulated the relevant question correctly:
>
> > . . . whether PJL, in the person of its controlling minds – its directors Mr Woods and Mr Chater – entered into transactions knowing that they were connected with fraud, regardless of whether the fraud was committed by its immediate counterparty or by a trader at one or more removes from it in the chain, or in another chain linked by a contra-trader.
>
> The same formulation was repeated at paras 127 and incorporated in the summary at para 132. It is quite clear from reading the entire decision that this is the test which the FTT actually applied. Accordingly, this ground of appeal fails.

14 This appeal has involved some absences of evidence from CCA which we would have expected to see led, and in regard to which the following authorities have been drawn to our attention by counsel for the appellant.

15 The first is *Jaffray v Society of Lloyd's* [2002] EWCA Civ 1101, which concerned litigation by certain Lloyd's Names against syndicates alleging misrepresentation and fraud in their recruitment to Lloyd's and their subsequent liability for long-tail asbestos losses suffered by those syndicates. During the course of the trial a number of witnesses were included in the trial bundles from witnesses on behalf of Lloyds. The trial judge read the witness statements, but later directed himself to disregard them since they were not called. The Judge did not draw an adverse inference against Lloyds for failing to call witnesses that it had served statements from and complaint was made of that approach on appeal.

16 The Court of Appeal considered that in the circumstances the Judge should have drawn an adverse inference (although this did not result in the appeal being allowed):

> 406. Mr Randall was not called to give evidence. It was somewhat unsatisfactory that a statement by him had been prepared and placed before the judge for his pre-reading. This case had many problems for the judge in terms of simply managing the case and, as explained in Part VIII below, he held that he had no power to compel Lloyd's to call those witnesses whose statements had been read by him and that the appropriate course was to put the statements out of his mind, and treat the witnesses as uncalled.
>
> There was no challenge to his ruling on this aspect by the names represented by Mr Goldblatt. Certain of the names in person have drawn attention to this aspect in their contention that the trial was unfair. We will deal with the ruling under that section of the judgment. But that still leaves the question of whether the judge should have drawn an adverse inference against Lloyd's.
>
> It seems to us that on aspects where the evidence points in a direction against Lloyd's in an area which could have been dealt with by Mr Randall the judge should have drawn an adverse inference from Lloyd's failure to call Mr Randall to deal with it. This does not mean that any allegation that the names make against Mr Randall must be accepted because he did not give evidence. It simply means that where the evidence points in a certain direction an adverse inference can be drawn from a failure to call the witness to deal with it.

17 The Court made it clear that a failure to call a witness does not inevitably lead to an adverse inference and that it does not follow that any allegation made but not responded to calls for inferences to be drawn:-

> 407. This conclusion seems to us to be in accord with the principles as to the drawing of adverse inferences summarised by Brooke LJ, after an extensive review of the authorities, in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324:
>
> > From this line of authority I derive the following principles in the context of the present case:
> >
> > (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

18 Finally, we note that argument about the admissibility of the evidence of Mr Roderick Stone referred to the interlocutory decision at first instance of Judge Mosedale in *Arjan Chandanmal & Ors t/a C Narain Bros* [2012] UKFTT 188 (TC) where these principles were stated:

> [22] Witnesses give evidence of fact from which the Tribunal forms its own opinion of the facts; opinion evidence is where the witness' opinion on the facts may be relied on by the Tribunal in reaching its own decision. There is therefore a very crucial distinction between fact and opinion evidence. As the Tribunal's duty is to form its own opinion on the facts, opinion evidence is only necessary where the matter is a specialist area outside the tribunal's general knowledge.
>
> [24] HMRC do not advance the proposition that Mr Stone could be an expert witness. Although it seems likely that Mr Stone is an expert in MTIC fraud from the experience he sets out in his witness statement, he is an officer of HMRC and he could not be considered to be an independent witness. And while the Tribunal might have power to accept expert evidence from someone who is not independent, I cannot see why I would do so particularly in this case where the opinions he expresses (largely on how MTIC fraud works) can as easily form part of HMRC's counsel's submissions. So in so far as Mr Stone gives opinion evidence it is not admissible.

*Notice 726*

19 Notice 726 was published by the Commissioners of Customs & Excise in August 2003. It followed the enactment of section 77A of the Value Added Tax Act 1994, which provided with effect from April 2003 that in the case of supplies of certain telephone and computer

equipment VAT unpaid in a chain could be recovered jointly and severally from the person primarily liable to pay it *and* from any person to whom a supply of the goods was made who at the time of the supply "knew or had reasonable grounds to suspect that some or all of the VAT payable in respect of that supply, or on any previous or subsequent supply, of those goods would go unpaid".

20 Subsection (6) of section 77A provided a rebuttable presumption that a person had reasonable grounds for suspecting that VAT would go unpaid if the price at which he bought was (i) less than the lowest price which could reasonably be expected to be payable on the open market, or (ii) was less than the price payable on any previous supply of the goods. The presumption was without prejudice to any other way of establishing reasonable grounds for suspicion, and the amount payable in the event of the section applying was the net tax unpaid on the goods.

21 Notice 726 explained section 77A and laid down guidelines which were designed to assist traders in avoiding liability under the section. The section was not, however, invoked in the cases under appeal, and no joint and several liability was pursued. In practice this Notice had come to be used for a rather different purpose, namely as a reference point for traders such as CCA who were liable to be denied repayments of input tax in situations where VAT had gone unpaid in the chain either before them or after them. This approach derived from a legal analysis confirmed by the European Court in 2006, and later by the Court of Appeal in 2010, which has been explained above.

22 The Notice emphasised the need for a trader to be circumspect about its trading connections. Under the heading "How will you establish 'reasonable grounds to suspect'?" section 2.5 of the Notice said:-

> You shall be presumed to have reasonable grounds for suspecting that the VAT on the supply would go unpaid if you have purchased the specified goods for less than:
>
> - The lowest market value of the goods; or
> - The price paid for them by any previous supplier
>
> These tests, which are rebuttable presumptions, are made without prejudice to any other way of establishing reasonable grounds for suspicion.

23 Section 3.3 of the Notice continued:-

> It is clear, from consultation, that businesses involved in the affected sectors are aware of the problems [of MTIC fraud]. In order for the fraud to be perpetrated the price has to be cut within the supply chain. This measure is

> aimed at businesses that either know who is carrying out the frauds, or choose to turn a blind eye. These businesses, if they do get caught up in the fraud, will have purchased goods that are priced either below the market price or at a lower price than that paid by a previous supplier in the chain. This is to the detriment of legitimate trade. Businesses that check the integrity of their supplies and the supply chain should not be affected by this measure.

24 For the purpose of checking the integrity of their supplies and the supply chain, section 4.4 of the Notice advised traders that they should take "reasonable steps" to establish the integrity of their customers, suppliers and supplies. Our witnesses agreed that this referred to a trader's "immediate customer" and "immediate supplier" and that a trader's enquiries could not be expected to go further than one up or one down the chain, commercial logic suggesting that it would be unrealistic to expect suppliers to disclose their sources for fear of being cut out in future. Section 4.5 of the Notice in fact made the same point. there was no evidence in this case of goods traded at prices below market value.

25 Section 8 of the Notice gave examples of some 18 checks or reference points to which it would be prudent to have regard. It was emphasised that this was not an exhaustive list of boxes to tick, but suggestions as to the areas of enquiry likely to be relevant. In summary, they are:-

i. The supplier's history
ii. The arrangements for financing and insurance
iii. Recourse if the goods are not as described
iv. The existence of a current market for the goods
v. Whether price increases in the chain are commercially viable
vi. Normal commercial price negotiations
vii. Reasons for any third party payments
viii. Existence of the goods
ix. Previous supplies of the goods to the trader
x. The condition of goods
xi. Certificates of incorporation and VAT registration
xii. Check on xi with HMRC
xiii. Letters of introduction on headed stationery
xiv. Trade references, written or oral
xv. Credit or background checks
xvi. Personal contact with senior officers, and visit to premises if possible
xvii. Bank details
xviii. Cross-checks of the above

*The issues*

26 A variety of issues emerged in the course of the evidence, which consisted of some forty lever-arch files of documents, and thirteen days of oral testimony, itself supported by written statements. Of particular significance were:-

- The nature and operation of the grey market in which CCA traded.
- The extent of the 'due diligence' undertaken by CCA.
- The commerciality of CCA's trading.
- Whether the commissioners led CCA to think that it was keeping clear of trouble.
- Whether CCA, through Mr Trees, did actually know of the frauds taking place or should have known that there was no reasonable explanation for the transactions except that they were connected with frauds on the Revenue.

27 The deals which generated the input tax which is the subject matter of the appeal consisted of purchases by CCA of goods from UK traders, and the onward sale and dispatch of those goods to traders based in other Member States of the EU (which we refer to as the "broker deals") as listed in the Appendix. The goods were purchased with VAT at the standard rate, and sold with VAT at the zero rate. CCA's VAT periods 04/06, 05/06 and 06/06 were the calendar months of April, May and June 2006 respectively.

*The input denial decisions*

28 CCA appeals against decisions of the commissioners to deny its right to deduct input tax on transactions conducted by the appellant in the VAT periods 04/06, 05/06 and 06/06. Those decisions are: (i) the decision, communicated by way of letter dated 13 July 2007 to deny CCA the right to deduct input tax of £6,320,368 in relation to transactions conducted in the VAT periods 04/06 and 05/06; and (ii) the decision communicated by way of letter dated 13 August 2007, to deny CCA the right to deduct input tax in the sum of £3,553,886.54 in relation to transactions conducted in the VAT periods 06/06. The grounds given for denial were that CCA's transactions were connected with the fraudulent evasion of VAT and that CCA, through the controlling mind of its director, Ashley Trees, either knew or should have known of the connection.

29 Mr Allyn Cunningham, who gave evidence at the hearing, was the officer with responsibility for conducting the verification of CCA's returns for 04/06, 05/06 and 06/06 and it was he who made the decision to deny CCA the right to deduct and who signed the letters of denial dated 13 July 2007 and 13 August 2007.

30 The July letter stated that:

> The Commissioners are satisfied that the transactions set out in the attached Appendix form part of an overall scheme to defraud the Revenue. The Commissioners are also satisfied that there are features of those transactions, and conduct on the part of CCA Distribution Limited, which demonstrate that you knew or should have known that this was the case. Accordingly your right to deduct the input tax claimed in respect of these transactions is denied.

31 However in the August letter officer Cunningham expressed the commissioners' reasoning thus:

> The Commissioners are satisfied that the transactions set out in the attached Appendix form part of an overall scheme to defraud the Revenue. The Commissioners are also satisfied that there are features of those transactions, and conduct on your part which demonstrate that you knew or should have known that this was the case, in that you either deliberately or recklessly, ignored factors which indicated that these transactions may have formed part of such an overall scheme.

*The pre-appeal period and relations with HMRC*

32 Mr Ashley Trees started in computers when he was 20 years old working for Apple Centres at Warrington and Manchester, selling (which included explaining and programming) computers, chiefly into schools and the like. He began his business, AC Computer Warehouse, in 1996 from the bedroom of his home. The business sold secondhand computer equipment to the public. After about six months he and his business partner, Carl Bennett, moved to a mill in Mottram Street in Stockport. Initially they rented premises in the 10,000 square foot mill with three floors, a main building and two wings; at first they occupied the first floor, a small open plan unit and then as time went on the business developed room by room.

33 Mr Trees bought substantial quantities of stock and entered into agreements with, amongst others, ICL to supply ICL Fujitsu with specialist computers. AC Computers manufactured new computers from older technology, sourcing the components individually and building the computers. Prior to starting AC Computer Warehouse, Mr Tress had sold Apple computers and was at that time insulated from the grey market. However, when he started his company he gradually developed knowledge of the grey market and was offered stock on a regular basis, stock that was not necessarily required any longer by manufacturers or that they could not dispose of.

34 Meanwhile, Mr Trees had a contract with HSBC to remove all their old computer equipment. The equipment was no more than two years old but the industry was changing rapidly and most banks wanted to move to new equipment. The contract was initially to remove about 15,000 computers from Call Centres throughout the UK and by the end of 1999 AC Computer Warehouse was employing 25-30 full time staff and was occupying the whole of the mill.

35 By this time, AC Computer Warehouse was the largest retailer of new and second user computer equipment in the UK and Mr Trees was anxious to expand into new markets from his core business of repairing old computers, selling second hand computers and selling software. He used sales forums to advertise quantities of stock because if he did not have sufficient customers for the number of monitors he had acquired from HSBC he would need to sell them on in large quantities. This Mr Trees did by advertising on computer forums that other computer traders used and it was when using these forums that he came across offers of mobile phones. On occasion they traded direct with the manufacturer, as when CCA bought a large quantity of printers and resold them.

36 Appleco (trading as 'AC Computer Warehouse') was incorporated in 2001, as was CCA. The initial reason for incorporating CCA as a separate company was to provide an associate of Mr Trees called Cameron Ferris with a vehicle to buy laptop computers from America. Initially that venture was successful, but there were various problems with Mr Ferris and eventually Mr Trees asked him to leave. CCA then stopped trading for a short period of time as the company had become redundant for the purposes of Mr Trees and Mr Bennett.

37 In late 2002 and early 2003 any trading conducted by Mr Trees in mobile phones was through Appleco. However, for every mobile phone transaction conducted by Appleco there would be between 40 and 50 computer transactions and in or about April 2003 Mr Trees decided that he would separate the trading, so that computer transactions were conducted through Appleco trading as AC Computer Warehouse and mobile phone transactions conducted through CCA.

38 How this came about was that the officer responsible for the business's VAT compliance, Mr Vincent D'Rozario, was relatively uninterested in the trading of goods other than the mobile phones and he experienced considerable difficulty in having to wade through all the records of non-mobile phone trading; he therefore asked Mr Trees if there was a way that the phone trading could be separated. Mr Trees then had the idea of resurrecting CCA for the purpose and Mr D'Rozario agreed that it would be a good idea. Though this meant extra cost, Mr Trees thought it would assist cooperation with HMRC which he regarded as important. Thus, from April 2003 onwards CCA was used as the corporate vehicle to conduct the phone transactions.

39 At the time Appleco employed between 30 and 40 staff and no more than four or five staff crossed over to assist with the work of CCA. Mr Trees saw the considerable potential for the market in the whole distribution of mobile phone handsets as there was considerable growth in the mobile phone industry at the time; he had a good

knowledge of the mobile phone industry and its products and he saw it as a worldwide market. Whilst Appleco and CCA had a common showroom, the retail business that they did was mainly generated by word of mouth; the bulk of their business was by mail order or internet sales and Mr Trees said that he saw that his role in the mobile phone industry would be in selling to the trade not to retail.

40 From November 2002 onwards trading by AC Computer Warehouse and, CCA had been closely monitored by HMRC on a monthly basis in the person of Mr Vincent D'Rozario, assisted in April, May and June 2006 by Mr Allyn Cunningham. Mr D'Rozario had frequent contact either with Mr Trees or with his bookkeeper, a Mrs Pat Ryan. This lady was of mature years, careful and thorough, and Mr D'Rozario found her always to be helpful and cooperative; he was impressed also by Mr Trees's knowledge of phones and their functionality.

41 Mr D'Rozario routinely checked much of CCA's purchasing, informing them that they were going to be subject to full verification or extended verification and Mr Trees would know that Mr D'Rozario would be liaising with CCA's immediate suppliers and going up the chain. For example, in the periods 09/03, 10/03 and 11/03, repayment of input tax on acquisitions from Y M International was initially withheld but subsequently released because tracing by HMRC had not been able to establish any tax loss upwards in the chain – though much later the supplier was discovered to be a contra-trader.

42 CCA's trading started in a small way in March 2003 and took over the trading with Future Communications and Soul Communications from Mr Trees's other businesses, constructing back to back deals and paying and receiving money by telegraphic transfer. The company was financed by loan capital of £610,000, derived partly from bank lending but principally from Appleco and by further amounts of £235,000 and £200,000 from Mr Trees personally mortgaging his house and the mill; there were on occasion thereafter short term loans to CCA from Appleco, but no outside source of finance was introduced. By May 2003 CCA was therefore effectively self-financing. In April 2003, Mr D'Rozario noted that CCA "have now begun trading in MTIC goods", by which he meant that they were trading in mobile phones or CPUs; there was no implication then of dishonesty, but there was for Mr D'Rozario an amber light where such business was concerned.

43 The trade had two aspects: UK to UK deals, and export deals. On the former, CCA expected routinely to make a £1 profit. They used to sell second hand printers to Nigeria and Pakistan and, to keep it simple, they applied an uplift of £1 per item, and the internal UK phone deals followed that pattern and there was no room for

negotiation. Better money was to be made in exports, and in that market there were obviously greater operational costs, not least the cashflow problem of having to await the repayment of input tax from HMRC; and there were greater risks. Profit margins were therefore higher and prices were the subject of negotiation. A typical margin would be somewhere between 1% and 2%, though Mr Trees said that if he could get away with it he would try for £5 per item.

44 The way business was typically done was that a supplier would offer stock to CCA who then sought a buyer for it; if the only buyer available wanted a lower quantity than that on offer, CCA would go back to the supplier and bid for that. It would be exceptional for CCA to hold and stock itself and generally it only did so where something had gone wrong; normally, the stock remained with the freight forwarder in warehouse while the sales were being put together. Sometimes it would be the other way round, with the first approach coming from the prospective buyer. Checking and inspecting goods was therefore done at the warehouse by the freight forwarder.

45 When payment had been received from the customer, the freight forwarder would be instructed to ship the goods to the order of the customer; during the appeal period, this meant that they were consigned to Boston Freight in Belgium, at an address in Bulkampstraat in Veurne. CCA did not do any due diligence on the consignees' nominated freight forwarders, Mr Trees saying "It simply didn't occur to me". The last stage was then to pay the supplier. Mr Trees said that he did the same now, selling flue ducting systems: "we take the goods, we sell them and then we pay the supplier". Only occasionally would CCA source from authorised distributors.

46 In all the appeal period transactions, UK to UK and UK to EU, the purchase and sale documents bore the same date and Mr Trees accepted that there was no distinction between the documents being generated and being dated. Thus, in one period of effectively twelve hours, the purchase order would be received from CCA's customer, CCA's purchase order would go to its supplier and the goods would then inspected, and invoices would be issued to CCA by the supplier and by CCA to their customer; the deal giving rise to this would not, however, necessarily be done on the same day.

47 The two freight forwarders CCA used were A1 Distribution, who had almost all of CCA's work, and in 2006 a company called Aquarius. CCA quickly fell out with Aquarius when it emerged (in exports made during the appeal period) that they had charged CCA fees for transporting consignments individually within the limit of £750,000 value set by CCA's insurance cover but had in fact sent the consignments all together thus breaching the terms of the policy. When Mr Trees found out that this had happened, a dispute ensued and he paid only a quarter of Aquarius's invoice.

48 In May 2003 the first control visit on a repayment claim by CCA was made and the claim was checked by HMRC and paid in June. Further control visits as such followed – Mr Trees thought they were more frequent than Mr D'Rozario's records show, but there were at least full control visits on 7 May 2003, 15 April 2004, 7 June 2005 and 16 June 2006, besides a constant exchange of telephone calls, emails and correspondence either to Mr Trees or Mrs Ryan the bookkeeper, with both of whom Mr D'Rozario repeated that he had a good working relationship.

49 Mr Trees felt the same, although he was clearly not given much leeway: referring to Mr D'Rozario, Mr Trees commented that "Vincent D'Rozario was a very through man, probably the most thorough person I've ever met in my life, and he constantly called or wrote to us asking for further information". And further, about unannounced visits: "He would just arrive and he would be at the front desk".

50 The record shows that on occasion Mr D'Rozario also spoke to Mr Wesley Gordon, the company secretary. Early on in these exchanges, Mr D'Rozario instructed CCA in the detailed records they needed to keep, including the CMR documents, ferry tickets, any inspection reports and the sales invoices; we mention elsewhere the issue of the IMEI numbers and Mr D'Rozario's efforts to persuade CCA to note them down. Mr D'Rozario explained what checks he wanted done on trading partners and Mr Trees volunteered information about companies which seemed to him to present problems – though he never got any reaction from Mr D'Rozario or any feedback.

51 In 2003 and early in 2004, two acquisition deals were traced back to tax losses and there was obvious difficulty for CCA in checking the chain of transactions leading to the supply to them, and it took time for Mr D'Rozario to do so by contacting the control officers in the chain as it emerged, one by one. Very substantial delays occurred in respect of claims going back to June 2003 and, in an effort to shorten the process, CCA instructed KPMG in March 2004 to undertake confidential checking on their behalf and report direct to HMRC without divulging the details to CCA but at CCA's expense – an expense which, according to Mr Trees, amounted to £40,000.

52 A meeting was held between the three parties on 15 April 2004 to set it up. Mr D'Rozario agreed that this assisted HMRC and that detection of a fraudulent tax loss earlier in the chain, if there was one, would not have been feasible for CCA themselves. KPMG's checks revealed that the chains for 9/03, 10/03 and 11/03 were satisfactory and those for early 2004 were approved in August, and eventually a repayment supplement to CCA was authorized, as had also been the case for a claim for the March 2003 month. After these delays, no fully extended verifications took place until the end of 2005 but each claim was checked carefully before release.

53 In practice, however, Mr D'Rozario did not skimp his own detailed investigation of each month's reclaim and he plainly carried out his duties very thoroughly, including liaising with colleagues in other EU states and senior management at HMRC. Often this was to the subdued exasperation of Mr Trees whose cashflow was of course the worse for it, and who found that his bank – Royal Bank of Scotland – who were reluctant to tide him over until verification was complete and became alarmed that CCA was, as they thought, being investigated; Mr Trees at one point had to remortgage his home to fund the tax he had paid out and was waiting for back. RBS subsequently closed CCA's account – according to Mr Trees, under pressure from HMRC.

54 Nonetheless, Mr Trees often consulted Mr D'Rozario on trading matters, as when a query arose in early 2004 on a purchase from a company called Euro Trading who turned out not to be VAT registered at the moment of purchase. In November 2004, *a propos* of two acquisitions from Future Communications and Soul Communications, Mr Trees was given Notice 726 on 'joint and several liability' in order to encourage him to carry out due diligence checks more extensively than he was doing, and from then on CCA began to undertake credit checks on their suppliers. At the beginning of 2005, correspondence was exchanged about recording the details of goods on CMRs: Mr Trees agreed in principle to instruct freight forwarders to do this, but reserved the right not to if the security of the consignment would be jeopardized in consequence.

55 Mr D'Rozario continued throughout to insist on meticulous reporting by CCA of the details and documentation of transactions. In mid-2005, CCA started trading with a new supplier, Infinity Holdings, and Mr Trees undertook a full credit check, visited their premises in Leicester and met one of their directors, a Mr Thakor. At that time, verification of two deals with Future Communications was making slow progress and Mr Trees complained that Future Communications had not yet been approached by their local VAT officer; HMRC were suffering staff shortages and could not undertake a full verification of Future Communications, so Future Communications volunteered that they would be happy to deal direct with Mr D'Rozario.

56 In the same period, Mr D'Rozario queried an unusually high level of profit made by CCA on one deal, and he kept up his demand for IMEI numbers to be recorded and supplied; Mr Trees responded that he was vexed that even the commercially driven profitability of his deals was being questioned - on occasions he made a loss, of which we had evidence - and it was not for Mr D'Rozario in Mr Trees's opinion to comment on commercial judgments.

57 In September 2005, when Mr D'Rozario was away from the office, a colleague dealt temporarily with CCA's reporting and wrote on the official log "Noted format is outstanding". Mr D'Rozario, back in the office, checked the weights shown on the CMRs and found some discrepancies, including with regard to the delivery address, which he queried with CCA who took it up with the freight forwarder, whose explanations Mr D'Rozario subsequently accepted. In October, CCA was dealing with Easy Trading in Spain, Mr Trees having been to visit them in the summer of 2005. But enquiries and checks were less than satisfactory and Mr Trees passed the information to Mr D'Rozario; the latter replied that it was up to Mr Trees to make a commercial decision whether to continue to trade with them and CCA then decided against it.

58 In the six months preceding the appeal periods there was no let up. An OASIS check was run on the vehicle registrations reported by CCA for goods transit and all were found to be satisfactory. Also in October 2005, CCA instructed their freight forwarder to provide HMRC with a list of all IMEI numbers on their deals. By the later part of that year, CCA were trading consistently with Future Communications, Infinity Holdings and Soul Communications, and a new supplier called UK Wide whose director Mr Trees visited twice and whose premises he visited once, as well as doing credit checks on them. CMR checks were carried out by Mr D'Rozario, who noted more than once that CCA were now insuring EU exports; he made random cross-checks on values against invoices to FCIB accounts (CCA had opened an account with FCIB on 27 October 2005), the mark-ups on sales, and he queried one item which was resolved by reference to CCA's Lloyds TSB account. A more detailed FCIB account statement was required to be provided by CCA in future.

59 By the start of 2006, a further new supplier called Sound & Secure had come on the scene and again CCA had done credit checks on them, with details of the directors and of how contact had been made. In regard to Future Communications, Mr D'Rozario noted "from many previous verifications where the supply chain has been checked there has never been any dispute/discrepancies, therefore have not been pursued [verification]". CMRs continued to be checked, random OASIS checks and FCIB cross-references were made as before. In January 2006, Mr D'Rozario noted:

> I have confined my checks only to the above and have not undertaken a full verification due to the fact that all previous ones have resulted in chains where there has been no UK tax loss, no third party payments.

> However, in the light of CCA being on a monthly tax stagger, I will at some point in the near future conduct a full verification post repayment on the ten EU deals to see if they can commence with a tax loss. If so,[2] this will assist in moving CCA on to a quarterly tax stagger.

60 Matters carried on in the same manner as 2006 progressed. CCA changed a bank account from Lloyds TSB to the Bank of Ireland. From time to time discrepancies appeared in CMRs with regard to weight which Mr D'Rozario noted were not CCA's responsibility – though it was he considered their responsibility to keep their freight forwarders up to the mark. Mrs Ryan, the bookkeeper, supplied 'deal packs' consisting for each transaction of the sales invoice, the sales purchase order, the purchase invoice, the purchase order ad all the payment details, which were destined to be recorded at HMRC on a spreadsheet for present or future use.

61 The work undertaken by Mrs Ryan included trying to reconcile payments made by CCA with the relevant invoices. The task was difficult because payments were often not matched neatly to purchases or sales and in that case she sought to annotate allocations to the invoices accordingly. Mr D'Rozario, having done spot checks with the bank statements, considered these annotations generally to be accurate and that CCA's payments had been received or paid in full. Mr Trees made his own allocation of payments to transactions which often differed from Mrs Ryan's and that was the one he relied on when making payments, but details of it were only on CCA's computer which was not in evidence.

*Boston Freight*

62 For the month immediately preceding the appeal period, March 2006, there were 13 export deals and for April 2006 there 14 such deals; in both months all the export consignments went to a freight forwarder in Belgium called Boston Freight – evidently in the Dutch-speaking region of that country – about which there were queries, including the allegation that certain of the goods (some Samsung Serenes and P990 phones) did not exist because the manufacturers were said to have stated that they were not in circulation in the numbers involved in the deal. The supplier, Future Communications, however insisted that they did exist.

63 Input tax on these phones was denied separately, by letters from HMRC on 18 August and 11 October 2006 and it is not included in this appeal. CCA had paid for these phones before HMRC claimed that they could not have existed and denied the input tax on them. CCA in December 2006 claimed the money back from Future

[2] Presumably this should read "If *not*, this will assist . . ."

Communications; since Future Communications did not in the event provide evidence to refute HMRC's claims, CCA withheld payment of some £5,600,000 in respect of the appeal period transactions which, together with other debts, led eventually to Future Communications petitioning for the winding up of CCA and to its being at the time of the appeal in administration.

64 At this stage Mr Cunningham was gradually taking over from Mr D'Rozario and, as he was inputing details of the April deals to the spreadsheet, he noticed that some of them showed a supply date three weeks before shipment, for which the explanation was that CCA were either awaiting payment (they did not normally deliver or release until payment had been received) or else delivery instructions from their customer had been received.

*The raid of 1 June 2006*

65 The annual control visit was agreed between CCA and Mr D'Rozario for 16 June. On 1 June, however, and unknown to both Mr D'Rozario and Mr Cunningham, an unannounced visit to CCA's premises by a group of some four or five officers dressed in dark blue caps and stab jackets took place. The officers appeared at the front desk with a search warrant and Mr Trees was called out. The warrants, on inspection, turned out to have the wrong address but Mr Trees invited them in nonetheless and said they would have full cooperation whatever they wanted; he asked them first, however, to remove their combat gear in order not to alarm the staff, and they did so. The officers were polite and everything was amicable.

66 After much confusion and telephoning about what the officers were supposed to be looking for, Mr Trees said: "Why don't you take away everything that's here and then you can return what you don't need?", and that was what was done. Effectively, all CCA's records for the previous six months were taken, composed of approximately 20 lever-arch files, but no computers or extracts from computers. Copies of some of these papers were subsequently made available to Mr Cunningham's office, though it is clear that what he had then to go on in deciding to deny input tax was incomplete and gave him only a partial picture of CCA's due diligence.

67 At the time of hearing this appeal, the originals of these documents had still not been returned, and even copies were not supplied to CCA until between two and a half and four years later. Mr Trees at the time expected their return within a couple of weeks, which is why he invited their removal. It is not clear why some of the records disappeared in this exercise on 1 June since those who descended on CCA's office on 1 June did not give evidence, but Mr Cunningham told us:

> I have experience of doing similar operations myself, where every piece of paper, virtually, is picked up. I have even been through waste paper bins in my career doing that sort of thing.

68 In addition to the documents which appear to have been lost as a result of the raid is an A4 blue or red ring-binder file containing an index of all the mobiles phones Mr Trees had researched and their technical details, including the disputed Samsung Serene and P990 phones which HMRC claimed were not available at the time they were said to have been supplied. This file, at least, cannot have been a victim of the raid because at the control visit on 16 June Mr Cunningham spent a long time checking through it to see that each phone listed in the index was in fact detailed inside. There is no explanation of why this file cannot now be located.

69 For CCA, there was no outcome to this event, carried out by what was referred to by the Crown witnesses as 'law enforcement' - which we understand to be the division of HMRC responsible for criminal investigations and prosecutions. Mr Trees was not asked to give any statement, he was not interviewed under caution or otherwise, he was not prosecuted or called as a witness in any prosecution, and there was no subsequent communication with the officers responsible for CCA's VAT compliance; his documentation was simply removed for up to four years without explanation, and it seems likely that some of it has been lost. We now know that the raid was contemporaneous with one on Future Communications, three of whose officers were subsequently prosecuted, and we refer elsewhere to the outcome of those prosecutions, but Mr Trees was not at the time told that this was the context.

70 Although Mr Trees sought in the circumstances to cancel the visit due on 16 June, it nonetheless went ahead lasting nearly four hours, with both Mr Cunningham and Mr D'Rozario attending and a detailed and lengthy written questionnaire addressed to Mr Trees being completed by the officers. It disclosed among other things that Mr Trees kept a detailed database called Filemaker Pro showing all his purchase and sales; that CCA had adopted a new trade application form the previous month. This database contained notes on all the companies CCA had contact with, including those with whom the policy was not to have dealings with, or to deal only with caution.

*The appeal period*

71 As well as the transactions actually under appeal, CCA conducted a large number of UK to UK transactions during April, May and June 2006, making a profit in virtually every case of £1 only. Against the background of Mr Trees saying, as he did, that he enjoyed the process of price negotiation and relished the thrill of driving a bargain, this appears unexpected. Future Communications purchased from CCA in

112 deals during this period on these terms, and Mr Trees's explanation of it was that "I have dealt with Future for a long time and there is no need to negotiate with Future". The same was true of the five sales to Infinity Holdings during the same period.

72 Mr Trees was pressed on this apparently formulaic pattern of business. Asked why he did not try for a higher price, he replied "Because I was happy making £1". Yet when he bought from these same companies Mr Trees accepted that they did negotiate prices with him, but still the mark-ups were constant. For sales outside the UK Mr Trees claimed that the shipping cost varied, though for the 39 EU sales over the appeal period it did not vary - the mark-up averaged about £4 with shipping etc costs at about £1, leaving £2 profit, or twice the £1 profit on UK to UK deals.

73 One explanation Mr Trees gave for this was that he could sell more goods in UK to UK deals because the price was easier, and since it was higher in UK to EU deals there were fewer of them. In spite of averaging the export profit level, there remains in the deals we have seen a disparity between the invariable mark-up in UK to UK sales and the more individual approach to UK to EU sales. Mr Trees was taken aback by evidence produced by the commissioners that Future Communications, Infinity Holdings and Soul Communications were, at the same time trading with his European customers, and with CCA; he agreed that it was not something likely to happen in an ordinary commercial environment and could offer no explanation for it.

74 In the three months of April, May and June 2006 CCA traded about 3,330,000 handsets. In April there were 70 UK to UK sales, all to Future Communications who, according to Mr Trees, had secured contracts with Tesco and Walmart and could not get enough stock; they were sourced from several suppliers. There were 14 UK to EU sales, all sourced from Infinity Holdings. In May, there were six UK to UK sales, five to Infinity Holdings and one to Future Communications; and there were 12 UK to EU sales, all sourced from Future Communications. In June there were 41 UK to UK sales, all to Future Communications; and there were 13 UK to EU sales, 11 sourced from Soul Communications and two from Future Communications. The details of the export sales are in the Appendix and the UK to UK sales are described more fully elsewhere.

75 The export deal documents did not deal with contractual terms such as the passing of title, the distribution of risk, or the terms of payment. Thus, the purchase orders of CCA's EU customers Allimpex, Shabir Mohamedbhay, and BHS Vertriebs are silent as to any contractual terms. CCA's invoices and purchase orders were also silent as to such matters as the passing of title, the distribution or risk, and the terms of payment. CCA had informal credit agreements with its suppliers in which, in practice, it paid the supplier when the

customer had made payment. It is unclear how long this credit extended, but Mr Trees regarded CCA as responsible for accidental loss of the stock once it had been released to them until the point at which they had paid for it, but he considered that title did not pass to CCA until they had paid their supplier; it followed that CCA's customer, on this basis, did not acquire title until CCA had paid their supplier.

76 In general, the documents were also silent on such matters as whether the goods were new or used, whether (in the case of mobile phones) they were locked to a network, or SIM free, whether the goods were of UK or European specification with a two or three pin charger, whether the goods came with a warranty, whether the goods came with accessories, such as software and a battery, the colour, or the languages of manuals, and handsets. There was no specification on the purchase orders of CCA's customers Allimpex, Shamir Mohamedbhay, and Universal Handels, save for the make and model; the only exceptions are the colour of Nokia 8800s in deals A14 and J10-11, and the Asian specification of the Nokia N93s in deal J3 – see the Appendix. Equally, there was no specification on CCA's purchase orders or invoices, save for the make and model.

77 The invoices and purchase orders of Infinity Holdings said that the goods were SIM free and of central European specification, but they were silent as to all other information, save for the colour of the Nokia 8800s, and the Asian specification of the N93s. The purchase orders of Future Communications only stated that the goods were of original manufacturer's specification, but nothing further. The invoices had no specification beyond the make and model (though the N93s in deal J3 are described as of Asian specification.)

78 The purchase orders and invoices of Soul Communications described the goods as being SIM free but were silent as to other information, save for the colour of the Nokia 8800s in deals J9-11. By way of exception, the purchase orders of Pielkenrood Opto Electronics provided that the mobile phones should be of central European specification, with the latest software and standard accessories, central European languages, unlocked, with a 2 pin charger and international and European warranties, and in the original packaging.

79 CCA's supplier's declaration which CCA's suppliers were asked to sign however, prepared with the help of Mr D'Rozario in 2004, stated explicitly that the supplier had full legal title. Invoices from Future Communications and Infinity Holdings included a term that goods remained the property of the supplier until paid for in full. While CCA did not part with goods until their customer had paid them, CCA only paid their suppliers on receiving their customer's money. This was said by Mr Trees to be based on the trust his suppliers had in him, and also because the suppliers were much larger than CCA and effectively traded with them on terms that were preferential for CCA.

80 As we have seen, Mr Trees accepted that title would remain with his supplier until payment had been made, which would be after he had sold the goods to his EU customer and received payment from them. Asked how this squared with the commerciality of trading in millions of pounds worth of goods and why he did not have these different terms of trading spelt out, Mr Trees replied:

> That wasn't my experience. That is not my experience of how I've ever traded or what I've ever done. And it wasn't something that really occurred to me, to make more contractual (sic). It's not my experience. It's not what I know.

81 Pressed further in cross-examination, Mr Trees added:

> Looking back, in hindsight, I can see why you would bring this up. But at the time, being so involved with my business and what I was doing, and being so busy, it wasn't a question I raised with myself. It just wasn't. And nobody raised the question with me either. My accountants didn't say anything to me. Vincent [D'Rozario] didn't say anything to me. Pat Ryan didn't say anything to me. It's just something that was done. In hindsight I can see why you would say that.

82 And later:

> I have never had a formal written agreement for any of the contracts that we've done.

83 On the other details of the phones, such as the languages they were programmed with, the manuals for them or the number of pins on the chargers, Mr Trees said he had had no occasion to source chargers or manuals and that it would be assumed that 'European Spec' was required unless it was otherwise stated; all types would have the English language on them. The usage of the market was to assume that a phone was new, unless the contrary was stated.

*Samsung Serenes & Ericsson P990s*

84 At this point, further mention must be made of these two particular types of phone which figured in CCA's trading in 2006, including the appeal period, but which HMRC have adduced evidence that they did not at that time exist, at least in the quantities involved.

85 Thus, in three of the deals which are the subject of the appeal, CCA also bought and sold a total of 2,495 Samsung Serenes: 210 in deal A4, 1,285 in deal M9, and 1,000 in deal J4. In its UK to UK deals, CCA also traded in these goods: 2,763 in April, 2,084 in May, and 1,695 in June. In the previous VAT accounting period, CCA also purported to trade in these goods: 1,423 in January, 680 in February and 3,765 in March. The total of this trade was therefore 14,905. In so far as the P990s were concerned, CCA traded 10,269 of these goods in 2006: 1,955 in January, 2,365 in February, 4,759 in March and 1,190 in April.

86 The evidence adduced by the Crown given in previous unconnected criminal proceedings was to the effect that, in July 2005, 300 prototypes of the Serene were produced, 180 of which were fully functioning engineering samples and 120 non-functioning marketing samples. These were sent to Bang & Olufsen (Samsung's partner in the joint venture) and Samsung's European subsidiaries. Because of the packaging, software, and the limited accessories, it is said that it would have been highly unlikely that even a functioning prototype would have been sold on the open market. The Serene was originally scheduled for release onto various European markets in October 2005 and this prospective release was publicised but the European release was said to be delayed until December 2005.

87 This previously given evidence was that mass production of the Serene began in November 2005 with 200 units. No Serenes were supplied to non-European markets in 2005 and 2006, save for 23 units shipped to the UAE, 100 China, and 235 to Hong Kong. The Serene was launched onto the Chinese and US markets in late 2006 and early 2007 respectively, and production began in November 2006 and December 2006 upon these variants. The number of Serenes manufactured and shipped from November 2005 to December 2006 is said to have been 240,985. On this basis, it is said that it is implausible that CCA could have been trading anything like the quantities in which they were purporting to trade.

88 In relation to the Sony Ericsson P990s, the evidence given to the criminal proceedings was that Sony Ericsson originally intended to launch the P990 in the second quarter of 2006, and this was publicised in October 2005. However before June 2006 only 4,708 prototype units, and 100-200 sample units of this model were produced and the prototypes were supplied under strict contractual conditions, one of which was that there was to be no sale or resale of the prototype, and this was clearly marked on the boxes in which the units were shipped. There was also a sticker under the battery on each unit marked "prototype". The samples were fully functional but were supplied under the strict condition that they were not for sale to third parties.

89 The evidence continues that the prototypes were not fully functional, and were supplied with the bare minimum of accessories. Sony Ericsson said they had no experience of prototype units being traded, whether at a premium or otherwise, and the phone would not have been marketable to consumers. Production of the final version of the P990 without software and battery did not start until 12 June 2006, and production of the complete set sold to end users did not start until late July 2006. The first launch date anywhere in the world was in Mexico on 31July 2006. There were no reports of thefts, whether at the production stage or afterwards. It is said to be highly unlikely that any counterfeiter would be able to produce a properly functioning copy of the P990, let alone find it economically viable to do so, and there is no record of any counterfeit P990 handsets being identified anywhere in the world.

90 This evidence was provided in witness statements of Mr Steven Bishop of Samsung, Mr Jonathan Pearl of Sony Ericsson and Mr Thomas Hjannung of Bang & Olufsen. These witnesses were not called at this appeal hearing, but their evidence is said to have been tested in other proceedings in the Crown Court, and we were told that it had been accepted there. As against this evidence, it must be recorded that Mr Trees forcefully denied knowingly trading in non-existent goods.

91 At the control visit by Messrs Rozario and Cunningham on 16 June, Mr Trees asked Mr D'Rozario to test him on his knowledge and he was asked to distinguish between the specifications of two Nokia phones. Mr Trees took up the challenge and Mr D'Rozario was satisfied with the result; he also confirmed that at that meeting Mr Trees produced a file containing the details and specifications of a number of mobile phones. Mr Trees in evidence asserted that both the Sony Ericsson P990 and Samsung Serene were included in this file. Mr Cunningham, who was reading through this file at the meeting, could not confirm whether those phones were specified in the file or not.

92 In relation to these phones, Mr Trees said in evidence that he was in no doubt that both products were available to the market. In December 2005, he had gone online to a forum where the Sony Ericsson P990 was being discussed at some length about its functionality and technical people were discussing the phone in great detail. The P990 was an eagerly awaited product and some people had it and had used it and were commenting on it. The Samsung Serene he said he had actually seen in a shop window.

93 After the challenge by HMRC to the existence of these phones, Mr Trees spoke to Mr Gathani at Future Communications who was "very flippant about it" and said that the matter could be dealt with very quickly, that he had evidence that the phones existed and there was no problem at all. Mr Gathani in the event failed to produce the necessary evidence and Mr Trees formally demanded the cost of these contested items as a set-off in a letter dated 13 December 2006; this remains an outstanding claim by CCA's administrator.

94 The conflict is difficult to resolve. On the one hand, the evidence from the manufacturers is in principle persuasive given its source, but on the other hand there is no means by which we can be assured that it does in fact stand up to challenge because we have not seen the detail of what passed in the criminal proceedings from which it is derived. The fact that the appellant did not seek the attendance of these trade witnesses at this hearing to challenge them, does not absolve the tribunal of responsibility for considering whether their evidence is better than that of a live witness who denies it and who has been subject to challenge.

95 In the event, there is an unresolved conflict with apparently credible evidence in both directions but Mr Gathani's failure to provide evidence rebutting the Revenue's allegations indicates that the phones did not exist in the quantities claimed at the relevant time. The burden of proving that Mr Trees was aware of this, however, lies on the Revenue and we find as explained later that in relation to these two phones it is not discharged to the required standard.

*Close-down*

96 By the end of July 2006, Mr Trees was becoming impatient again about the delay in verifying his reclaims for the preceding three months, amounting now to some £10 million, and had approached Deloittes to assist in the way KPMG had done previously in speeding up HMRC's checking. In the absence of CCA's input tax reclaims being paid, the company's lack of cashflow meant that it stopped trading and Mr Trees concentrated on A C Computer Warehouse's business.

97 It was a sudden end to a period of spectacular growth. In 2002/2003 CCA's turnover had been £6 million; in 2003/2004 it was £9 million; in 2004/2005 it rose to £65 million and for 2005/2006 it was £402 million; in the three months of the appeal period, the first quarter of 2006/2007, it was £140 million and Mr Trees agreed that at that rate the figure for the whole of 2006/2007 would have been half a billion pounds in turnover. And all this for 15 employees in both CCA and A C Computer Warehouse combined.

*Banking*

98 CCA banked with the Royal Bank of Scotland until mid-2005 when their accounts were closed by the bank who told Mr Trees that they didn't want people CCA's sector. According to Mr Trees the bank admitted to him off the record that this was done under pressure from HMRC – as to which we make no finding. CCA then opened an account with the Bank of Ireland, which offered good interest rates. A little before then, a man called Roy Nixon had introduced himself to CCA as representing Transworld Solutions and told CCA about the services of the First Curacao International Bank (FCIB).[3] Mr Nixon claimed that he was promoting this bank widely to professional firms as well as to business and said that they used Barclays Bank as an intermediary and were connected with Barclays Bank, which was confirmed on FCIB's website.

[3] This bank was based in the Netherlands Antilles; it ceased operation in October 2006 in the course of an investigation by the Dutch authorities into money laundering.

99 Mr Trees described the attraction to him of FCIB as follows:

> First of all you could access FCIB from anywhere in the world online. Whereas previously if you had a NatWest or RBS account you had to load the RBS software on to your computer, it then had to dial up from a dial up modem and then you could only use that specific computer that you had installed the software on to access your bank account. Whereas FCIB you could use – you could access your account from anywhere, any computer in the world online. You didn't need the special software. The other thing is there were no monthly or quarterly charges. You paid per transfer and it was relatively inexpensive to what RBS were charging us.

100 In the event, some 70% of CCA's business was to go through FCIB, which Mr Trees described as "a lot more flexible in terms of its usage than the Bank of Ireland system", from and to which it took 48 hours to make a transfer. Nonetheless, HMRC refused to make VAT repayments to FCIB so they had to go to the Bank of Ireland; staff wages and standing orders were also paid from the Bank of Ireland account, as were some deal payments at times when the FCIB account was not operating. That occurred because every six months FCIB would do its due diligence on CCA, requesting spot details of a particular deal and the documentation for it, an exercise which suspended the use of the account while it was being carried through. All payment instructions to FCIB were given by Mr Trees and none by Mrs Ryan.

101 An attempt was made by second counsel for the Revenue to cross-examine Mr Trees on bank statements derived from CCA's account with the Bank of Ireland in conjunction with those of FCIB with a view to demonstrating that the company's business could not have been conducted without an external infusion of funds. It appeared at once that this was a contention that had not been pleaded and of which the appellant had had no notice. After a brief adjournment to take instructions, counsel indicated that this line of questioning would not be pursued.

102 For the rest, the banking evidence consisted of extracts from FCIB material which the relevant officer, Mr Peter Birchfield, had examined in the context of another case but which incidentally showed monies flowing through CCA's account. Mr Birchfield had traced the movements of monies through CCA's FCIB account in relation to six transactions; three of these six, were 'buffer' deals and three were 'broker' deals i.e. exports from the United Kingdom. Evidence was also produced about the flows of money through the accounts of Future Communications and Infinity Holdings which Mr Birchfield had had occasion to examine earlier.

103 It was not claimed that any of these figures related to the transactions under appeal, but the purpose of their being put in evidence was to assert that transactions in which CCA had been involved at the time of the appeal were contrived and uncommercial – and that therefore it was probable that those actually under appeal were likewise contrived and uncommercial. According to this thesis, the evidence shows actual knowledge of fraud by CCA, because it was accepted by the witnesses that CCA could not otherwise have been aware of the transactions above and below its own, or at least been aware that they were steps in a linked fraudulent undertaking; Mr Birchfield indeed specifically agreed that in 2005, when CCA's account was opened, FCIB was to the public perception a "highly reputable offshore bank offering up to the minute state of the art e-banking facilities".

104 In regard to the previously compiled evidence regarding the transactions of Future Communications and Infinity Holdings, the Crown's case is that the analysis shows that, where CCA appears in it, it was paying and receiving monies in the context of money flows which were either circular, or contrived, or both. It suffices to say that, while the analyses show a *prima facie* case indicating that further investigation might call in doubt the commerciality of the transactions, we have no specific evidence in regard to any of them or the circumstances in which any of them took place, and our assessment of that section of the FCIB material is that it does not get near to establishing on the balance of probabilities that CCA knew or should have known that its trading in those cases was connected to fraud. Accordingly, we focus in this evidence on the six cases Mr Birchfield put forward as indicative of CCA's trading in the period of this appeal.

105 The first is CCA sales invoice 33015 of 21 April 2006 for £839,308.38 which concerns a UK to UK deal, a sale by CCA to Future Communications. Mr Birchfield had been told by Mr D'Rozario that the bookkeeper Mrs Ryan had annotated the invoice that the payment for it was part of the much larger sum of £6,115,804.04 received from Future Communications on 10 May. The FCIB accounts show CCA as then paying £6,114,659.09 on in three parts to three suppliers BS Electronics, Look Who's Talking and Talk Together UK, who then paid £6,114,791.65 to a single upstream supplier, Booming Technologies; from them, the same amount goes via another company to Bartonole, from whom a slightly smaller sum, £6,007,821.00, had originated the same day before going through CCA.

106 In relation to the same invoice, however, CCA is shown as having paid eight days later on 18 May, UK Wide Computers the sum of £1,405,016.00. Mrs Ryan's annotation appears to show that the payment to UK Wide Computers was for stock supplied on their invoices 722 and 723 representing the goods sold to Future Communications on invoice 33015, and that the payment for that stock was part of a larger payment to UK Wide Computers of

£1,405,016.00. However, Mr Birchfield had not seen any of the invoices in question and had not therefore been able to cross-reference them; he had relied entirely on an email from Mr D'Rozario for his information and Mr D'Rozario had not mentioned invoice 723 at all.

107 The result is that it is not clear what the various money flows represent in terms of individual transactions and Mr Birchfield accepted that, in spite of the appearance of circularity from and back to Bartonole on 10 May, that 'loop' extended further and that eventually the sums traced leave or enter the loop from Barclays Bank or Standard Chartered Bank and so on, and that particular loops could be constructed using different companies than Bartonole, and that not every analysis chart contained a complete loop. The money movements in other words have not been effectively reconciled with the invoices.

108 The second invoice is 33026 of 25 April 2006, also a UK to UK deal and also a sale by CCA to Future Communications. There is again Mrs Ryan's annotation on the purchase invoice from Infinity Holdings that CCA's payment for the goods was part of the £4,011,000.00 paid to them on 11 May, which evidently included the discharge of other obligations by CCA. The annotation is that the goods were sourced from Talk Together under invoice 52 for £990,666.00 and UK Wide Computers under invoice 769, although this does not appear from the bank statements. Future Communications had paid CCA £6,115,804.04 on 10 May, which CCA paid to three suppliers BS Electronics, Look Who's Talking and Talk Together, and a further payment of £4,012,708.39 to CCA on 11 May. The annotations show that this latter payment included payment for the first supply invoice 52 but payment for the second invoice 769 cannot be traced.

109 The third CCA invoice is 33038 dated 4 May 2006 for £276,360, again a UK to UK deal and again relating to goods supplied to Future Communications; this followed apparently a purchase by CCA from Talk Together under invoice 84 for £274,597.50. The background is particularly uncertain: Mr Birchfield testified that, based on the email he had received from Mr D'Rozario, he did not know which of two money movements from CCA to Talk Together on this date in the FCIB bank statements could be identified with the purchase in question:

> All I can say is that Mr D'Rozario has told me that CCA paid Talk Together on the 10th [of May] and those are the only two payments that flow from CCA to Talk Together on the 10th. So if he's correct, it must be within those amounts.

110 The amounts paid by CCA to Talk Together on this date were £2,334,000 and £4,235,451.65. The money flowing from Future

Communications to CCA for the first of these payments was £2,337,229.48 made up of three amounts which appear to have entered the FCIB system from Barclays Bank, but that avenue had not been researched further; the second sum derived from a payment of £6,115,804.04 from Future Communications to CCA, who then paid on £4,235,451.65 of it to Talk Together.

111 The first payment then goes through two more companies and finds its way to Bartonole and then goes onwards; almost all of the total payment to CCA in the second case appears likewise to flow through to Bartonole and then onwards. Future Communications made quite a lot of payments from and to its Barclays account, but there was no evidence about how movements into and out of that account related to the FCIB movements. Similarly, payments to the Standard Chartered Bank account are not followed through and the same is true in one case at least of a payment on to another FCIB account.

112 The case, however, becomes even more obscure because annotations on the Talk Together invoice indicate that £274,597.50 was paid to them on 10 May (although the customer Future Communications itself did not pay CCA until 19 May). But Mr Birchfield had not seen the annotated invoice and could not find the payment to Talk Together in the FCIB statements and he said that he could only assume that it was part of a larger amount or that it was not paid through the FCIB system.

113 The fourth CCA invoice taken is 33039. This is an export sale by CCA to Shabir Mahomedbhay in Germany for £1,528,731.00 paid for on 15 May 2006 out of a purchase from Future Communications on 10 April 2006 on invoice 5569 (and it appears invoice 5570, though Mr D'Rozario's instructions to Mr Birchfield only mentioned 5569) totalling £2,024,500.00. The payment from Shabir Mahomedbhay on 15 May, however, passes on minus £1,231, to Infinity Holdings, mingles with other sums from other transactions and is presumably part of a sum of £4,603,470.00 which finds its way to Bartonole and then onwards. It was derived *via* an unknown account, an Italian trader and so on in different money streams, and part of the corpus of money in question subsequently leaves FCIB for Standard Chartered bank in Dubai. In regard to the purchase from Future Communications, we have seen that there is confusion over the invoices but it appears that both those cited must be relevant; if so, £900,000 of the purchase money cannot be traced in the FCIB accounts.

114 The fifth CCA invoice is 32893, again an export deal to Shabir Mahomedbhay for £1,153,700.00 on which is a handwritten annotation that it was part of a payment received by CCA of £1,963,805.00 on 28 April 2006; that exact sum had passed from

Bartonole to Wizard before passing to Mr Mahomedbhay and thence to CCA, but there was no explanation of what the surplus over CCA's invoice was for. On that date, a further sum of £2,252,995.00 went from Mr Mahomedbhay to CCA, a slightly smaller version of which had reached him by the same route; Mr Birchfield had no explanation of it, and there were a number of other payments emanating from Bartonole on the same date for which there was no explanation either.

115 The goods supplied had been purchased by CCA from Infinity Holdings from their invoices 2772, 2773 and 2779, total value £1,343,612.00 and CCA paid Infinity Holdings £4,011,000.00 on 11 May; again, the overplus could not be explained. The payments downstream of Infinity Holdings went in part to Bartonole but some £2,300,000.00 left the FCIB system to go in two different payments to Standard Chartered Bank, with the consequence that no part of the sum paid by CCA to Infinity Holdings could be shown definitely to have gone to Bartonole. The final CCA invoice is 33117 for £2,081,560.00 for an export sale to Allimpex, and although the annotation suggested that payment was made as part of a sum of £7,000,090.00 it could not be found at all in the FCIB statements, and Mr Birchfield said that he had to assume that it was not paid for through the FCIB system. This was also a purchase from Infinity Holdings.

116 In examples five and six, the conclusions to be drawn from Mr Birchfield's analysis are even less certain than in the previous cases and we again make the comment that, although there is limited evidence of Bartonole being the centre of some circularity in all of them, Mr Birchfield accepted that money enters and leaves the circles and that he could also have chosen different end points for the money flows he demonstrated.

*Tax loss in the contra-traders' deal chains due to fraud*

117 In this appeal CCA concedes that the commissioners can prove that there was fraudulent evasion of VAT in the broker deals for the appropriate VAT periods of the contra-traders Infinity Holdings Limited, Future Communications and Soul Communications; and that the disputed transactions of CCA in this appeal are connected to those tax losses by reason of the offsetting conducted by the contra-traders in the submission of the relevant VAT returns. We therefore confine ourselves to an overview of the contra-traders' deals.

118 Before doing so, we record that three persons connected with Future Communications were tried in 2011 on charges of conspiracy to cheat the public Revenue. Haider Ravjani, a director of the company, was acquitted; Dilawar Ravjani, the company's beneficial owner and controller, was convicted; Rajesth Gathani, a phone trader with the company pleaded guilty.

119 Each of CCA's broker deals i.e. those in which it sold on outside the UK, had UK supply chains which have been traced back to Infinity Holdings, Future Communications or Soul Communications, the admitted contra-traders in this case. At the material times, the Crown say, and we accept, that these three entities were not legitimate traders but were vehicles for the fraudulent evasion of VAT and were acting as contra-traders in an overall scheme to defraud the Revenue.

120 In the VAT accounting periods concerned, the contra-traders were entering into broker, i.e. export, deals of their own which generated a large input tax credit and the supply chains of these broker deals led back to fraudulent tax losses. In the same VAT accounting period, however, the contra-traders were acquiring goods from EU traders with VAT at the zero rate, and selling the goods on to UK traders with VAT at the standard rate (which we refer to as the acquisition deals), generating a large output tax liability. These goods were then dispatched on to EU customers by other broker traders, including CCA.

121 The output tax liability of the contra-traders in the clean chains involving CCA was set off against the contra-traders' input tax credit claims in the dirty chains, which meant that the repayment claims arising from the contra-traders' broker deals would effectively be made by the other broker traders such as CCA when they made input tax claims of the kind in this appeal. The fraudulent tax losses at the beginning of the UK supply chains ending with the contra-traders' broker deals would therefore be distanced from the clean chain repayment claims; this would make it more likely that the clean chain repayment claims would be allowed before the discovery by the commissioners of their masking effect in relation to the fraudulent evasion of VAT in the dirty chains.

122 In deals A1-14, and J4, Infinity Holdings was CCA's supplier. In its VAT accounting period 06/06, which covered CCA's VAT periods 04/06, 05/06 and 06/06, Infinity Holdings transacted 304 broker deals, all of which took place in May and June.

123 The supply chains leading to these deals have been traced back to the following UK traders: 23 have been traced back to Rafik Sodawala, trading as RS Sales Agency Limited; 152 have been traced back to Wade Tech Limited; 5 have been traced back to Okeda Limited; 19 have been traced back to AS Genstar Limited; 33 have been traced back to UK Communications Limited; 39 have been traced back to ET Global Solution Limited; 14 of the deals have been traced to Booming Technologies Limited; 16 of the deals have been traced to Universal Trade Supplies Limited; three of the deals have been traced to Sound and Secure Limited.

124 The supplier to CCA in deals M1-12, and J2, 3 and 8, was Future Communications. In its VAT accounting periods 04/06 and 7/06, Future Communications made 6,791 supplies of goods. 560 of the sales were supplies of goods purchased from UK traders to other UK traders in buffer deals. 2,832 of the sales were supplies of goods to UK traders which had been acquired from EU traders. 3,399 of the sales were broker deals. Over 69% of the broker deal chains have been traced. All these have been traced back to UK tax losses amounting to almost £125 million. The broker deal chains in these two periods have been traced back to one of seven UK traders which defaulted on the output tax generated by the supplies: AS Genstar, Wade, ET Global, Okeda, Eutex Limited, C & B Trading Limited, and Kep 2004 Limited. The output tax remains unpaid.

125 Future Communications' VAT accounting period 07/06 consisted of the months of May and June 2006. All Future Communication's supplies to CCA which are the subject of the appeal took place in this period 07/06, and all Future Communication's broker deals in that period took place in the months of May and June. Of the 663 broker transactions conducted by Future Communications in period 07/06, 550 (83%) have been traced back to Wade, Okeda, ET Global, or UK Communications. A further 31 deal chains have been traced to Booming, 8 to Universal Trade, and five to Sound and Secure. The tax losses arising from the supplies made by Wade, ET Global, UK Communications, Okeda, and Booming are the result of fraud, for the reasons stated above. We accept that on the balance of probabilities, the supplies made by Universal Trade and Sound and Secure also lead back to fraudulent tax losses for the reasons stated above.

126 Soul Communications was the supplier to CCA in deals J1, J5-7, and J9-12. In its VAT accounting period 07/06, which consisted of the months of May, June and July 2006, Soul Communications conducted 100 broker deals. The UK supply chains leading to these deals have been traced back as follows: 92 of the supply chains have been traced to Wade, via Booming; 5 of the supply chains have only been traced back as far as Booming; 3 of the supply chains have only been traced back to Sound & Secure; in the 8 supply chains which have not been traced back to Wade, the buffer traders, including Booming and Sound & Secure, appear in the same place as the other supply chains. Therefore, again on the balance of probabilities, Wade was also at the beginning of those supply chains.

- *the "buffer" deals*

127 CCA was involved during the VAT accounting periods concerned in this appeal in 117 buffer deals, which it is accepted have on the balance of probabilities been connected with the fraudulent evasion of VAT. Thus, in April 2006, CCA conducted 70 transactions in which it purchased mobile phones from a UK trader and sold the phones to another UK trader. The evidence is that 61 of the supply chains have

been traced back to fraudulent defaulting traders C & B Trading, Kep, and AS Genstar, though it has not been possible to trace the remaining nine beyond Hillgrove Trading Limited, Highbeam UK, or Time Corporates Limited. It is noted that the supply chains for these deals are the same as the supply chains which led back to the defaulters; moreover, all the supply chains in which Hillgrove, Highbeam and Time appear amongst the 61 which have been traced (10, 13 and 48 respectively) have been found to commence with one of the defaulting traders.

128 All the deals were back to back, the goods being bought and sold along the supply chains on the same day; in almost all of the deals, the same quantity of goods was transacted throughout; in all the deals, CCA's customer was Future Communications; in all the deals CCA's supplier was either Universal Trade, Look Who's Talking Communications Limited, BS Electronics Limited, Sound and Secure, UK Wide Computers Limited, or Evonet Solutions Limited; in 51 of the supply chains, PC Mac appears as a buffer trader, always supplying the goods to Booming; a total of 2763 Samsung Serenes was bought and sold by CCA in 6 transactions. On the balance of probabilities, all these transactions were connected with the fraudulent evasion of VAT.

129 In May 2006, CCA conducted six transactions in which it bought mobile phones from a UK trader and sold them on to another UK trader. Four of the supply chains have been traced back to the fraudulent defaulting traders AS Genstar and Okeda; the other two have been traced back to Open Line Trading Limited. In five of the deals CCA's customer was Infinity Holdings and in the other it was Future Communications and CCA's suppliers were Talk Together, Evonet or BS Electronics. All the deals were back to back with the same goods being traded throughout the supply chains on the same day, and 2,084 Samsung Serenes were bought and sold by CCA in two of the transactions.

130 In June 2006, CCA conducted 41 buffer deals in which it bought mobile phones and camcorders from a UK trader and sold them on to another UK trader. 38 of the supply chains have been traced back to the defaulting trader Wade. The other three supply chains have been traced back as far as the fraudulent entity Booming. In all the other 38 supply chains, Wade supplied the goods to Booming, which in turn sold the goods to CCA's supplier. In all the deals, CCA's customer was Future Communications and its supplier was either Sound and Secure, Universal Trade, Evonet or Ceered Limited. Almost all the deals were back to back with the same goods being bought and sold on the same day and this almost always occurred throughout the supply chain. 1695 Samsung Serenes were bought and sold by CCA in three separate transactions.

131 All, or almost all, of the traders in CCA's supply lines used accounts with FCIB. As we have noted, CCA transacted 117 buffer deals in the appeal periods. 106, or over 90%, of the supply chains go back to fraudulently defaulting entities, so it is likely that the rest also commenced with a fraudulently defaulting trader. Thus, in 04/06, there were 11 variations of the supply chain leading to 70 sales which go back to only three defaulting traders; in 06/06, there were four variations of the supply chain leading to 38 sales, all of which go back to Wade. In all the 117 deals, the customer of CCA was either Future Communications or Infinity Holdings, and the same traders which appear in the supply chains leading to CCA's buffer deals, also appear in the supply chains leading to its broker deals.

132 Many of the traders which appear in the supply chains leading to CCA's broker and buffer deals also appear in the supply chains leading to the other deals transacted by the contra-traders. Also, the three contra-traders sourced the goods from the same EU suppliers: Alpha, Esat and Vertex, and were selling goods to the same EU customers as CCA, which supports the contention that CCA's deals were, knowingly or not, part of a scheme to defraud which encompassed the contra-trading of Infinity Holdings, Future Communications and Soul Communications. Ten of the onward supply chains after CCA's broker deals lead to the same traders, irrespective of the identity of CCA's immediate customers.

133 In all 39 deals under appeal, the quantity of goods available from a single supplier always matched exactly the quantity that CCA's customer wished to purchase. The deal documents were almost always raised in the space of a day. There was never a need for CCA to buy from multiple sources in order to satisfy the demand, or to split a purchase from a supplier between several customers. In 24 deals, the same pattern applied throughout the known supply chain from the EU supplier to CCA's EU customer.

134 In almost all the buffer deals in 04/06, the same goods were traded in a single day throughout a chain of UK suppliers. In the large majority of these deal chains, there are six or seven traders. In four of the buffer deals in 05/06, the same goods were traded in a single day through four traders; and in two deals through seven traders. In almost all the buffer deals in 06/06, the same goods are traded on the same day through five traders.

*Due diligence*

135 It has been seen that Notice 726 urged traders to exercise due diligence in their relations with other traders to avoid the application of the joint and several liability provisions of section 77A of the Value Added Tax Act 1994. In practice, and where there is no question of joint and several liability being sought, the commissioners cite any failure to adhere to these recommendations as suggestive of complicity in fraudulent trading.

136 We therefore record the extent to which CCA did undertake the types of the recommended 'due diligence' in its trading relationships. Mr D'Rozario commented in evidence that Mr Trees "was improving [CCA's procedures] over the time period that I was looking at the company; they did develop". As we have seen, Mr Trees kept a database of actual and potential trading partners which, again, Mr Cunningham had not seen or was aware of when he made the decision to deny input tax. On that database was a substantial amount of detail relevant to CCA's due diligence.

137 We have noted also that Mr Cunningham did not have available to him when he reviewed the case a significant portion of the records seized in the raid on 1 June 2006. Importantly, CCA was in process of renewing various due diligence exercises on trading partners, including the use of a new trade application form, when the raid took place; because a number of the documents in question were faxed in or received during the May/June period, the conclusion was drawn by HMRC that CCA was assembling its due diligence papers after trading had taken place in an effort to make good omissions ahead of HMRC's mid-June inspection.

138 The due diligence checks always included checks on the credit of the trading partner concerned. In many cases, the creditworthiness thus revealed was poor but as far as CCA was concerned, creditworthiness was not the main object of doing the searches, since CCA themselves gave no credit to anybody (though they did, formally and informally, receive credit on many occasions from their suppliers); and it could take Creditsafe two years to build up financial information on a new company. The purpose of the credit checks as Mr Trees saw it included ascertaining whether the business was registered at the address given, whether the directors were who they had been said to be, to see if the directors had any county court judgments against them and why, and whether the directors were directors of other companies giving rise to possible conflicts of interest. Wesley Gordon, CCA's company secretary, took over the due diligence work in early 2006.

139 This area of concern is affected by the problem of missing paperwork, which we refer to elsewhere. It is clear that when due diligence checks were updated CCA often failed to keep earlier records, thus giving rise to the appearance at least of checks being made only in 2006, or even after some of the 2006 transactions had taken place. A significant amount of information remained recorded on CCA's Filemaker Pro database which was not seen or examined by HMRC.

140 Some of the data has not survived due to technical difficulties: many later Creditsafe checks were thought to have been saved to the database and not printed, but as soon as CCA's subscription to

Creditsafe had expired Mr Trees discovered that they then ceased to be accessible; he contacted Creditsafe on finding this and was told that once the subscription had ended nothing was kept on their database for a former customer. It is clear, however, that Mr D'Rozario checked the due diligence closely as he went along and although we record what was actually in evidence, we are satisfied that there was more done than now appears. It will be seen that Mr Kerr complains that the issue of missing due diligence was not put to the Crown witnesses but it must be said, however, that they would be in a poor position to add anything useful on the subject; and it remains the case that over time Mr D'Rozario's exacting eye was largely satisfied with what was done.

141 There is no more obvious an area of due diligence where the absence of recorded work is concerned than the taking up of references; the paperwork here is particularly apt to be patchy and the evidence overall leaves the impression that there was a lack of thoroughness in the matter, but the absence of some of the records may partly explain that factor. Where we know that references were taken up, they were often from associated businesses or common freight forwarders. Challenged on this, that such referees might not have the necessary distance from the subject to be credible as a third party, Mr Trees replied that he saw no point in approaching businesses that he did not know because, not knowing them, he could not judge whether their opinions were of value or not. Evidently, however, only businesses which were familiar with CCA could offer a useful assessment of the company, and we see that as a fair response.

- *Infinity Holdings*

142 Infinity Holdings supplied CCA with goods worth over £22 million in deals A1-14 and J4. It also purchased over £4 million pounds worth of goods from CCA in five of the buffer deals in May. CCA had had a commercial relationship with Infinity Holdings since July 2005. Infinity Holdings had first approached CCA.

143 According to CCA's notes, the person with whom they dealt, Simon Thakor, was no longer a director of the company but a "senior employee" and clearly the person who actually ran the company; he had a troubled financial history in a previous company of which he had been a director, but Mr Trees considered the explanation he was given of this episode satisfactory. In effect, a bookkeeper there had been stealing money which had led to a county court judgment being registered against Mr Thakor; it was eventually, according to Mr Trees, removed. Mr Trees also dealt there with Mr Saj Cheema.

144 CCA obtained several items of information about Infinity Holdings. Firstly, there was a credit report obtained from Creditsafe in July 2005. The rating was from June of 2004, and the business was described as newly established and "less than 18 months old". There

was no recommended credit limit and no accounts had been filed. A further Creditsafe report obtained in September 2005 named two directors, one of whom was apparently Simon Thakor's brother; this report contained no financial information. Next, there were cert4ificates, obtained in July 2005, indicating that Infinity Holdings had been incorporated in June 2004 and registered for VAT in December 2004, and there was a check made with the Redhill VAT office in July 2005.

145 Thirdly, there were two trade applications documents. A trade application form dated July 2005 required a copy of a driving licence or passport, but none was provided. It named trade referees as Future Communications and A1 Distribution and it apparently also named Soul Communications. There was also a trade application form, a letter of introduction, a copy of the passport of one of the directors and a lease agreement, which seem to have been faxed to Infinity Holdings on 30 May 2006, and returned under cover of a letter dated 31 of May.

146 The form indicated that the business had been incorporated two and a half years previously in 2004, and the trade references proffered were Future Communications, A1 Distribution, Aquarius and an accountant; bankers were HSBC in Leicester and FCIB, and there details of Infinity Holdings' tenancy agreement, and a utility bill for the trading address, a passport of one of the directors there; a home address had been requested but was not provided; the accountant, however, was contacted by Wesley Gordon and his note was "seems fine".

147 Effectively, there had been two rounds of due diligence: the first in 2005 when trading had begun, and the second in May 2006. Infinity Holdings was described by Mr Trees as a "very large and well run business" with a "lot of staff". On the references, Mr Trees had contacted the accountant, who replied "[it] seems fine", although we saw no record of the other references being taken up.

148 Mr Trees visited Infinity Holdings' premises in the town centre of Leicester and spoke with Simon Thakor for two and a half hours. The company later moved to the outskirts of Leicester, to an industrial park and a large building where, according to Mr Trees, they still are. Mr Thakor sent his due diligence officer to CCA's premises to photograph them and collect details.

- *Future Communications*

149 The forerunner in business of Future Communications was Ravjani Corporation, which transferred its phone trading business to Future Communications which it had acquired. Future Communications supplied CCA with goods worth almost £22 million in deals M1-12, and J2-3 and J8. In April 2006, Future Communications purchased about £47 million of goods from CCA, and in June about £26 million worth. CCA obtained information about Future Communications in the same sort of way.

150 There is a letter from CCA to Future Communications seeking credit terms in June 2005, and in practice CCA obtained a degree of credit from Future Communications regularly; there were also certificates indicating that it had been incorporated in 2001, and registered for VAT in March 2002, and bank details and a letter of introduction, all received in 2003. A Redhill VAT office check was made in April 2005.

151 A Dun & Bradstreet report, dated 17 November 2004, describes the overall condition of the business as "well above average", and superior to other firms in the industry with 19 employees; the business activity is described as "internet and computer services, including web design and on-line trading of electrical goods". It also indicates that, although the value of the business was growing, there were no figures available to assess the company's profits or Revenue but said "you should confidently be able to rely on this company as a supplier, and their stability may make them a good outsource partner".

152 At the end of May 2006, a second round of due diligence on Future Communications took place with details of their accountant, their banking (Barclays and FCIB), trade references, the usual certificates, proofs of identity, a new trade application form and a letter of introduction. An accountant was named and a reference was supplied by a freight forwarder named by Future Communications, Hawk Logistics, requested on 4 July 2006 and received the next day. There is no surviving record, however, that various other details such as personnel identities were confirmed, but Mr Trees visited the company at least three times between 2003 and 2006, meeting Mr Rajesh Gathani there; but he did not meet either Mr Dilawar Ravjani or Mr Haider Ravjani, who were in fact more important as company secretary and director respectively.

153 Unknown to HMRC when deciding on the adequacy of the due diligence was the fact that Future Communications was part of a group that was re-branded in October 2006 as the Innovative Global Business Group Limited (the IGB Group) consisting of 18 companies, which included in its operations "commodity sourcing and trading"; their publicity brochure described Future Communications' activities and stated that they had developed new technology for phones available for use in 85 countries. On being acquainted with this at the hearing, Mr Cunningham agreed that it offered credible assurance to CCA that Future Communications was in a substantial way of business and well able to supply its customers.

154 Future Communications, despite a criminal investigation commenced on 1 June 2006, was still trading in July 2009.

- *Soul Communications*

155 Soul Communications supplied CCA with over £14 million worth of goods in deals J1, J5-7, and J9-13.

156 CCA obtained various pieces of information about Soul Communications, such as details of the bank account on letter headed paper in February 2003, a certificate indicating VAT registration in March 2002 and a Redhill VAT office check in September 2004, and banking details then. Mr Trees's contact was a Mr Dipak Majithia, a director of the company.

157 As in other cases, a second round of due diligence verification took place in 2006: a trade application form was received on 24 May 2006, indicating that the company had been incorporated in January 2002, had been trading for 4 years, and had three full-time and two part-time staff; it names an accountant, showing banking still with Co-op Bank but also now FCIB. Also enclosed were copies of a utility bill (though for the director's home address), the main director's driving licence and passport and a rent demand for their commercial premises.

158 A reference from one of the traders named by Soul Communications, Eliyon, was however obtained, which stated that Eliyon had been trading with Soul Communications for 5-6 years, and confirmed that Soul Communications dealt in mobile phones, traded from the address given, and was a good company to deal with. The reference appears to have been requested by CCA by fax on 20 June 2006 and received back the next day. The premises visited by CCA were based at a high street shop in London, 109 Colindale Avenue, which sold phones with three full time staff, and was described as being near a college or university with many students making purchases. Mr Trees spoke to Mr Majithia, who showed him documentary evidence for their warehouse – but not the warehouse itself, since to see round a warehouse could offer valuable clues to who the owner's suppliers were. No financial information was however obtained and no checks were made on the director of the company with Companies House or Creditsafe.

159 In deal J5 on 19 June 2006, papers taken from Soul Communications appear to show that the goods sold were delivered to CCA's premises at Stockport: there is what purports to be Mr Trees's signature and CCA's stamp on the delivery collection note. Mr Trees was adamant that the signature was not his and he pointed to ones that were his in other documentation; he was equally adamant that the goods had not been delivered to the mill at Stockport. We accept his evidence.

- *Allimpex*

160 CCA was contacted by this business in January 2006. Allimpex purchased over £15 million worth of goods from CCA in April, May and June 2006 and various pieces of information were obtained about them.

161 A report had been obtained from Creditsafe in January 2006 according to which payment experiences "[were] not yet available", and the credit-worthiness and the business development "remains to be seen". There was apparently only one employee. The business was described as "the renting of other machinery and equipment". The turnover in 2003 and 2004 was €1.2 million and €1.6 million respectively.

162 A Redhill VAT office check was made in January 2006 and a letter of introduction with bank details was faxed in January 2006 indicating that the business had been established in March 2003. Certificates of incorporation dated 6 October 2004 and a certificate of VAT registration in September 2004 were obtained. The business activities are described as buying and selling machinery and equipment, importing and exporting, wholesale and retail trading in goods of various kinds, in particular leather, textiles, household and industrial electrical appliances, telecommunications and telephone equipment as well as telephone systems, motor vehicles and medical equipment. Mr Trees's contacts there were a Mr Johal, and a Mr Amer who came to visit CCA's premises and impressed Mr Trees with his knowledge of the industry.

- *Pielkenrood*

163 CCA was first contacted by Pielkenrood in November 2005; they purchased over £10 million worth of goods from CCA in April, May and June 2006. A report was obtained from Creditsafe in March 2006 according to which the business of this company was wholesale trade in electro-engines. It had an issued capital of €18,000; credit without guarantee was described as "not safe". The company had been incorporated since 2003, but had apparently filed no accounts.

164 A trade application form containing an undated letter of introduction, including bank details (Alkmaar Bank and FCIB), company registration, a utility bill and VAT certificate had been received, claiming that the company's staff had been dealing in large volumes of mobile phones for almost five years. These documents were received in January 2006. The main trade application form, however, was faxed on 24 May 2006 and stated that the business had commenced trading in October 2003. CCA also obtained trade registration documents and a copy of the director's driving licence. It appears that Pielkenrood did not retain stock and did not trade domestically and there is no record of the references being taken up. Mr Trees's contact was Mr Simon Pielkenrood but he did not go to see him.

165 A statement by one Jacob Pielkenrood (understood to be the son of Simon, the owner of the business) made in 2009 to the Dutch authorities was produced in which the deponent sates that trading carried out by the company in mobiles phones with traders in the UK

in 2006 was fictitious and that the goods purportedly bought and sold did not exist. It was not established in what context this statement was made, what was the sequel to it if any, or that it necessarily referred to trading involving CCA at all; indeed, we had difficulty in verifying that it had even been signed by the person supposed to have made it. Mr Trees said that he had no contact with Mr Jacob Pielkenrood and there is no evidence to the contrary. We do not go so as to decline under the tribunal's Rules to admit evidence of this statement, but we see it as all but meaningless in the context of this appeal.

- *Universal*

166 This business, based in Vienna, contacted CCA in October 2005, and began to purchase goods in the same month. Universal purchased almost £20 million worth of goods from CCA in April, May and June 2006.

167 Trade registration documents, and a letter of introduction which claimed that the business had over 15 years experience in the telecommunications sector. A letter of introduction, with bank details and trade registration documents, was sent in October 2005 showing that the business had been established in 2004. A Redhill VAT office check on them was made in October 2005 and CCA made its first sale to Universal on 25 October 2005.

168 The trade application form dated 23 May 2006 confirmed that the business had been trading for two years, having started in January 2004 and that there were three full time and four part time staff and two trade references were supplied. A copy driving licence was provided for the director, Mr Jason Davis, indicating that he was resident in London; Mr Trees said that he was going to visit Universal in Austria but in the end met the director in Buckinghamshire at the latter's request at his wife's office there. A utility bill was provided but no tenancy agreement. An undated mutual assistance report to HMRC from the Austrian authorities about this company was put in evidence but we could glean no useful information from it.

- *Shabir Mohamedbhay and BHS Vertriebs*

169 CCA was initially contacted by this business in July or August 2005 and was visited by them later in 2005 at Stockport and they purchased over £11 million worth of goods from CCA in April and May 2006. The business was meanwhile incorporated as BHS Vertriebs, which purchased over £2 million worth of goods in June 2006.

170 There was a letter of introduction for Shabir Mahomedbhay as a sole trader dated 14 November 2005 with bank and company details (banking was with Deutsche Bank) and trade registration documents from 2005 when he first contacted CCA in the summer of that year and he also visited them; he was offered stock at that time but did not

buy it. In January 2006 Mr Mahomedbhay first traded with CCA, and a Redhill VAT office check was made in March 2006. For BHS Vertriebs there was a letter of introduction dated 7 March 2006, and trade registration documents from early 2006.

171 In addition to this there was a trade application form for Shabir Mahomedbhay as a sole trader, dated 22 May 2006 in which BHS Vertriebs is given as a trade referee, and also is named as the accountant. The other trade reference proffered is Eliyon, the trader nominated by Soul Communications as a referee. There was also a trade application form on 21 May 2006, signed by Shabir Mohamedbhay for the incorporated entity. Some of the information required by this form is not given and no utility bills are provided, but there was a copy driving licence and passport for Mr Mohamedbhay.

*Serial numbers*

172 The retention of the International Mobile Equipment serial numbers (the IMEI numbers) of mobile phone handsets, if practicable, had been suggested to CCA in a letter from Mr D'Rozario on 19 May 2003 for the purpose of helping to ensure that the same goods were not sourced or supplied more than once. A database known as Nemesis, not owned by HMRC, existed on which the IMEI numbers of stolen or lost phones were entered by the police; from February 2006, officers uploaded details to it from warehouses in which they had scanned the IMEI numbers of the stock there. They would also collect the numbers scanned by the warehousekeeper if he had been instructed by the exporter to do that work: coverage varied from 100% of a consignment to 10%, to nil, depending on the owner's instructions; and the completeness of the officers' own scanning depended on the time and resources available to them.

173 Further correspondence between HMRC and CCA from April 2004 to October 2005 also suggested the retention of these numbers so that they could be provided to the commissioners as and when requested. No record, however, was routinely kept by CCA but Mr Trees claimed to have supplied the numbers for one consignment each month in February, March and April 2006, and on earlier occasions, though the commissioners have no record of receiving them.

174 The Crown witnesses alleged that traders did not wish to supply the numbers because the information could or would reveal carousel trading, while Mr Trees pointed out that the information at any time held by HMRC – was incomplete and that for the trader to undertake this work would involve important expense for no certain benefit in regard to his own trading; he also maintained that there were technical reasons relating to the capacity of computers at the time which would have made searching and cross-checking almost impossible. Mr Trees's evidence was that it would have cost 50p per number, or often half his profit, which he was unwilling to forgo for a result which he did not believed would be obtained.

175 As against this, HMRC could and did go into warehouses to obtain the details of all IMEI numbers they had scanned at the instance of their customers, or to scan the IMEI numbers from stock held there; but Mr D'Rozario agreed that, even if CCA had supplied IMEI numbers, it would not always have been possible to say whether phones had been imported and exported before because the database was incomplete.

*Inspection of goods*

176 CCA did not retain, or seek, any inspection reports on the goods, though they often requested outer box inspections by the freight forwarders, maybe by a percentage check; this involved looking at the description on the outer boxes, and a box count, and on occasion looking at the retail boxes. The retail boxes and handsets were not opened and examined and there were no inspections made by CCA themselves during the appeal period.

*Visits to trading partners*

177 Some emphasis is put by HMRC on the importance of visiting trading partners, to meet the directors of the company, to see the set up, to see physically that there is stock on hand and the business is operating in the trade sector in which they say they are. In that context, it is worth recording the reasons given by Mr Trees to Mr D'Rozario for not always doing so, especially when they are abroad. The points Mr Trees made are as follows:

- Visiting companies abroad involves significant expense and it is easier to await an opportunity to see people when they are in London.
- Establishing an accurate credit rating for an overseas company is likely to be more difficult than for a UK based company.
- Trading contacts are often made at short notice and it is impractical to visit every prospective dealer on the assumption that CCA would deal with them.
- To delay a proposed deal until a visit is made is likely to jeopardise the deal.

*Insurance*

178 From the outset, CCA and its sister companies for the most part did not insure, a fact which was known to HMRC at least from 2003. This was a commercial judgment that the cost of premiums was too high and that it was better for the businesses to carry their own risk, bearing in mind that hauliers did provide insurance cover for stock while in transit and likewise for stock in warehouse.

179 By the end of 2005, due to a change in legislation, freight forwarders ceased to be able to provide insurance and CCA had to obtain its own cover direct. A marine cargo transit policy was

therefore put in place from 25 January 2006 for one year through W B Tidey & Co Limited as brokers. The estimated annual value of carryings upon which the policy was based was £20 million and the default limit for any one consignment was £750,000, with an initial premium of £19,200 for the whole policy. At the end of each year, if the annual carryings figure had been exceeded a *pro rata* top-up of the premium was due, thereby providing retrospectively for cover for the full value actually carried, though it was possible that a very great discrepancy would call that in question.

180 If the value of an individual consignment, however, exceeded £750,000 the matter could not be cured in that way and underwriters would be likely to apply average, which meant that they would reduce the amount payable on a claim in the same proportions as the excess value bore to £750,000; but that problem could be avoided by splitting individuals carryings so that their value did not exceed the limit.

181 Something over a quarter of the individual consignments to Belgium in the appeal period contained goods worth in excess of this figure, and there is no evidence of the notifications to insurers therefore needed to avoid the consequences of under-insurance. The records show that over £8 million worth of goods sold in June were carried in a single vehicle on 3 August 2006, over £7 million worth in a second vehicle, and over £6 million worth in a third vehicle. We mention elsewhere why this occurred and the action Mr Trees took when he discovered it.

182 There may have been other problems with the cover in relation to conditions in the policy that the assured should have a written agreement with freight forwarders containing detailed provisions with regard to security arrangements, packing lists and carriers liability insurance, and it is unclear whether these matters were properly attended to; and DVD players, GPS systems and laptops were not included within the cover although they figured among the appeal period exports - Mr Trees admitted that this was his error.

183 The main problem, however, related to Belgium. The countries export to which was covered were initially France, Germany, Italy, Spain and Portugal, but in May 2006 Portugal was deleted from the list and replaced by the Netherlands. Belgium, however, was never on the list and all the exports we are concerned with actually went in the first place to Belgium. The evidence was that underwriters would accordingly have been entitled to refuse any claim arising from these carryings and that they probably would have done so. It is not for the Tribunal to speculate about the reasons for this obvious error, but Mr Trees's explanation for it was that it was simply an oversight.

184 The insurance broker, Mr Tidey, told us that it was common for commercial carryings to be under-insured or not insured at all, and

that not many underwriters would cover CCA's type of high value goods; the underwriter in question, Aviva, had however done so.

*The evidence of Mr Trees's knowledge*

185 Mr Trees, in his own evidence, consistently denied that he had any actual knowledge that fraud was taking place and strongly resisted suggestions made to him in cross-examination that he turned a blind eye to an obvious lack of commerciality in the dealings he was undertaking. There is no evidence explicitly attesting to awareness of fraud actually taking place: no email, no letter, no document, no intercepted telephone call, no witness evidence. The case against CCA is based on inference from the circumstances of trading patterns and money payments; but the allegations against Mr Trees by the commissioners' officers based on the circumstantial evidence amounted to a claim that Mr Trees had actual knowledge, at least in general terms, of the fraudulent connections of his dealings.

186 Thus, Mr Cunningham accepted that Mr Trees would not be able to detect from his trading partners that they were involved in a Revenue fraud, but he asserted that Mr Trees should have known of that fact since the overall pattern of trading was, in his view, clearly uncommercial and contrived. Mr D'Rozario, CCA's control officer for the three years leading up to the appeal periods, was categorical that, although an honest arm's length trader in CCA's position could not have detected the fraudulent character of the trading, Mr Trees was necessarily a knowing partner in the enterprise. In answer to one question on this he said:-

> Well we are working from the perspective that CCA and Mr Trees would have been - in order for those trades to have happened, occurred, he must have been at the outset brought into the syndicate or the sale because why would he be surrounded and so securely protected by three of the largest, what we now know to be the largest, contra-traders in the U.K., and why would he buy from, say, Future Communications all the time when he is dispatching, which would commence with no tax loss, and then why would he sell to the same company in his U.K. deals which commence with a tax loss?
> We see it as so contrived at the outset that he wouldn't have been just by chance an independent arms length trader who just happened to be in that transaction chain.

187 Mr D'Rozario also accepted that CCA could not "from a genuine trader perspective", have discovered by means of due diligence alone, that it was dealing with contra-traders whose transactions were covering up a connected fraud.

188 The Crown's case against Mr Trees and CCA is put as one of dishonesty strongly implying actual knowledge of the fraudulent character of the trading context in which he was buying and selling -

though not necessarily of who was committing the fraud or how it was being committed; the overall pattern of business showed that he must have been dishonest and been in possession of such a degree of knowledge as to disqualify CCA from its *prima facie* entitlement to deduct input tax under the case law as now expounded.

189 Against this background, Mr D'Rozario asserted that CCA made a good profit from its trading over the three months under appeal – some £537,000 gross profit in fact. Mr D'Rozario, accepting that the contra-traders offset their fraudulently acquitted right to input tax in the dirty chains against the output tax they are paid by CCA in the clean chain, then went on to describe why he considered that CCA could not have been an innocent victim in these terms:-

> . . . they [the others in the chain] are all going to benefit with the profit that is going to be achieved by the broker stealing the VAT . . . having the fraudulent reclaim of VAT repaid by HMRC.

190 Asked how "they" were going to benefit, Mr D'Rozario replied:-

> I don't know because I haven't got the actual evidence, but I'm sure what would happen here is whoever is going to make the profit, i.e. the profit is the VAT, the broker gets the VAT by way of VAT repayment from HMRC and then they will all participate in sharing that profit out.

191 Mr D'Rozario repeated this allegation, and he said the same thing about the commercial profit to which he had referred of £537,000, that it "would then be split, what we would say, amongst the cell . . . because they have all conspired to allow him, CCA, to make that profit". Pressed on that reply, Mr D'Rozario said that the repayment "would go back into the chain, for more, to recycle it again, to buy more product, to do it again. Now as to the mechanics of how much of that will go to individuals in the supply chain I have no idea." It is accepted by the Crown, however, that there is no evidence of circularity in this case in regard to the goods supplied.

192 On the profit – it was not quite clear at this point whether the reference was to the commercial profit or to the VAT repayment, or to both - Mr D'Rozario said "I don't know how it would be shared out", adding:-

> It is just – it is our feeling, or understanding, because it's all contrived and it is all a cell, and evidence from – that I have from other cases via my colleagues in law enforcement, that's how it's done. It is the cell shares the profits."

193 When Mr D'Rozario was asked whether HMRC had used their extensive information powers to seek to discover who the money had gone to, he replied that he was not aware that they had. The same allegation was made by other officers. Ms Holden, who had final responsibility for verifying the trade patterns of Infinity Holdings, said:-

> I believe it is a contrived trading scheme. The chains – the people involved in the chains must have been aware of the fraud. There are numerous factors of Infinity Holdings' trading that show this to be the case. And if it is a contrived, pre-arranged scheme then the participants had to be aware of it to know who to trade with. They wouldn't have been free to just trade with anybody.

194 By December 2009, when Ms Holden took over responsibility for Infinity Holdings, the input tax on its trading with CCA for many of the contested deals had not been denied, and HMRC were out of time to make an assessment for it.

195 Ms Judith Clifford, who was the officer with responsibility from May 2006 for the VAT affairs of Future Communications and who was involved in the subsequent uncovering of that company as a contra-trader, was of the same mind:-

> There is an overall scheme to defraud, which involves a number of traders, all of whom must have knowledge that they are participating in a fraud.

196 'Contra-trading' is a term devised by HMRC to describe the mechanism of concealment of MTIC fraud which occurred in this case. The evidence, however, is that neither Mr Trees nor Mr D'Rozario were acquainted with it until July 2006 (Mr Trees possibly later still), although as we have seen the Crown alleges that Mr Trees was aware before then of what was taking place, whether he knew of the term or not.

197 In Mr D'Rozario's explanation of it, a contra-trader would use ten or more brokers in clean chains to spread around the offset of the fraudulently acquired input tax in one dirty chain and Mr Birchfield, who analysed the banking evidence, described the fraud in this situation as "a very large scheme". It is also noteworthy that, as we have seen, Future Communications was raided in a criminal investigation as long ago as June 2006, its main personnel subsequently prosecuted and convictions secured, yet no evidence from that source incriminating Mr Trees or CCA was presented.

198 Mr D'Rozario's information to CCA about fraud focused on fraud in the supply chain and he did explain the generality of MTIC fraud early on in 2004, but he did not go into detail about carousel fraud and refused a request by Mr Trees for a "rogues gallery" of those believed to be involved. Naturally, because he did not understand it himself, Mr D'Rozario did not explain to Mr Trees what contra-trading was and he was always guarded about what he said – due no doubt to the obligations of taxpayer confidentiality, not to mention the danger of libel actions.

199 This is well illustrated by an episode with regard to Y M International, a Dutch company whom Mr D'Rozario informed Mr Trees "had gone missing". Mr Trees tried to contact them, found only an answerphone in use and left an urgent message; the next morning at 6.15 am the call was returned and the story was categorically denied. On being told this, Mr D'Rozario replied only "I can't comment". Mr Trees said that this nil reaction happened on five, six or seven occasions when he reported untoward information about a company to Mr D'Rozario.

*The Grey Market*

200 As is typical in cases such as this, CCA was what is known as a grey market trader, that is to say that it was buying and selling for the most part outside the manufacturers' authorised distribution systems, which are supported by a contractual network designed to maintain distinct sales territories and the wholesale and retail prices within them. Effectively, the grey market operates to circumvent these restrictions and to maximise the immediacy and sufficiency of supply to the markets, but because it is unregulated by the main industry players the conditions in it at any one time are more difficult to establish and, by the same token, are more open to manipulation by organised crime; and the grey market is in general viewed with disfavour by original equipment manufacturers.

201 That is the background to the expert evidence about the grey market in mobiles phones in 2006 which both parties sought to adduce. Beside the evidence on this from Mr Trees, who was of course actually operating in the grey market, Mr John Fletcher of KPMG was put forward by the Crown as an expert witness and Mr Nigel Attenborough of NERA Consulting was put forward for the taxpayer.

202 Mr Attenborough has a BA degree in economics from Cambridge University, an MA degree in energy economics from Surrey University and an MBA degree from Kingston Business School. At the time of preparing his evidence, Mr Attenborough was the Head of the European Communications practice at NERA Consulting, an economic consultancy and has published and lectured widely on economic matters; before joining NERA in 1991, Mr Attenborough worked for 5 years for British Telecom, becoming Head of Regulatory Economics and Competition Policy.

203 Mr Fletcher is a chartered accountant and has been a director at KPMG since 2005 where he has acted for a range of communications clients providing strategic and regulatory advice. Mr Fletcher has given evidence for the commissioners in excess of 20 cases hitherto, but in no case has he given evidence at the request of a grey market trader; Mr Fletcher's firm acts for Nokia and has since 2010 been a member of the Anti Grey Market Alliance, an American organisation for which KPMG provided a Report in 2003 on the market's effects on the IT industry in the US. His statements utilised work performed by a team of industry specialists, forensic accountants and economists who have worked under his direction and supervision and who had reported back to him on their findings. Mr Fletcher has 15 years' experience in the telecoms industry, he has been employed by the parent companies of service providers and mobile network operators, has examined distribution channels for handsets in western and central Europe, Asia and the Middle East and has advised Dial-a-Phone on its strategy for business development.

204 Because of KPMG's client relationship with Nokia, they have a confidentiality agreement with that company in consequence of which the basis for Mr Fletcher's evidence derived from Nokia could not be disclosed. Similarly, a material part of his evidence was based upon oral or written reports to him by colleagues which were not exhibited. Mr Fletcher accepted that there was no established body of knowledge or academic research into the grey market in 2006, but he said that colleagues whose information he had drawn on in his statements had worked with distributors trading in both the grey market and the white market, though they could not be considered direct comparators to CCA.

205 In terms of possible conflicts of interest, Mr Fletcher said that he would probably see acting for a grey market trader in a case such as this as incompatible with his relationship with HMRC. Mr Fletcher saw no conflict arising however on account of KPMG having acted for CCA in verifying their up-chain transactions in 2004, or in KPMG belonging to the Anti Grey Market Alliance. In relation to the former, Mr Fletcher pointed out that the transactions involved in 2004 were not those under appeal, and in relation to the latter he said that the content of the Report prepared by KPMG for the Alliance in 2003 had no bearing on the issues in the appeal.

206 Mr Fletcher said he had seen how the grey market operated at other points in supplying phones to markets outside the UK and discussed with a number of operators and retailers in markets overseas in the years before 2006 how grey market supply in the UK reached their markets. Both experts agreed that in 2006 there was a significant, vibrant, legitimate and honest grey market in the wholesale distribution of mobile phone handsets. This market was global, including not only the U.K. but also Europe, India, Asia and Africa, though not generally north or south America; between 2002 and 2006

there had been an explosion in the demand for mobile phone handsets worldwide and for traders in the grey market there were substantial profits to be made. Mr Attenborough and Mr Fletcher identified four areas of opportunity for the grey market afforded by failures in the operation of the official distribution systems, or 'white market'. These areas are: arbitrage, box-breaking, volume shortages and volume surpluses.

207 There is no hard and fast evidence as to the size of the UK grey market in 2006 and official trade figures cannot be relied on because it is accepted that they are distorted by the volume of fraudulent trading which it is agreed was taking place. Mr Attenborough nonetheless made an attempt to estimate the size of the legitimate grey market for UK exports, working back from the more reliable figures available for 2010 of UK exports (when there was thought to be much less fraud because of the introduction for these goods of the reverse charge) and world sales, to reach an estimate for the UK export grey market in 2006 of 7.13 million items, or 10 million in the UK grey market altogether. Mr Attenborough estimated that under 30% of unofficial imports to the UK were for domestic consumption and that the rest were destined for re-export, to which had to be added grey market exports of official imports – though they were in his view very small.

208 Mr Attenborough took issue with the basis on which Mr Fletcher calculated what he termed the 'addressable authorised handset distribution market' in 2006; in Mr Attenborough's view the size of this market is underestimated by Mr Fletcher and that his calculations were "fundamentally flawed". This was in part related to estimates of the growth of the UK market and extrapolations therefrom to reach reliable figures for 2006, and on the extent to which the grey market had been affected by such matters as the auctioning of third generation mobile phone licences. On this, the experts were at variance in their perceptions of what had happened to the market between 2006 and 2010 when the more reliable figures became available, and consequently on the adequacy of their respective projections backwards to 2006.

209 A significant part of the disagreement focussed on the extent to which the 2010 figures, on which the backwards projections had been made, were in fact fraud-free. Mr Attenborough, relied on evidence from Mr Stone that the reverse charge introduced for mobile phones in 2007 had by 2010 all but eliminated MTIC fraud of the kind found in the present case, and proceeded on the basis that the trading figures for that year were therefore in principle reliable. Mr Fletcher, however, countered that while this might be the case in so far as the UK alone was concerned, it was also possible that the trade figures remained distorted by the UK being used for MTIC fraud targeted against other EU states; but he did not have any figures to support that hypothesis.

210 A subset of that issue was whether the extended verification introduced by HMRC in 2006 shrank the market, Mr Attenborough saying that it did and Mr Fletcher saying that it did not. A further issue concerned the extent to which it was possible to regard growth in the UK market as mirroring growth in the global market. But in spite of his reservations about Mr Attenborough's method of calculating growth in the UK market between 2006 and 2010, Mr Fletcher concluded:

> I have not considered how one would go about restating this calculation. I have simply pointed out the difficulties I have with the approach Mr Attenborough has taken.

211 Mr Fletcher was very reluctant to make an estimate, but settled on a maximum of 12 million handsets for the addressable authorised handset market in 2006; he thought Mr Attenborough had over-estimated the grey market proportion of the market, but he was not able to say by how much. The difference of view appeared to relate ultimately to the volumes each thought were, on the grey market, being imported to the UK and then re-exported, Mr Attenborough considering that such a trade did exist in volume and Mr Fletcher disagreeing, adding that he could not estimate the grey market even in 2009/10. In Mr Fletcher's view, however, CCA *could* reasonably have expected to be in the market and to have made a profit.

212 Mr Attenborough considered that all sectors of the white market interacted with the grey market. Thus, Original Equipment Manufacturers (OEMs), Mobile Network Operators (MNOs), Authorised Distributors (ADs) and specialist multiple retailers such as Carphone Warehouse and Phones4U, all sell to and on occasion buy from the grey market. If these businesses find themselves with shortages or surplus of handsets which cannot be remedied through official channels use is made of the grey market e.g. because they have not accurately forecast demand, or because they have over-bought in order to gain marketing support from the manufacturer.

213The system of sales territories often operated by manufacturers could also produce surpluses or shortages which could be disposed of (often called 'dumping' where older stock is concerned) or made up for by buying from adjacent territories – necessarily on the grey market. Mr Fletcher agreed that even original equipment manufacturers sold to the grey market but, in the case of Nokia, only outside Europe; there was no information about the quantities likely to be involved; he also agreed that it was entirely possible that mobile network operators facing volume shortages would source from the grey market, including doing so to meet the needs of their corporate customers.

214 Mr Attenborough considered that in the grey market there is an important role played by intermediaries matching sellers and buyers, a role which could not easily at the time be undertaken by electronic

exchanges instead, and that the existence of intermediaries was not necessarily an indication of fraud. Mr Fletcher agreed that such behaviour was possible, but thought it unlikely to occur except where the intermediary added value.

215 Regarding what HMRC call 'buffer' traders, Mr Attenborough said that they existed because "some people will pass on information, they don't actually want to be sort of involved in the deal; they just want to make a small cut"; such intermediate sales would generally be by way of back to back deals and were typical of many commodity markets characterised by rapidly changing prices, of which the grey market shared some of the characteristics. In his evidence, Mr Attenborough compared the UK to other global trading centres such as Hong Kong, Singapore, New York and Amsterdam and said that the UK acted as a gateway to other networks; he opined that:-

> It is perfectly reasonable for the phones to come into the UK and then move out again, because I think as I say more in my second report than my first report that it isn't a very expensive process.

216 Mr Fletcher disagreed both that this was a likely scenario and that the expense would not be a discouragement, adding that he did not think there would be "a huge number of instances" where road transport from one part of the continent to another through the UK would make sense. Mr Fletcher did however state that mobile network operators or authorised distributors used intermediaries to hide the fact that they were trading on the grey market, that they might wish to break up a transaction into smaller deals to reduce their significance in the market and that they could have reasons for wanting to put stock into the UK grey market.

217 Mr Attenborough added that phones that have become obsolete in the UK would not necessarily be so in other countries, and that in his view also provided a reason for exports to take place. Likewise, back to back deals generally occurred where there were volume surpluses and the price was falling, and a trader would want to have stock in his ownership for as short a time as possible. In Mr Attenborough's opinion "in the case of volume surpluses back to back trading makes a lot of sense".

218 Mr Fletcher agreed that back to back trading did occur in the grey market but disagreed that it would occur in box-breaking or volume shortage transactions, and he thought that volume surpluses would usually be dealt with by direct export to a market outside the UK; he conceded that such trading could occur in the case of volume shortages, but would only be likely with an authorised distributor or a mobile network operator at the end of the chain – though other trading could not be excluded. In regard to box-breaking, Mr Fletcher felt that back to back trading would not typically occur in export trade

situations unless the export was being made by the box-breaker, or that box-broken goods would find their way into the UK for re-export.

219 In Mr Attenborough's view, a further opportunity would be offered by what is described sometimes as 'staggered release arbitrage', which occurs when a new product is launched but is not available in all sales territories at once and cross-territory trading is therefore incentivised. Arbitrage opportunities could take other forms as well, as where there was a significant price difference between territories, or where currency fluctuations occurred, or where authorised distributors had qualified for discounts, or have lower or higher costs, or are discounting to increase market share. In so far as Nokia was concerned, Mr Fletcher disagreed that their homogenous pricing policy, designed to avoid EU competition objections, was ineffective or that there was effectively no such policy at the wholesale level.

220 Box-breaking is the opportunity which occurs when a trader buys phones in the UK where they are heavily subsidised (to lure users into expensive contracts) and shipping them out to other territories where they are normally dearer. In such cases, it may or may not be necessary to 'flash' the phones i.e. change the languages (an operation which Mr Attenborough says can be carried out in a matter of seconds) and to provide two-pin plugs for the chargers. This happens principally in the UK but also in other countries, for example Spain and Portugal.

221 On the length of chains in the grey market, Mr Attenborough was consistent that there might or might not be good reason for each participant being there, though the longer the chain the less likely it became that there would be rational market explanations for it. Similarly, traders buying and selling the same phones from each other in the same period did not in Mr Attenborough's view necessarily point to any conclusion: it could be due to imperfect information in the market. Likewise, no certain conclusion could be drawn from the simple fact of shipments into and then out of the UK when the goods could have gone more directly than through the UK: this could be due to better transport systems being available, and might not be more expensive, or to conceal A's identity from C by interposing B.

222 Mr Fletcher put in evidence research findings by an organisation called GFK, a German market research institute, on the volumes of phones being traded for retail in 2006. GFK claim that they capture 92% of all consumer and SME sales in 22 European countries and the UAE by means of links to electronic point of sale systems in retail outlets and that the remaining 8% of sales are accounted for by sales through petrol stations, newsagents, toyshops, black markets, offshore islands and exports. Their results are therefore focussed on certain retail sectors in certain countries - there are generally agreed to be some 50 European states - within the worldwide market for mobile phones. GFK had estimated that 234 million handsets were sold in

2006, while Nokia's figure was of some 276 million though the territory definitions used could explain the difference.

223 The GFK data did not include corporate sales, which Mr Fletcher considered would be from the manufacturer *via* a mobile network operator to the sort of large business concerned. Such sales would not in his opinion be made from the grey market, though Mr Fletcher was ready to allow that 9% could be made up of purchases by authorised distributors and mobile network operators from the grey market.

224As to the European countries not covered by GFK, Mr Fletcher agreed that there might be a demand there for handsets no longer popular in the larger countries; and he agreed that he did not know the extent of the white market or the grey market in any territory, but said that there was certainly an active grey market in the UAE in 2004 and without doubt also in 2006. That market would be fed by phones coming from and being supplied outside the authorised distribution channels, and potentially coming from Europe. Mr Fletcher also accepted that phones traded on the grey market in Europe could well find their way to the Middle East, India and south east Asia, but thought that the buyers for them would be "more likely to be looking in their neighbourhood" than to Europe because of the need to source goods equipped for those markets.

225 Mr Fletcher initially gave it as his opinion that the Nokia 8800 sales by CCA in April, May and June of 2006 were "an unreasonably large volume for that trader to have secured" being, as he estimated it, between 45% and 50% of those goods sold in the retail market in the GFK surveyed territories in that period. Likewise, in the case of the Nokia N90 Mr Fletcher thought CCA's sales volume for April and June 2006 as "unreasonable", though for May the volume was "perfectly reasonable". There was an inconclusive exchange of views on whether the Nokia 8800 (described by Nokia as "popular", though Mr Fletcher disagreed) went out of production in May 2006, and whether the sales volumes seen might have resulted from stock accumulated in anticipation of that being released onto the market.

226 On the possibility raised by Mr Attenborough that the sales of the two Nokia phones included phones being 'dumped' or sold off as volume surplus, Mr Fletcher's reaction was that it was unlikely to be the case, though he qualified that view by saying that he would need to look at the details of the trade and had not done so in relation to CCA. Mr Fletcher agreed that the GFK figures did not indicate what was happening in the grey market, but he claimed that "the grey market for mobiles phones exists only to supply the retail market" and that therefore the GFK figures were a fair yardstick by which to assess CCA's trading volumes. While accepting that it was possible that goods sold on the grey market could go further afield than to European retail sales, Mr Fletcher considered that it was unlikely "based on what KPMG has seen happening". Being pressed further on this point, Mr Fletcher did, however, agree that it was possible that declining sales of

the phones had led to them being sold or 'dumped' onto the European grey market for export onwards, and thus to CCA's sales volumes.

227 For the Samsung SGH300, the GFK figures showed that CCA had in the appeal period traded more than the entire retail market in Europe for that period. CCA had in the same period traded more Samsung P850 phones than the entire retail market in Europe for the whole year. And for the Sony Ericsson W900i, CCA had traded about 30% of the GFK surveyed market for the same period, which Mr Fletcher also considered "unreasonable".

228 While Mr Fletcher acknowledged that grey market traders did deal directly with manufacturers and authorised distributors, he would only expect to see that occurring when the volume sold was about 50,000 handsets a quarter, and where a permanent official relationship was therefore in prospect. It was also accepted that goods being 'dumped' by authorised distributors or mobile network operators could be sold to grey market traders in the UK who would then export them, though in Mr Fletcher's opinion the volume would not be significant.

229 Mr Attenborough pointed out that grey markets existed for many products, instancing footwear, clothing, cosmetics, music recordings, consumer electronics, domestic appliances, motors cars, drinks, pharmaceuticals and confectionery. Back to back transactions in the mobile handset market would be frequent and was a natural strategy to adopt as it enabled traders to lock in immediate profits and minimise their exposure to price fluctuations.

230 For the record, we note that articles in *Mobile News* of 26 March 2012 were produced on behalf of the appellant dealing with the conditions of the grey market current at that date and in 2011. The articles were produced during the hearing on 27 March 2012, therefore without any notice to the Crown, and although we made it clear that we were prepared to exclude the evidence as unfair in these circumstances no objection to its introduction was in the event made by Mr Kerr. Given that Mr Attenborough's evidence used figures from the nearer date of 2010 and that the reliability of the figures used in the articles was uncertain, and that the articles did not purport to deal with the market as it was in 2006, we do not find them of assistance in determining this appeal.

*Mr Stone's evidence*

231 As is customary in MTIC cases, the commissioners submitted witness statements from Mr Roderick Stone giving an overview of the course of their policy towards what was undoubtedly a serious and persistent challenge to the integrity of the public Revenue. It would be wrong to deny that Mr Stone's witness statements have provided a helpful perspective on what is often a complicated situation, and a useful description of the process known as 'extended verification' which precedes these appeals.

232 Second counsel for CCA, Mr Taylor, in a very helpful submission reminded us of the basic principles regarding the usefulness, and hence the admissibility, of evidence in civil proceedings – that the tribunal's task is to make findings of fact, that facts emerge from the evidence of witnesses of fact, and that the drawing of inferences from the primary facts is a matter for the tribunal and not one for the witnesses.

233 So Mr Stone's statements about matters of fact, such as the actions from time to time taken by HMRC to contest MTIC fraud, the actual policies of HMRC and so forth, are relevant but the way the fraud or frauds are supposed to work, the nature of carousel fraud, contra-trader fraud, the partly organised fraud, are matters on which Mr Stone is essentially expressing an opinion and are matters which, in each case, are properly the province of the tribunal to determine.

234 Mr Taylor referred us to the dicta of Lightman J in *Mobile Export 365 v CRC* [2007] EWHC 1737 (Ch) at [20] that "The presumption must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary"; and, further, to the interlocutory decision of Judge Mosedale in *Arjan Chandanmal & Ors t/a C Narain Bros* LON/2008/2398 and submitted that we should adopt her paragraph by paragraph approach to Mr Stone's statement in this case as she had done in *Narain*. Allowing for discussions between counsel, there were 41 paragraphs in the Stone evidence which were at issue; the rest were conceded as admissible.

235 Mr Hayhurst, in a similarly helpful submission for the Crown, urged that the tribunal should address the question of Mr Stone's statements on a case by case basis, having regard to the particular matter to be decided in the appeal; slavishly to follow the decision in *Narain* with respect to the paragraphs to be excluded would be unnecessarily rigid and not be what is envisaged by the broad principle enunciated in Rule 15(2)(a) of the Tribunal Rules, that evidence before the tribunal is admissible whether or not it would be admissible in a civil trial in the United Kingdom. In that context, Mr Hayhurst cited examples of which what were arguably opinions creeping into the factual evidence which witnesses were at the time giving in this appeal.

236 An illustration of the tribunal adopting a case by case approach was provided, in Mr Hayhurst's submission, by *H T Purser Limited v CRC* [2011] UKFTT 860 (TC) where the tribunal acknowledged at [136] that:-

> First instance authorities were cited to us in support of the proposition that Mr Stone's evidence is inadmissible. We do not doubt that such a conclusion may properly be reached in suitable cases on the basis of the present rules governing the tribunal's proceedings, but we do not need to go that far in these appeals.

237 That approach was not excluded in *Narain* where the tribunal observed at [50]:-

> Nevertheless, it may not always be proportionate to exclude a witness statement simply because it includes opinion. The exclusion itself requires a hearing to decide whether and to what extent the evidence is opinion. It will depend on the facts of each individual case. In some cases a Direction "that a failure by the other party to cross examine on the opinion of a witness of fact is not to be taken as acceptance of it" would suffice to deal with the matter proportionately.

238 Moreover, in Mr Hayhurst's submission, the exercise of excluding opinion evidence paragraph by paragraph, if it were to be undertaken, would need to be done with less of a broad brush than it was in *Narain*; he illustrated by reference to that decision how that could done, showing that the facts of this case required a different approach to what should be excluded and what should not, by reference to the extent to which CCA had put in issue matters on which they sought the exclusion of Mr Stone's evidence as irrelevant.

239 The consequential exercise of comparing Mr Stone's statement in *Narain* and this case was not without its complications, rather emphasising Mr Hayhurst's point. We were concerned that the reference at [52] in *Narain* to certain paragraphs being "in all cases inadmissible" should be read as indicating a desire for consistency in tribunal decisions in relation to these common paragraphs of Mr Stone's, but Mr Hayhurst persuaded us that this would be to read Judge Mosedale's words out of their context.

240 We decided at the hearing to proceed to receive Mr Stone's evidence but to reach a conclusion on its usefulness after the event excluding whatever we felt it was unfair to CCA to admit, on the basis provided by the tribunal's Rules. We note in our Conclusions below the outcome of this exercise.

*Submissions for the taxpayer*

- *the law*

241 On the underlying issues of law, Mr Pickup QC submitted that in a contra-trading case the only logical question to ask is whether there is sufficient evidence to establish that the trader had actual knowledge of the fraud of the contra-trader and was thereby a participant with him in a fraudulent scheme; it is either actual knowledge or it is nothing.

242 As in *Livewire* and *Brayfal* (and *Blue Sphere Global*) this appeal is a pure contra-trading case. The connection with the fraudulent tax loss is the contra-trader's offsetting. There is no other connection. The approach of Lewison J. in *Livewire* followed again in *Brayfal* is the appropriate and proper "basis for analysis". The allegation here is of knowing participation in a contra-trading fraud. The only reason for that contra-scheme is to cover up the fraudulent evasion of VAT in the

contra-trader's broker deals. In *POWA*, Roth J was considering an appeal based on the submission that "on a proper analysis of the ECJ jurisprudence, even if a trader should have known that there was fraud in a transaction or transactions higher up in the chain, that was not a ground on which its claim for repayment of input tax could be denied since in those circumstances it was not sufficiently involved in the frauds" [at 20]. That submission was rejected and the appeal was dismissed.

243 However in dismissing the appeal Roth J made the observations noted above at [32], [34] and [36] concerning the application of the *Mobilx* test and he referred to the principle of proportionality and to the decision of the ECJ in *Teleos* in order to, reject the 'privity of contract' argument and to confirm that these principles did not serve to narrow the test in *Kittel*. What these passages highlight is that there are parameters to the reasonable commercial checks that a trader can make – i.e. that a trader (absent actual knowledge as a co-conspirator) is confined to questioning his commercial partners. If when exercising due commercial care, a trader would not be able to detect fraud connected with his transaction, then he should be allowed to deduct his input tax.

244 In this appeal it is clear that due commercial care on CCA's commercial partners would not have revealed either the fraud of the defaulter in its supplier's broker chain or its supplier's cover-up fraud, therefore the only remaining proportionate basis for refusing the right to deduct would be on the grounds that there is evidence of actual knowledge of the fraud of the contra-trader. In the light of these cases and in particular the reasoning of Lewison J when identifying the essential questions in a contra-trading case, CCA must, in order for HMRC's decision to be upheld, be shown by HMRC to have known or have had the means of knowing that either (i) there was a fraudulent evasion of VAT in the dirty chain, or (ii) that the contra-traders (Future, Soul and Infinity) were fraudulently covering up that fraudulent evasion.

- *missing evidence*

245 There were three sources from which more evidence could have been made available: Mrs Pat Ryan the bookkeeper, Mr Wesley Gordon, Mr Trees's assistant who dealt with collecting due diligence material, and the computer on which Mr Trees kept his spreadsheet with details of historic due diligence documentation and payment allocations. To these must be added such papers as may have been withheld by CCA's former legal representatives, Ashton Law. In these areas of 'absent' evidence it is said for CCA that it would be inappropriate for the tribunal to draw an adverse inference.

246 In relation to Mrs Ryan, she is now elderly and the events about which she could give evidence go back many years. It is highly unlikely that she would be able to assist the tribunal by giving

evidence; her dealings with Mr D'Rozario are well documented in his progress sheets and she could only otherwise deal with the allocation of payments to invoices by reference to her annotations on the invoices, which are already before the tribunal. With the passage of time it would be unlikely that she could add anything more.

247 Similarly, with Mr Gordon, he was engaged by Mr Trees to refresh CCA's due diligence; he acted under his instruction and reported the results of his work to him. The material he was compiling at the time of the visit by officers in June 2006 was either uplifted and has been produced in these proceedings; or it has been produced by CCA or it remains with Ashton Law. It is difficult to see what if anything of substance he could add by way of evidence.

248 The final area was the due diligence material in the hands of Ashton Law. The evidence that Mr Trees gave about this, at its height, suggested that they may have documents supporting due diligence completed by CCA. In assessing whether the absence of this material was in anyway significant it is important to bear in mind that Mr D'Rozario saw due diligence in 'real time' as it was obtained by CCA. This is evidenced by HMRC's progress logs. It is equally clear from the progress logs that if there had been something adverse to CCA or material was otherwise incomplete, Mr D'Rozario would have noted his concerns.

249 Whilst the historical due diligence would have been helpful by way of completing the full picture, it was not being 'kept' from the tribunal for fear of it damaging CCA's case. It would have been helpful to have the material, but in its absence its existence is confirmed by other evidence. The proper course would be for the tribunal to draw an adverse inference only if it is satisfied that there had been a deliberate attempt to conceal relevant and damaging evidence from it.

- *opinion Evidence in Mr Stone's Witness Statement*

250 It was agreed that paragraphs 34, 141-153 in Mr Stone's first statement and 1-78 and 91 of the second statement would not be relied on by the Crown in this appeal. CCA argues that other passages are also inadmissible viz: paragraphs 6-7, 9-33, 35-9, 42-7, 49, 50-4, 130-2, 139-40 from the first statement and paragraphs 79-90 of the second statement. These passages of his evidence should be excluded following the reasoned directions of the tribunal in *Narain*.

251 The tribunal has a wide power to receive evidence in a hearing before it and is empowered by the rules - Rule 15 - to give directions as to the issues that it wishes to hear evidence about and whether expert evidence is required. It is acknowledged that evidence may be admissible where in civil proceedings it would be inadmissible. Judge Mosedale in *Narain* recognised in her decision that where opinion

evidence was being given by someone other than an expert (Mr Stone fell into the non-expert category) then that opinion is irrelevant and therefore not material that the tribunal should consider in reaching its decision, the premise underlying that conclusion being that the tribunal should only reach decisions on evidence that satisfies the test of relevance, as Judge Mosedale explained at [22] and [24]. As a statement of general principle it is difficult to improve on this formulation. It has been said however that:

> The grounds more commonly assigned for the rejection of opinion evidence are that opinions, in so far as they may be founded on no evidence, or inadmissible evidence, are worthless and, in so far as they may be founded on admissible evidence, tend to usurp the functions of the Tribunal whose province alone it is to draw conclusions of law or fact.
>
> (Phipson on Evidence 17th Ed., 33-01).

252 Evidence of opinions from an expert is an exception to the general rule that opinions are either worthless or usurp the function of the tribunal. However, in order for the opinion to have any value it must be in relation to a matter that calls for 'expertise' i.e. it is outside the knowledge or experience of the tribunal and it must be from a suitably qualified person. The remaining disputed areas of Mr Stone's evidence are not outside the tribunal's area of knowledge and Mr Stone is not suitably qualified to give the opinions he seeks to give. The tribunal is urged either to exclude the disputed evidence or alternatively indicate that (whilst admissible) it has disregarded the evidence in reaching its decision.

- *knowledge*

253 Mr Pickup QC argued that it is difficult to see how in any contra-trading case the exporter/broker in the clean chain such as CCA, in the absence of actual knowledge, could or should have known of the connection of its transactions to either the contra-trading fraud of its supplier or the fraud of the defaulting or missing trader in the broker chain. The trader can only carry out reasonable checks or due diligence on its immediate trading partner or counter party.

254 Since there is no fraud in or connected with (other than by offsetting) its disputed transactions, no matter how much due diligence and how many checks were done within reason, CCA could not have discovered the fraud. In a contra-trading appeal, the case for HMRC must be one of actual rather than constructive knowledge: CCA is either a knowing participant in the contra-trading fraud and thereby loses its right to deduct, or it is not.

255 The evidence of Mr Cunningham was confused and contradictory: he effectively said both that there was an overall scheme to defraud the Revenue apparent from the course of the dealings both in the appeal chains and the buffer chains, and yet he accepted that there was no way in which Mr Trees could have known who was committing the

frauds or indeed that they were doing so – but nonetheless he claimed that Mr Trees should have known that the frauds were occurring. The confusion was compounded by the difference of view between Mr Cunningham and Mr D'Rozario, the control officer who had had close dealings with CCA over a long period.

- *contracts and title*

256 The nature of trading in the wholesale distribution of mobile phone handsets did not lend itself to detailed formal legal agreements. This was commodity trading. Deals were conducted within a matter of hours. A trader such as the appellant would be offered stock and it would attempt to find a customer for that stock at the right price. If a customer could be found and if the price could be agreed a deal would be done.

257 The commodity being traded, i.e. mobile phones, diminished in value over a short period of time. It was in the interests of all parties, the supplier, the trader and its customer to ensure that the trade was conducted speedily and upon receipt by the trader of payment from its customer the goods were shipped and the supplier paid. Typically the relevant transaction documents were the purchase order from CCA to Infinity, Infinity's sales invoice to CCA, CCA's sales invoice to its EU customer and that customer's purchase order to CCA.

258 Release instructions were provided to the freight forwarder who would conduct an inspection of the goods on behalf of CCA to confirm that the goods existed and were in good condition. Were this not to be the case CCA would expect its EU customer to make complaint. Payment would be made by the EU customer and once payment was received into CCA's FCIB account the goods would be released. Once CCA was paid its supplier would be paid.

259 As to title in the goods, the understanding of all concerned was simple, namely that title in the goods remained with the supplier until such time as the goods were passed to the EU customer. The customer only received title upon payment for the goods. When CCA received payment the purchase price agreed with the supplier was held by CCA as bailee in possession. The money belonged to the supplier, CCA having sold its goods on its behalf.

- *insurance*

260 As he conceded, Mr Trees perhaps did not read the fine print of the insurance policy as carefully as he should. For instance, the policy did not cover laptops, DVD's and GPS systems. He accepted that was his error. Moreover, he overlooked the need to add Belgium to the nominated list of countries since most, if not all, of the goods sent post January 2006 were sent to the premises of Boston Freight in Belgium.

261 The failure to nominate Belgium can only have been an oversight on the part of Mr Trees. If, as was suggested to him in cross

examination, the purpose of the insurance policy was for window dressing, mindful of the thoroughness of Mr D'Rozario, it would surely have been incumbent on Mr Trees if he was a knowing participant in the fraud of the contra-trader to ensure that the policy nominated the country to which the goods were being sent; that Belgium is not included in the list of countries demonstrates that he was not a knowing participant in an overall scheme to defraud the Revenue, but rather an innocent party caught up in what was for others perhaps contrived trading.

262 Many traders in this market would not have taken out insurance. Indeed it had been Mr Trees's practice at Appleco not to insure and carry the risk, but when the legislation changed in January 2006 he had to reconsider the position and consulted two specialists in commercial insurance, considered alternative policies and chose a policy which fitted the circumstances of his trading. The premium paid out was not insubstantial. The circumstances suggest that this insurance was far from window-dressing.

- *relations with HMRC*

263 CCA's relations with HMRC were always good. Mr D'Rozario's progress sheet reveals extensive contact whether in person, by letter, e-mail, fax or phone call. This contact was with either Mr Trees or Mrs Ryan. On numerous occasions Mr D'Rozario would request assistance and cooperation by way of submission of documents, further to those that were regularly supplied on a monthly basis together with the VAT return. The character of Mr D'Rozario, his attention to detail and his conscientious scrutiny of all aspects of CCA's trading and record keeping is apparent not only from his progress sheet but also from the manner in which he gave evidence before the tribunal. It is perhaps not surprising that in his evidence Mr Trees described him as "probably the most thorough person I have ever met in my life".

264 Whilst the correspondence file reveals differences of opinion between Mr Trees and Mr D'Rozario from time to time and an irritation on the part of the trader when he felt Mr D'Rozario had exceeded the remit of his authority, their relationship, albeit occasionally strained, was one of mutual assistance and cooperation. Whatever the failings in Mr Trees's due diligence and whatever his views as to inspections, insurance and/or recording of IMEI numbers, he expressed those views directly, whether orally or in correspondence, and they were duly recorded. Nothing it seems was hidden.

265 Two points must follow from the pre-appeal period of rigorous scrutiny, firstly that CCA is entitled to take comfort that its transactions through 2005 and into 2006 have not been traced back to a fraudulent tax loss and secondly, that it would be folly in the extreme

for a trader such as CCA to expose itself as a participant in a contra-trading fraud to the extended scrutiny of Mr D'Rozario and HMRC.

266 The circumstances of CCA's transactions were apparent for Mr D'Rozario to examine through 2004, 2005 and 2006. The circumstances did not change, the nature of the trading, back to back trading, no stock held at CCA premises, payments to the supplier only when received from the customer, payments made after April 2005 by way of FCIB, all remained constant. The suppliers, and indeed many of the customers, were present in the transactions in January, February and March 2006 and before. Indeed the suppliers Future and Soul were present in transactions conducted by CCA in 2003.

267 Each monthly progress sheet or progress log kept by Mr D'Rozario identifies the suppliers that month and the EU and UK customers. There are notes made by Mr D'Rozario to request due diligence in respect of new suppliers or new customers and it is inconceivable that this material would not be provided to him. It was obtained and provided to Mr D'Rozario for his examination and he checked through the appellant's due diligence. Whilst some of that historic due diligence is no longer available, whether because it has been retained by Ashton Law or gone missing over time, or been erased from the screen (as with the early Creditsafe checks), the fact remains that Mr D'Rozario was aware of the due diligence being conducted and the trader would not have been permitted to conduct itself as it did if its due diligence had failed.

268 Criticism is now made of Future Communications, Infinity Holdings and Soul Communications that they were fraudulent contra-traders engaging brokers such as CCA as participants in an "overarching contra-trading fraud on the Revenue". That was not known to CCA at the time of its transactions in the disputed periods and it was not the perception given by those traders; nor apparently was it the view held by HMRC during the period when CCA was quite openly conducting repeated transactions - in the case of Future Communications both purchases and sales - over a period of years.

- *the contra-traders: Infinity Holdings*

269 Infinity Holdings were the alleged contra-trader in the appeal of *Blue Sphere Global*. In that case the tribunal heard from Mr Simon Devine, the trader's VAT officer from registration; his evidence was that only a portion of the broker chains of Infinity (at that time) had been traced back to a fraudulent tax loss. The hearing of that appeal before the tribunal took place in late June and early July 2008 and Mr Devine's witness statements were dated 10 October 2007 and 24 January 2008.

270 The tribunal found that Infinity was not in itself fraudulent but either knew or should have known of the frauds of the defaulting traders in its broker chains. On appeal to the High Court, in his

judgment the Chancellor rehearsed the finding of the tribunal but criticised the approach taken by the tribunal which had, as he found, focussed too heavily on due diligence and reached a conclusion that the trader BSG knew or ought to have known that its transactions were connected with the fraudulent evasion of VAT because they did not "do enough to protect themselves". Furthermore, the tribunal erred in referring to the "risk" of BSG being involved in transactions that "might" have undesirable consequences.

271 The Chancellor's conclusions were that the test applied was misleading: firstly, the burden of proof lay on the Crown; secondly, the issue was whether the taxpayer ought to have known that it was participating in transactions which were connected with the fraudulent evasion of tax. The Chancellor went on to conclusion cited above at [55] of his judgment.

272 CCA is in precisely the same position as Blue Sphere Global was in its appeal before the tribunal and its subsequent appeal to the High Court (the contra-trader is the same, the defaulters are the same and the EU customers are the same). The only significant difference between the evidence placed before the previous tribunal and that in this appeal is that with the passage of time and further tracing activities HMRC can now show that on the balance of probabilities all Infinity Holding's broker chains in the relevant accounting period can be traced back to a fraudulent tax loss. However, the findings of the Chancellor on appeal in *Blue Sphere* are pertinent and relevant to this appeal. The judgment reinforces the arguments already advanced that in a contra-trading case such as this the Crown's case can only be one of actual knowledge.

273 Infinity Holdings was CCA's established supplier. It had supplied CCA with mobile phones in many, if not all, VAT periods up to and including 04/06. In all these periods (save for 04/06) its reclaim had been met by HMRC. The circumstances of CCA's transactions with Infinity Holdings did not change; they remained the same; CCA's due diligence on the trader remained the same; the arrangements for payment between CCA and Infinity Holdings were the same. There was nothing therefore in the circumstances of CCA's transactions with Infinity Holdings in April 2006 which could have caused Mr Trees to conclude that the only reasonable explanation for his transactions was that they were connected with fraud.

274 Infinity Holdings' acquisition deals with CCA were all in April 2006. CCA was on a monthly VAT returns and submitted its 04/06 VAT return before Infinity Holdings conducted its fraudulent broker deals - which, as Ms Holden confirmed, were all in May and June 2006. It follows that the fraudulent tax losses in Infinity's broker chains, which were offset against the output tax in its acquisition deals with CCA, occur not only after CCA's transactions but after CCA has submitted its return. So HMRC must show that at the time CCA

entered into each of its transactions in April 2006 it knew or it should have known that that transaction would be connected (by offsetting by Infinity Holdings) with the fraudulent evasion of VAT.

275 The evidence before the tribunal in June/July 2008 was insufficient to prove that Infinity Holdings was fraudulent. As the Chancellor found on appeal in circumstances where the fraud was carried out after the transaction in the clean chain "there was no dirty chain of which the appellant could have known unless the same was pre-planned and that fact was known to the appellant." It was accepted by all witnesses in this appeal that CCA could not reasonably be expected to conduct enquiries beyond its immediate counterparties. To adopt the reasoning of the Chancellor in *BSG*, HMRC must show that at the time CCA entered into its transactions with Infinity Holdings in April 2006 it was pre-planned that the output tax from that transaction would be offset against fraudulently acquired input tax and that CCA knew of that plan, i.e. was a participant in the contra-trading fraud.

- *the contra-traders: Future Communications*

276 Future Communications was the alleged contra-trader in the appeal to the tribunal in *Brayfal* heard in July and September 2009. At the time of the appeal Future Communications was still trading; no action had been taken against the trader by HMRC albeit that it was believed by 2009 to be the largest contra-trader encountered by the commissioners. As in this appeal Mrs Clifford gave evidence for the commissioners.

277 Having considered the evidence about Future Communications and whether the trader Brayfal could have known about their contra-trading, the tribunal found:-

> [153]. . . that no information whatsoever was provided as to why Future was allowed to continue trading despite the Commissioners now stating that it was the "ringleader" (our term) in the scheme, nor was any evidence adduced to show that Future's VAT returns for 01/06, 04/06 and 07/06 were queried despite now being told of the small amounts of VAT payable on exceedingly high turnover. As Future was the only supplier to Brayfal in the relevant periods it seems to us that "at the time of the transaction" the Commissioners themselves were not even sure that anything was amiss with Future; certainly nothing was made public so that companies dealing with them could be made aware. If the Commissioners were not aware at that time it seems to us that Brayfal was also most unlikely to be aware.

278 Ms Clifford became the allocated VAT officer for Future Communications in May 2006; she had had no dealings with Future prior to that date and had only looked at the 2006 transactions and had not considered the historic trading relationship between CCA and

Future. Ms Clifford admitted that after the initial investigations began Future Communications continued to trade and they traded into 2009.

*- the contra-traders: Soul Communications*

279 Soul was also a longstanding trading partner of CCA and had first contacted CCA in February 2003, at the start of its business in the wholesale distribution of mobile phones, although on the evidence the first transaction was in May 2004. Mr Trees never had any reason to question the circumstances of his trading with Soul Communication at any time between February 2003 and June 2006 nor to question the integrity of Soul as his supplier.

280 In evidence were delivery notes from Soul Communications which bore a signature and what appeared to be the CCA stamp: Mr Trees denied that the signature on the documents was his and he referred the tribunal to documents which did bear his signature and which he pointed out was very different to the signature on the documentation recovered from Soul; he denied that goods were ever delivered to the Stockport mill by Soul Communications. Mr Rhodes, the officer who subsequently investigated Soul Communications, enjoyed little cooperation from them, receiving no due diligence and little, if any, paperwork. This agrees with Mr D'Rozario's evidence that from time to time he requested Mr Trees to speak to his suppliers (Infinity, Future and Soul) to encourage them to provide paperwork to their VAT control officers.

281 If the commissioners are correct and Mr D'Rozario's thesis as to the final distribution of profit is correct, that the VAT reclaim made by the exporters such as CCA is the "profit of the fraud" to be shared around between the participants, it is remarkable that a principal participant such as Soul Communications, as with Future Communications and Infinity Holdings, does not cooperate with officers of HMRC to ensure that the broker's reclaim is processed expeditiously.

*- the grey market*

282 The tribunal has heard evidence as to the nature and size of the grey market in the wholesale distribution of mobile phone handsets in 2006 from Mr John Fletcher called on behalf of HMRC and Mr Nigel Attenborough, an economist and director of NERA Consulting, called for CCA. It may be considered by the tribunal after hearing their evidence that there is little material difference between the opinions they expressed.

283 Both experts agree that in 2006 there was a significant vibrant grey market in the wholesale distribution of mobile phone handsets. This market was global, including not only the UK but also Europe, India, Asia and Africa. Whilst Mr Attenborough has attempted to estimate the size of the grey market in 2006, Mr Fletcher has chosen not to do so but adopts the position that its maximum size was no more than 12 million handsets, and probably somewhat less.

Mr Attenborough calculates the size of the UK grey market in 2006 to have been in the order of 10 million handsets, and probably more.

284 However, critically, Mr Fletcher agrees that someone such as CCA trading in that market could reasonably have expected to receive regular and substantial quantities of handsets and to find customers both in the UK and Europe willing to buy them. He agreed that between 2002 and 2006 there had been an explosion in the demand for mobile phone handsets worldwide and for traders in the grey market there were substantial profits to be made.

285 Mr Fletcher presented himself as an independent expert, but on behalf of CCA his independence was challenged. Mr Fletcher is a director in KPMG; he is an accountant with considerable experience in the telecommunications industry: his clients, before he joined KPMG, included Ofcom, British Telecom, T-Mobile, Siemens and Orange. KPMG have undertaken engagements with Nokia and have a confidentiality agreement with Nokia which means that Mr Fletcher has access to information upon which he relies for his opinions, but he cannot disclose it either to CCA or to the tribunal.

286 Mr Fletcher has given evidence before the tribunal in a number of similar appeals (he puts it now at some 22 or 23) and always on behalf of HMRC: he has never given evidence for a trader and has no knowledge or experience of the grey market but he denied that to give evidence for a trader would present him with a conflict of interest. In the Appeal of *H T Purser v HMRC* heard before the tribunal in June 2011, Mr Fletcher when giving evidence had agreed that KPMG acted for Nokia and he would have a conflict of interest in acting for any grey market trader. When that part of his evidence given in *Purser* was put to him in cross-examination Mr Fletcher sought to clarify what he had meant, namely that the conflict of interest would arise not by reason of KPMG's agreement with Nokia but rather out of KPMG's relationship with HMRC.

287 Mr Fletcher was asked about the report prepared by the United States practice of KPMG for the Anti Grey Market Alliance concerning the threat of the grey market to authorised distributors of IT equipment and peripherals in the USA. Initially Mr Fletcher suggested that he was not familiar with that report but he was aware that KPMG had in the past prepared such a report. Mr Fletcher was given the opportunity to research into this report overnight and on day eight of the hearing he confirmed that the AGMA report dated from 2003. At that time KPMG had not been a member of AGMA but in fact joined in 2010 and he said: "I think I have been shown this report or reference has been made to it in other tribunals".

288 However, whilst Mr Fletcher had been made aware of this report previously he had not, it appears, investigated the circumstances in which the report had been prepared nor had he thought the fact that

such a report had been prepared by KPMG and that KPMG were (from 2010) a member of AGMA was a matter that ought to be disclosed both to an appellant in any future tribunal hearing or to the tribunal itself; he denied that it had any bearing on his evidence or that it was relevant to disclose the fact.

289 Mr Fletcher was asked about the GFK research: these figures were the retail sales for individual months in 2006 taken from 22 EU countries and the UAE. The figures did not include corporate sales nor did they include 17 other European countries (smaller countries such as the Baltic states) where, Mr Fletcher agreed, grey market trading may flourish since in these states there may be a greater demand for phones which didn't exist elsewhere. As to the UAE, Mr Fletcher conceded that he didn't know the extent of the white or the grey market in the UAE or indeed any other territory, but he could state from his experience that there was an active grey market in the UAE in 2004 and he had no doubt that that market continued in 2006.

290 Mr Fletcher's comments were similar to those expressed in his evidence by Mr Attenborough, that without knowing the quantities of stock held by the Authorised Distributors and without knowing the trading circumstances within the grey market at the time, it is not possible to infer from the retail statistics whether or not a trader such as CCA's trading in that model of phone in the grey market at the same time was "unreasonable".

291 As to the size of the grey market, Mr Fletcher agreed that Mr Attenborough had estimated a figure of £7 million being the level of exports of grey market handsets in 2006. Mr Fletcher has not made any attempt to quantify the size of the legitimate grey market in 2006. He argues that since there was no collecting of figures in 2006 and there is no source or publication for such statistics it is not possible to gauge the size of the market. However, as already stated, Mr Fletcher conceded that there was no dispute between Mr Attenborough and him that the grey market existed, that it was vibrant, that it was lively and that there was absolutely perfectly legitimate, honest trade going on in that market at the time. The disagreement between them is as to the overall size.

292 Mr Attenborough addressed Mr Fletcher's criticisms in his second report and he confirmed that his enquiries suggested that any white market exports in 2006 would have been small and that his understanding (taken from the second witness statement of Mr Stone) was that the introduction of reverse charging had removed the VAT loss from the UK. Mr Stone had in response revisited that statement and suggested that HMRC were aware that since the introduction of reverse charging, UK traders had acted as conduit traders for MTIC fraud perpetrated in other EU countries. Neither Mr Stone nor Mr Fletcher had any hard evidence to support that and in the absence of

any figures Mr Attenborough maintained his estimate for the size of the grey market in 2006.

293 In determining the size of the grey market it must be remembered that original equipment manufacturers will sell to markets worldwide. In the U.K. they sell directly to mobile network operators, authorised distributors and specialist multiple retailers, who also buy from and sell to the grey market if they experience shortages or surpluses. In addition grey market sales arrive in response to arbitrage opportunities and as a result in box breaking. Many phones make their way via the grey market from Europe to India, other Asian countries and Africa. This gives rise to significant opportunities for grey market traders in the UK.

294 Both Mr Fletcher and Mr Attenborough agree that intermediaries will often be present in deal chains in circumstances where they add value. In his first report, Mr Attenborough considered circumstances which may arise in typical transactions where an intermediary is present since that trader "adds value". The role of the intermediary is important in providing information and matching buyers to sellers and a trading network may exist based on pre-existing ethnic ties between countries. Destinations such as Hong Kong and Dubai are important hubs for the distribution of phones.

295 This, in Mr Attenborough's view, would explain why substantial quantities of grey market handsets are first imported into and then exported from the UK which acts as a gateway to these networks. The role of the intermediary cannot easily be replaced by electronic exchanges, and sometimes mobile network operators and authorised distributors will wish to hide their identity when trading in the grey market and prefer to use intermediaries to mask the fact that they have either a shortage or a surplus of stock.

- *the FCIB evidence*

296 Mr Birchfield has conducted an extensive examination of the FCIB Bank Master data, the statements of account and transaction details from a large number of account holders and he has set out in all some 22 loops of money movements between the various accounts held in FCIB. This exercise has not been undertaken for the purpose of this appeal but to demonstrate how money flows in the alleged scheme through Future Communications and Infinity Holdings. In all the 22 loops cover 55 different trading entities; CCA appears twice in loops 10 and 17 and only deals with 8 of the 55 entities concerned.

297 The evidence demonstrated the circumstances in which Mr Trees' accounts were closed by RBS and in which in April 2005 he opened an account with FCIB, together with the attractions of FCIB, the flexibility of its facility and that he never questioned the integrity of a FCIB as a bank of international standing. Mr Birchfield agreed that in

2005 the public perception FCIB was of a highly respectable offshore bank offering up to the minute state of the art e-banking facilities.

298 In respect of each of four of the six invoices considered, Mr Birchfield was provided with details in respect of each invoice considered for his assistance by Mr D'Rozario from the handwritten annotations both on the sales invoice and on the CCA purchase invoice. Mr Birchfield's analysis is therefore entirely dependent upon the information provided to him by Mr D'Rozario, which in turn is dependent upon the accuracy of the handwritten annotations which he has identified on the CCA paperwork. Mr Birchfield himself has not examined the underlying documentation.

299 The movement of money over the 22 loops reveals certain patterns but is not circular and the flow is ongoing. Mr Birchfield has, as he accepted, chosen to start and end with Bartonole or Peoria, suggesting circularity but that is to some extent artificial since he could, again as he accepted take other traders as his "pinch point". It is therefore a matter of choice where any analysis starts and ends in a particular loop. However, Mr Birchfield was of the view that Bartonole is the obvious choice and his charts may in places show what appears to be contrived trade and it may show that the appellant's transactions formed part of that contrived trading, but it does not without more show knowledge or means of knowledge on the part of the appellant, either that its transactions were contrived or that its transactions were in some way connected with the fraudulent evasion of VAT.

300 There are, furthermore, significant factual limitations in the analyses of Mr Birchfield, both as to the attempt to link the payments in and the payments out and the integrity of the money movements themselves. Mr Birchfield accepted the limitations of his analyses insofar as they affect CCA and agreed that they would not necessarily be aware of the contrived scheme and that it would depend on the evidence in relation to the trader - though he maintained his view that CCA were aware of the fraud. He was challenged as to that and accepted that the evidence suggested that Infinity Holdings and Future Communications were fraudulent contra-traders and part of a contrived scheme. These companies were established trading partners of CCA and on the face of it the charts show normal commercial transactions on the part of CCA; what CCA appear to be doing is receiving money in respect of outstanding invoices and then settling outstanding debts to suppliers; the monies that come into CCA and go out differ in that the amount going out is frequently smaller than that that comes in, suggesting the retention of an amount of "profit".

301 There is evidence in the accounts of monies moving out from the loops into non-FCIB accounts and monies coming in from outside, and it was suggested that these were features of CCA's trading which did not fit with its being a fraudulent participant in a contrived scheme to defraud the Revenue. Mr Birchfield agreed with this to a point and

conceded that CCA did receive money from outside the bank; he further accepted that some money left the circle and some money comes back in. Finally, Mr Birchfield agreed that "it is a very large scheme".

- *the Samsung Serenes & P990s*

302 These phones and CCA's repayment claims in respect of transactions in the appeal period relating to them do not form part of this appeal. The matter is therefore before the tribunal almost as a side issue and it was not a factor that was relied upon by Mr Cunningham in his original decisions to deny the right to deduct in July and August 2007, nor is it a factor relied upon by the commissioners in the original Statement of Case. The suggestion that Infinity Holdings and Future Communications could not have supplied CCA with Samsung Serenes and Sony Ericsson P990s as reflected by the paperwork in the periods 04/06, 05/06 and 06/06 is made in the Amended Statement of Case and is relied upon by HMRC as "demonstrating a lack of integrity on CCA's part".

303 Mr Trees, and thereby CCA, at all times genuinely believed not only that they were trading in these models of mobile phone handsets as confirmed by the paperwork, but also that these models were in production and available within the market. That was the information available to him and indeed in the witness statements of Jonathan Pearl (Sony Ericsson) and Steven Bishop (Samsung) there is some support for the views held by Mr Trees and expressed by him in evidence.

304 Mr D'Rozario took the decision in respect of the Samsung Serenes and Sony Ericssons in August/September 2006. When Mr Trees was made aware of the suggestion by HMRC that the Samsung Serenes and P990's could not have been traded he spoke with Mr Gathani at Future Communications challenging the latter to produce evidence to refute the allegation.

305 It would certainly seem on the evidence that Mr Trees was the sort of individual who would go on to online forums and take an interest in the latest model of mobile phones whether that was a model already on the market or soon to be launched. The P990 was eagerly anticipated. It was heralded as a ground breaking smartphone. Both the P990 and Samsung Serene were intended to be launched to the market in late 2005. That was the publicity that was made available to the market. The evidence suggests that there were significant quantities both of P990 prototypes and Samsung Serene prototypes and fully functioning units shipped to the European market between late 2005 and Summer 2006.

306 There is sufficient material to support Mr Trees's assertion that he genuinely believed that these phones were available within the market, whether authorised or grey, so that it would not surprise or concern him when such phones were made available to him by his suppliers.

The evidence in this regard is insufficient to suggest dishonesty on the part of CCA in its transactions, so that the tribunal might be assisted in determining whether it had actual or constructive knowledge of the frauds alleged.

*Submissions for the Crown*

- *the law*

307 The appellant submits that HMRC must prove that CCA knew or should have known that, either there was a fraudulent evasion of VAT in the dirty chain, or that the contra-traders were fraudsters, relying on the observations of Lewison J in *Livewire Telecom* at [102] – [106]. This is not the state of the law, and the *Kittel/Mobilx* test should not be further refined. The *Livewire* test cannot be a general formulation for all contra-trading cases because it would conflict with the principle that it is simply the fact that the taxpayer knew or should have known of the connection with fraud, which means that he fails to meet the objective criteria which determine the scope of the right to deduct.

308 It is possible to envisage a case, for example, in which it could be shown that the taxpayer knew from all the circumstances of the transactions that the only reasonable explanation for them was that they were for the purpose of fraud, because they did not make any sense in commercial terms. It would be plainly wrong in such a case to say that the taxpayer should be entitled to his input tax because it could not be proved that he knew specifically of the fraudulent purpose of the contra-trader. He might not even have had any contact with the contra-trader if there was an intermediary in the supply chain. It is submitted that the *Livewire* test is not a general prescription. However, if there were any conflict, or tension, in the law, it is submitted that it was resolved by the judgment of Moses LJ in *Mobilx.* This is the only MTIC case to have come before the Court of Appeal, and it is therefore the overarching authority.

309 Although the *Livewire* test was restated by Lewison J at [19] of *Brayfal,* after the release of the judgment in *Mobilx,* this too was *dicta,* which was not part of the reason for the decision. The reason for the tribunal's decision was its finding that there was no evidence to show that Brayfal knew of the overall scheme to defraud, not just that it did not know of the fraudulent purpose of the contra-trader, and so there had been no argument on the point. It is submitted that the subsequent judgment of Roth J in the Upper Tribunal released in February 2012, in the case of *POWA (Jersey),* is plainly inconsistent with the *Livewire* test.

- *previous findings about Infinity Holdings and Future Communications*

310 CCA submit that the tribunal should rely upon the finding of fact by the tribunal at first instance in *Blue Sphere Global* that "rejected

the evidence that Infinity were fraudulent" and that it is therefore incumbent on HMRC to establish that CCA knew or ought to have known of the fraud of the defaulters in Infinity's dirty chains. It is submitted by the Crown that this argument is wholly misconceived. As a matter of law, it is not open to a tribunal to rely upon a finding of fact by another tribunal; this is quite clear from the judgment of the Privy Council in the case of *Calyon v. Michailaidis* [2009] UKPC 34. This confirmed that the principle in *Hollington v. Hewthorn* is good law, and has only been amended by statute with respect to the admissibility of criminal convictions.

311 The appellant in its opening submissions also referred to the finding of fact by the tribunal in *Brayfal* that, if the commissioners were not sure that anything was amiss with Future Communications, then Brayfal was also most unlikely to be aware. The appellant appears to be inviting the tribunal to take account of this finding and it is submitted that this finding should be disregarded by the present tribunal. Although it is open to the appellant to argue a similar point in this case based on the evidence in the current appeal, it is for the reasons given above not open to this tribunal to have regard to findings of fact made by the *Brayfal* tribunal and the finding of fact in *Brayfal* is in any event of no probative weight in this appeal.

- *the essential allegations*

312 It is submitted that the trading of Infinity Holdings, Future Communications and Soul Communications in these VAT accounting periods was such as to disguise the tax losses from detection by HMRC. This is because the input tax generated by their broker deals was set off against the output tax liability generated by their acquisition deals, including those in which they supplied CCA. As a result of the contra-trading and the fact of the set off, it is submitted that CCA's broker deals are connected with the fraudulent evasion of VAT by the defaulting traders at the beginning of the broker deal chains of the contra-traders. This is because the output tax liability generated by the supplies to CCA has been set off by the input tax credit generated by the broker deals of the contra-traders.

313 However, the corresponding output tax liability of the traders (the defaulters) at the beginning of the UK supply chains leading to the broker deals of the contra-traders (the "dirty" chains) has not been accounted for. The input tax claim that the contra-trader had in the dirty chain was moved to the appellant (and other traders in its position) at the end of the "clean" chain. The terms "dirty" and "clean" chains are used to indicate which chains are directly connected to tax losses. It is the Crown's case, of course, that the "clean" chains are just as much part of the fraud.

314 Moreover, it is submitted that each of the contra-traders was not merely a contra-trader in fact but was, at all material times, trading fraudulently for the purpose of disguising the tax losses in its dirty

chains. In other words, each of the contra-traders was participating in an overall scheme to defraud the Revenue.

315 It is submitted that the 39 broker deals, and the 117 buffer deals, executed by CCA in April, May and June 2006, were part of an overall scheme to defraud the Revenue. This is based principally on the evidence with regard to the contra-trading, and the contra-traders themselves.

- *the grey market*

316 It is submitted that the evidence of Mr Attenborough with regard to the size of the grey market, and with regard to the volumes of exports and imports in 2006, is fundamentally flawed. The whole basis of Mr Attenborough's calculation of the size of the market is to try to establish the *de facto* export figures in 2006. He assumes that all the exports are grey market, save for an insignificant proportion of exports through the official channels. In order to calculate the 2006 figures, he takes the 2010 figures and interpolates back to 2006. The reason he cannot use the 2006 data is that he accepts that those figures would be tainted by fraudulent exports, in other words traffic for the purpose of fraud which is nothing to do with the lawful grey market. He assumes the 2010 data would not be tainted with fraudulent traffic because of the reverse charge mechanism.

317 However, the reverse charge mechanism only eliminates the impact of fraud upon UK VAT revenues. It does not stop the UK being used as a conduit for the purpose of MTIC fraud in other member states. Mr Attenborough accepted that he did not know for sure whether or not this was happening in 2010 and that he did not know what proportion of the 2010 data is tainted by fraudulent traffic.

318 Mr Attenborough then attempted to mitigate the impact of this upon the reliability of his figures by saying that only 40% of exports were to the EU. However, this assumes that the goods would have to be exported to the EU in order to facilitate fraud. Mr Fletcher also says that the methodology of the interpolation from 2010 to 2006 is demonstrably flawed. Mr Fletcher's figure of 12 million handsets going through authorised distributors is at least a reliable piece of data. Mr Attenborough does not dispute it.

- *knowledge*

319 CCA, through Mr Trees, actually knew or at the least should have known of the connection with fraud. This shown by: the banking evidence, the overall scheme of trading, the offers of business to CCA being too good to be true, the lack of rationality in the trading, the failure by CCA to take basic steps to protect its commercial interests, other parties evidently trusting CCA not to query deals it could not possibly have made if it had been properly cautious e.g. buying the non-existent Samsung Serenes and Sony Ericsson P990s, and the

frequency of the trade being connected to fraud. CCA, as a small company in the market, was an unlikely candidate to be approached with offers to buy and sell very large quantities of phones, especially when it suppliers were already dealing direct with the same EU-based customers themselves.

320 The trading actually carried out was virtually risk-free: no storage facilities had to be provided, no financial risk was taken, all trading was back to back, CCA never bought without having a buyer, detail specifying the goods sold in the commercial documentation was almost completely absent, the passing of title in particular was left obscure and at odds with the suppliers' retention of title clauses, the sales documentation for the deals was all generated at once each time, and the one-sided payment arrangements under which CCA paid only when they had been paid, with the extended informal credit involved, were transparently uncommercial as were the standard £1 mark-ups in UK to UK deals and the invariable payments by EU customers in sterling.

321 It would not have been rational for the organisers of the frauds to have involved CCA as an ignorant conduit for the fraud and the company must therefore have been a participant in it. If CCA had been a free agent, they would have been in a position to frustrate the scheme by selling outside the ring. Mr Trees was admittedly well aware of fraudulent trading taking place in the grey market for mobile phones and could not have been entitled to rely on his relationship with HMRC to absolve him from his duty of commercial care.

322 The trading model itself was improbable and irrational. Goods were, as Mr Trees was aware, imported from outside the UK and transhipped back to where they had come from, instead of going from one party on the continent to another direct, which would obviously have been more commercial and efficient. Even on Mr Attenborough's estimate of a total grey market in the UK in 2006 of 10 million handsets, CCA would have traded 10% of that market over the year. This equates to a turnover of over £0.5 billion for the year and must have been apparent to Mr Trees as unreal in commercial terms to be achieved with a staff of five, two of whom were also working for A C Computer Warehouse.

323 It is submitted that for all these reasons taken together, including the issues raised by Moses LJ in *Mobilx*, Mr Trees must have known that the only reasonable explanation for the opportunity being presented to CCA was that the deals were connected with fraud. This is especially so given Mr Trees's acute awareness of the presence of fraud in the sector, and his experience of the reality of business through AC Computer Warehouse since 1996.

- *missing documents*

324 At various points throughout his evidence, Mr Trees suggested that there was missing documentation. This was principally to do with due diligence, but it was clarified that it is not being suggested that HMRC has failed to disclose material in this appeal. The suggestion made by Mr Trees is that CCA's former solicitors, Ashton Law, are in possession of significant additional material which is not before the tribunal. It is submitted that this contention is wholly without merit, and has been advanced at a late stage in order to explain insufficiencies in the appellant's documentation, principally in the area of due diligence.

325 There is no suggestion anywhere in the witness statements of Mr Trees, the last of which was made as recently as the 9 March 2012, that there was documentation yet to be retrieved from Ashton Law. No explanation has been put forward as to why steps have not been taken to require the production of the documents, such as a production order by the tribunal. Some of the evidence about missing documents is inconsistent with the proposition that it is retained by Ashton Law. Anything which had been scanned onto Mr Trees's computer would have been retrievable by him; his computers were not seized by HMRC.

326 During the course of his evidence, Mr Trees referred on a number of occasions to a spreadsheet which he kept, and which apparently showed the reconciliation of the payments to the invoices. He claimed that this, rather than the annotations on the invoices of Mrs Ryan, would most accurately show when payments had been made. He was asked where the spreadsheet was, and he said on his computer. When pressed why this had not been produced, he said that he had not even looked to see if he still had it. This begs the question whether he had checked to see if he had any other relevant documentation which had been scanned onto the computer.

327 Mr Trees produces a number of documents in his exhibits which do not appear in Mr Cunningham's exhibits. Mr Cunningham accepted that this was additional material, not removed by the officers in June 2006, which he had not previously seen. This is wholly at odds, it is submitted, with the proposition that Mr Trees subsequently took documentation to Ashton Law which has been retained by them. Mr Trees still had it, and that is why it is produced in his exhibits.

328 Mr Trees suggested in his evidence on a number of occasions that he had provided Mr D'Rozario with more due diligence material than was now available, or which was recorded in his log. However, this was never put to the witness during his lengthy and thorough cross examination. It was never suggested to any witness that there was additional due diligence documentation about the three UK suppliers and four EU customers in the broker deals which had not been

produced. On one occasion, Mr Trees suggested that Mr D'Rozario would not have allowed CCA to trade with Soul Communications if there had not been an earlier due diligence file in existence; he made the same suggestion with respect to Shabir Mohamedbhay.

329 None of these suggestions was ever put to the witness, and, in any event, Mr D'Rozario would have had no such power and Mr Trees later conceded that this was the case. Elsewhere he suggested in his evidence that documents were printed out to give to Mr D'Rozario, but a copy would not have been printed out for his own records. Things were left on the computer. This would not explain, however, why they were not retrievable by him, as in the case of the missing spreadsheet which he had not looked for.

330 When Mr Trees was asked about the clause in the insurance policy which required him to have agreements with his freight forwarders, he said that he did have such agreements, but they were no longer in his possession. However, this is at odds with the note made by Mr D'Rozario during the visit of June 2006 which says that Mr Trees told him there were no security conditions. According to this note, Mr Trees was asked what security conditions his insurer required and said there were no security conditions, but he had informed his insurer that his freight forwarder had satellite tracking. Mr D'Rozario was not challenged in cross examination about this, although Mr Trees in evidence said it was inaccurate.

331 When Mr Trees was asked whether he had provided any serial numbers to Mr D'Rozario, he said that he still had the hard copy of the serial numbers which he had forwarded but could not locate the covering correspondence. It is unclear why, if what he said about missing documents is true, he is still in possession of the serial numbers.

332 In conclusion, it is submitted that the evidence which the appellant gives to suggest that relevant documentation is missing is highly unsatisfactory. The tribunal is entitled to conclude that it is not credible, and has been advanced at a late stage and opportunistically, in order to explain away gaps in the appellant's documentation, in particular with respect to due diligence. The tribunal is invited to draw an adverse inference with respect to the credibility of Mr Trees and to disregard any suggestion that significant documentation is missing.

- *due diligence*

333 It is submitted that the checks which CCA undertook upon its counter-parties fell far below those which a prudent businessman would be expected to undertake, both for the purpose of protecting its commercial interests, and for the purpose of minimising the risk of its involvement in fraud. This is particularly so given Mr Trees's acute

and ongoing awareness of the risk of fraud in the sector, and also the very high value of the goods in which it was trading. The standard fell so far below that which would be expected that this is evidence that CCA knew that the deals were not for the purpose of commerce but for the purpose of fraud.

334 Little or no attempt was made to verify the credit standing of these businesses, or to obtain financial or accounting information. What credit information was obtained was almost invariably negative, and the negative indicators, or the non-availability of information, were apparently not questioned.

335 Although it is accepted that CCA was not itself extending credit, it was in its commercial interests to ensure, so far as it reasonably could, that the traders with which it was dealing were substantial entities which could fulfil the very large orders which were being placed, and which could pay for the very large quantities of stock which were being ordered. Mr Trees told the tribunal that he had had experience in the past of being left with stock, as result of which he made substantial losses.

336 Little or no genuinely independent information appears to have been obtained or sought into these businesses, despite the negative indicators and the fact that most of the businesses appear to be relatively newly established. Moreover, CCA had only recently started to trade with all four of the EU customers to which it sold the goods in the periods directly under review, all of which had contacted him in the latter part of 2005 and January 2006. He had only begun to trade with Universal in October 2005, Allimpex on 19 January 2006, Pielkenrood on 23 February 2006, and Shabir Mohamedbhay on 22 March 2006. None of these businesses, to which CCA was selling millions of pounds worth of goods, were visited, despite being within easy travelling distance.

337 There is little evidence that the referees which were named were contacted, and no evidence that any independent references, such as from banks or accountants, were sought. Mr Trees said that they did not approach accountants for references, despite the fact that the names of accountants were generally required and given on the trade application forms. His explanation was essentially that the accountant would not know much about the trading. The two trade references which appear in the papers contain minimal information, and were provided well after trading had commenced.

338 Missing information required by CCA's own due diligence process was apparently not obtained or even chased, but it is accepted that Mr Trees has given evidence that he made oral enquiries with regard to some of the apparent inconsistencies, and the freight

forwarders. He also said that he made some documentary checks on the freight forwarders, but this does not appear in the papers.

339 Much of the information was obtained well after deals worth millions of pounds had already been concluded. Mr Trees's explanation for this was that he was updating the due diligence, and that material which had existed previously was either not available or had been discarded. The issue of missing material has been addressed above. It is unclear why the due diligence on the EU customers, with which he had only recently started to deal, would need to be updated. Nor is it clear why earlier material obtained would have been discarded. Nor is it clear why copies of passports and other photo identification would need to be updated. It is suggested that the real reason why so much of the information appears to have been obtained at the end of May is that Mr D'Rozario told Mr Trees on 14 May 2006 that he intended to visit him within the next few weeks in order to review his due diligence.

340 There were common links between the CCA's customers and suppliers which should, at the very least, have prompted searching further enquiry from a trader with Mr Trees's knowledge of fraud. Mr Trees accepted that connections between companies might be of concern. There is no documentary evidence at all of any checks made into the freight handlers A1 or Aquarius. No further enquiries appear to have been made by Mr Trees following the raid by officers of HMRC on 1 June 2006; he does not appear to have made any enquiries of his counterparties with respect to this and did not even ask Mr Raj Gathani about it when he visited Future Communications later in the year. Nothing changed as a result of this event which would have caused major concern to an ordinary, prudent businessman.

- *inspection of the goods*

341 Mr Trees did not take reasonable steps to inspect the stock that any reasonable and prudent businessman would have done in his position when purchasing and selling goods of such high value. This failure is particularly striking given that he was acutely aware of the risk of fraud in the sector and specifically knew, from May 2006, of the concern of HMRC as to the availability of some of the goods (namely the Samsung Serenes and the P990s).

342 Moreover, if he did not sufficiently inspect the stock, and obtain proof of the inspection in the form of inspection reports, this would mean that Mr Trees would therefore be relying on his customer not to make any false reports with regard to the quality and description of the stock. It should be remembered that he had only recently started to trade with all four of the EU customers which he supplied in 2006. However, his approach appears to have been that "if there's going to be a problem your customer will come and tell you".

- *insurance*

343 It is submitted that the insurance which was taken out for the goods was insufficient for CCA's commercial purposes. A reasonably prudent businessman dealing in goods of such high value would have taken much greater care to ensure, so far as he reasonably could, that the goods were sufficiently insured. Although Mr Tidey, the insurance broker, was aware of clients who did not insure exports and imports, he was not aware, in his 25 years of experience in commercial insurance, of clients willing to do without insurance who were exporting high value goods worth millions of pounds. Although Mr Trees said that the premium of £19,200 was a lot of money for CCA, it plainly was not in view of the profits the company was making.

344 On the other hand, Mr Trees accepted that he was aware that one of the issues that Mr D'Rozario was interested in was whether the goods were insured, and that this was one of the factors which he was looking at in deciding whether to release the input tax. It is submitted that the evidence suggests that he insurance was obtained for the purposes of window dressing, and not for genuine commercial purposes.

- *IMEI numbers*

345 A reasonably prudent businessman with the acute awareness of fraud in the sector which Mr Trees had would have wanted to obtain at least a sample of the serial numbers of the goods which he was trading. Mr Trees described how he thought that the numbers could not be used to show circularity, but it is submitted that this evidence was disingenuous and designed to deflect the issue.

346 This issue is nowhere mentioned in Mr Trees's witness statements, and none of it was put to Mr Stone who expressly deals with these matters in his witness statement, and indeed in his oral evidence. Nor was this point put to Mr D'Rozario who gave a specific example when, in his experience, numbers were put through a database, matches were found, and the trader was alerted. Indeed, it was put to Mr D'Rozario, who agreed, that if numbers provided by a trader are put into the NEMESIS database, and are found to have been round before, the trader would be notified, otherwise there would be no feedback.

347 In fact, although Mr Trees knew that HMRC wanted the numbers to detect circularity, he did not provide them despite repeatedly representing that he would do so. It is remarkable that, if Mr Trees genuinely did not see the point in obtaining the numbers, he did not make this clear to Mr D'Rozario, rather than repeatedly fobbing him off with these representations.

- *Samsung Serenes & Sony Ericsson P990s*

348 During the first half of 2006, CCA was also trading in Samsung Serenes and Sony Ericsson P990s. The input tax incurred on the purchase of these goods was separately denied on the basis that the goods did not exist. The denial with respect to the P990s was issued in August 2006, and the denial with respect to the Samsung Serenes was issued in October 2006. This denial has not been challenged. However, the fact that CCA purported to deal in these goods is relevant to the issues of whether CCA knew, or should have known, that its transactions were connected with the fraudulent evasion of VAT.

349 It is submitted that CCA could not have been supplied with, or supplied these goods, at least in anything like the quantities it purports to have done. This is evidence that CCA knew that its transactions were connected with fraud. The goods were being supplied by Infinity Holdings and Future Communications, as well as by its other UK suppliers, and the goods were being supplied by CCA to those companies in buffer deals, as well as to its EU customers.

350 If CCA had carried out a sufficient inspection of these goods, it would have discovered that, either the goods did not exist, or they were not as described. Even if there is a genuine reason why CCA could not have carried out a sufficient inspection, or research, it would not make sense for the fraudulent scheme to use them as a conduit for the goods because there would always be a risk that they would carry out inspection or research, and frustrate the scheme.

- *improbability and credibility*

351 All 39 the broker deals transacted by CCA in the periods which are the subject of the appeal have been traced back to one of three entities which were acting as contra-traders for fraudulent purposes. 103 out of 117 buffer deals transacted by in the periods which are the subject of the appeal have been traced back to fraudulent defaulting traders. On the balance of probabilities the rest did as well, and this appears to be accepted on behalf of the appellant.

352 It is submitted that if CCA was trading in mobile phones for genuine commercial purposes, and was unwittingly caught up in MTIC fraud, it is inherently unlikely that such a high proportion of its deal chains would be so tainted, even when it was supplied by other UK traders. If it was trading for commercial purposes, it would be expected that there would be occasions when their chains were demonstrably unconnected with fraud. In *Red12*, Clarke J observed that "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".

353 Mr D'Rozario was a transparently honest witness and the assertions by Mr Trees of events occurring which were not recorded in Mr D'Rozario's very careful log are not credible. Mr. Trees was inexplicably ignorant about the turnover of CCA and his receiving of credit from his suppliers on an apparently open-ended basis is not commercially credible. There were inconsistencies in Mr Trees's evidence in regard to his meeting, or not meeting, Mr Haider Ravjani of Future Communications and Mr Sander Pielkenrood, with regard to his approach to the need for insurance, with regard to his use of the Bank of Ireland account, with regard to CCA taking possession of goods and he added to his witness statements in oral evidence.

- *alternative submission for the Crown*

354 In the alternative, it is submitted that CCA should have known that the deals were connected with the fraudulent evasion of VAT; it should have realised that, taking into account all the circumstances, the only reasonable explanation was that the deals were connected with fraud. A reasonably prudent businessman, in the position of Mr Trees, and especially with awareness of the risk of fraud in this sector, should have questioned the following matters:

i. Why it was being presented with the opportunity to make such profits, and to trade in such volumes of goods, in a model which was apparently risk free, and relatively effortless, with little experience or history of trading in mobile phones, no contacts and minimal investment and infrastructure, in contrast to the labour intensive business of its associated company, the profits and turnover of which were very small by comparison?

ii. Why it did not need to advertise the stock?

iii. Why its suppliers and customers were apparently content to shoulder all the risk in terms of the timings of the payments, and the shipping of the goods: its suppliers were happy to release the goods without payment despite CCA having a poor credit rating, but customers were happy to pay for the goods up front before they had even been shipped?

iv. Why Future Communications, in particular, was content to release the goods to CCA without payment, but was quite happy to pay up front when being supplied with the goods by CCA?

v. Why the four EU customers were content, apparently without question, to pay in sterling, thus shouldering the risk of any currency fluctuation?

vi. Why its suppliers and its customers, with some of whom it had only started to deal, were never apparently concerned about the description of important contractual terms, or commercially important information (such as whether the goods might need to be adapted for the destination market) in the deal documents?

vii. Why it was receiving such offers of stock for which it was able to find customers on so many occasions over such a period of time, and why it was not being cut out of the supply chains, despite the fact that it was adding no value to the goods?

viii. Why such volumes of goods, manufactured to meet an end retail demand, were apparently repeatedly passing through the UK, despite the fact that the ultimate demand was elsewhere?

ix. Why it was able to match the available supply with demand so precisely on so many occasions; CCA apparently never needed to buy from multiple sources to satisfy an order, or to split a purchase between several customers, and the deal documentation was always raised during the course of one day?

x. Why its supplier and customers, all relatively newly established businesses, were able legitimately to source and purchase millions of pounds worth of goods, and why there was so little financial information, or adverse information, about these entities?

xi. Why so many of the counterparties did not provide documents required by CCA's own due diligence process, and why the descriptions of the business activities of some of the counterparties in the documentation which was available was at odds with the wholesale trading of mobile phones?

xii. Why all four of its EU customers wanted the goods delivered to the same warehouse in Belgium?

xiii. Why none of the goods were ever returned, and why there were never any reports of damaged, missing, or misdescribed stock?

xiv. Why in 115 out of 117 of the buffer deals, its customer was always willing to pay a price, and/or its supplier always charged a price which allowed it to make a mark up of precisely £1, and why there was no need to negotiate with Infinity Holdings and Future Communications with regard to the price?

xv. Why all of its suppliers and customers were using the same offshore bank in the Dutch Antilles?

xvi. Why Infinity Holdings gave the names of both Future Communications and Soul Communications as referees, potentially promoting its competitors, and also the names of both of the freight forwarders involved in all the broker deals, A1 Distribution and Aquarius?

xvii. Why Soul Communications was trading from premises apparently next door to Future Communications?

xviii. Why both Infinity Holdings, based in Leicester, and Soul Communications, based in London, were using the same freight forwarder, Aquarius?

xix. Why on every occasion when the appellant was able to find a buyer in the EU (39 deals) its supplier was Infinity Holdings, Future Communications or Soul Communications, and why on every occasion when it sold goods in the UK (117 deals), its customer was Infinity Holdings or Future Communications but its supplier was one of eight other traders? (In April 2006 for example its supplier in all 14 of the broker deals was Infinity Holdings; however, in all 70 of the buffer deals, Infinity Holdings did not supply the goods once, and they were all sold to Future Communications.)

xx. Why it had been raided by officers on 1 June, and whether CCA's suppliers and customers had also been raided, or whether they knew anything about it?

355 It is also submitted that if CCA had conducted sufficient inspections of the goods, it would have discovered that the P990s and the Samsung Serenes, apparently supplied to it by Future Communications and Infinity Holdings (as well as by its other suppliers) and which it was supplying to the EU customers (as well as to Future Communications, Infinity Holdings and Soul Communications) did not exist in the quantities described. Moreover, after it had been informed in May 2006 of the concerns of HMRC about the availability of the goods, it could have conducted additional research, such as contacting the manufacturers directly.

356 Taking account of all of the circumstances described above, the tribunal can be satisfied that, on the balance of probabilities, the deals were connected with the fraudulent evasion of VAT, and that Mr Trees knew this, or should have known of it. The appeal should be dismissed with costs.

*Conclusions*

*Admissibility of Mr Stone's evidence*

357 It will be seen that there was a clear submission by the taxpayer that a substantial part of the evidence of Mr Roderick Stone for HMRC should be ruled inadmissible, and that precedents were cited in which that had in effect been done in previous appeals of this sort. The extent to which a detailed analysis of each paragraph of Mr Stone's evidence could be argued for and against in relation to this appeal, and the positions adopted by each of the parties, was graphically illustrated by counsel's submissions; a particular difficulty arises from the frequent references in Mr Attenborough's reports to Mr Stone's evidence. Had a final decision on each contested paragraph been attempted, the result would have been to add at least two days to the length of the case.

358 It pointed us at the time, and still more on reflection, to the conclusion that the exercise of deciding that this or that paragraph should be excluded when undertaken in the middle of an appeal like this is likely to be disproportionate to the benefit gained. We are therefore persuaded that a dissecting approach to the admissibility of evidence, which mixes fact, inference, opinion and legal submission as Mr Stone's evidence does, will simply prolong an already lengthy hearing with refined arguments about the precise category to which each paragraph, and sometimes each sentence, should be assigned.

359 In these circumstances it is the tribunal's function to examine what Lightman J in *Mobile Export* referred to as "all relevant evidence", which we take to mean all *prima facie* relevant evidence, and to give it such weight as its connection to the actual facts of the case warrants and no more, and to exclude from the tribunal's reasoning whatever is not helpful or useful or soundly based. These are not circumstances in which a jury needs to be protected from the confusion of mind which may result from tendentious or speculative evidence being led. The tribunal is required to sift and weigh the evidence before it and to hear the submissions of advocates as to how it should be regarded.

360 Rule 15(2)(b)(iii) entitles us to exclude evidence only if it would be unfair to admit it and the exercise of deciding whether it would be unfair to admit evidence was in the circumstances of this case most usefully undertaken when all the evidence in the case had been heard and all the submissions had been made. An example of this having been done before is afforded by [76] – [78] of *Purser,* where the tribunal excluded evidence (not Mr Stone's) from consideration after it had been given when it was apparent *ex post facto* that there had been unfairness in introducing it.

361 That said, the balance of advantage may well be different when such issues are raised in interlocutory proceedings as in *Narain*,

especially where the parties are represented at a high level of professional competence; in such circumstances, the trial may effectively be shortened and become better focussed as a result. In this case, the question of timing pointed to a different approach.

362 In the event, Mr Stone was called to give oral evidence to supplement his written evidence, and a small amount of factual evidence which he was able to give in addition to his written statements was relevant. Subject to that, we do not see Mr Stone's written evidence as being more than of general background value in painting the broad picture as the commissioners see it, and it has not been of material assistance to us in determining the substance of this particular appeal.

*Missing evidence*

363 It is clear that some material of relevance was not before the tribunal – in particular, evidence regarding CCA's historical due diligence and evidence concerning the details of payments made, and how they and the receipts were allocated to individual deals. The sources from which this material would have come were putatively: Mrs Pat Ryan, Mr Wesley Gordon, Ashton Law and Mr Ashley Trees's computer. The two witnesses were not called and had not refused to give evidence; no production order for the papers apparently with Ashton Law had been sought; Mr Trees had not interrogated his computer for the relevant data.

364 It was submitted by Mr Pickup QC that the proper course would be for the tribunal to draw an adverse inference from the absence of this material only if it is satisfied that there has been a deliberate attempt to conceal relevant and damaging evidence from it. Mr Kerr submitted that the explanations for the failure to provide this evidence were opportunistic and lacking credibility, and he invited the tribunal to draw an adverse inference.

365 Whether the evidence would be damaging or advantageous to CCA, we cannot of course determine without having seen it, but it is plain that all of it could have been provided if CCA had wished. Mrs Ryan is said to be elderly, but beyond this general assertion there is no evidence of her ill-health and it is very unlikely that she would not have been able to corroborate or otherwise, at least in general terms, the important evidence given by Mr Trees about the different approach she and he adopted to recording payments and receipts. In regard to the papers held by Ashton Law and the material on Mr Trees's computer, we can see no reason for them not having been produced, with the aid of a production order if necessary, especially bearing in mind the ample time there has been for preparation. Mr Gordon could have been summoned and the contents of Mr Trees's computer could have been put in evidence.

366 All this evidence would, it is said, have assisted the appellant, and the tribunal would not have been asked to rely on Mr Trees's possibly self-serving assertions alone. That said, it must be remembered in this context that the burden of proof lies on HMRC to justify the withholding of what is *prima facie* the taxpayer's entitlement, and that the department is armed with wide powers of search and inspection of documents which were exercised, but it seems only by the criminal investigators. The material in question could have been obtained by HMRC, or the lack of it demonstrated, in the lengthy civil review of the case; it is probable, moreover, that the criminal investigators' handling of the records seized on 1 June 2006 has contributed to the situation.

367 Although we are critical of CCA's failure to produce, or seek to have produced, the evidence we are discussing there is nothing beyond speculation to suggest that the failure has been a deliberate ploy to conceal matters which would harm its case; indeed if it were to be shown that relevant material had deliberately been held back the conduct involved would be very serious, and might indeed also reflect on the appellant's professional representatives. In the event, we do not have the evidence on which to reach such a conclusion, and we do not therefore draw an adverse inference from the absence of the material in question.

368 We have before commented upon the objection taken by Mr Kerr that Mr Trees's claims to have shown or given Mr D'Rozario evidence of the due diligence he had undertaken, and which was now not available, were not put to Mr D'Rozario as a witness. It is said therefore that no finding adverse to HMRC should be made with regard to its evidence about due diligence documentation or IMEI numbers.

369 While there is clearly force in these procedural objections in principle, it is evident that little practical difference would have resulted from the exercise of explicitly putting matters to the witness, since it was made quite clear by Mr D'Rozario that as far as he was concerned all the relevant detail was recorded in his meticulously kept logs and that there was nothing else relevant. The precise extent of the due diligence is in any event not one on which, having regard to authority, the appeal turns or which has in fact been determinative in reaching our decision.

*Evidence from previous cases*

370 It has been seen that the tribunal is urged to take into account the findings of fact by earlier tribunals in regard to Infinity Holdings and Future Communications, and that Mr Kerr in response has strongly resisted our taking that course and cited authority in the Privy Council. That authority is of course binding on the tribunal and it is evident, if there were to be any doubt about it, that it would be procedurally unfair to admit findings of fact made in other circumstances and where there is no witness statement or witness to be examined and

challenged in the current proceedings. We accept Mr Kerr's submissions on this and have taken no account of the evidence found in any other proceedings before the tribunal.

*Mr Fletcher's credibility*

371 It will also have been seen that, not for the first time, attacks have been made on the status of Mr John Fletcher as an expert witness and on his independence of commercial interests.

372 It is not necessary or useful to enter into a discussion of whether Mr Fletcher qualifies as an expert witness in the traditional sense of speaking from a position of special expertise, and drawing on an established body of knowledge or research in a particular area. The information which Mr Fletcher has brought to bear on the facts of this appeal is, within its limitations (which were thoroughly explored in cross examination), unquestionably useful and relevant. In so far as of conflicts of interest in the professional sphere are concerned, that is not a matter for the tribunal and Mr Fletcher has very properly taken advice on them.

373 We make it clear that we have no reason to doubt Mr Fletcher's personal integrity and that we have no reason to believe that KPMG's membership of the Anti Grey Market Alliance has in fact influenced his evidence; but what is of concern, however, is the identification of Mr Fletcher's employer with the Alliance. It is important that a reasonable observer of the proceedings, at the time of the hearing or afterwards, should not be able to gain the impression that an expert witness's independence is at all compromised by the commercial interests of his employer. That is especially so when the witness in question is relying in part on unpublished and confidential material.

374 From the point of view of Mr Fletcher's independence, there can be no valid objection that KPMG prepared a report for the Alliance as a client of the firm at a time when he was not employed by the firm, and which Mr Fletcher was scarcely even aware of. KPMG's membership of the Alliance since 2010 may on the other hand be perceived by the reasonable observer as crossing the line between offering services to a client and actually sharing that client's commercial interests.

375 That degree of identification by an important part of KPMG's global practice with the industrial establishment, albeit in a different but closely related sphere, may be perceived as affecting the freedom of their employees in advising the tribunal with complete independence. To that extent, it is desirable for us to be properly cautious in reaching final conclusions on the basis of evidence thus associated, since justice must be seen to be done without there being room for reasonable concerns that the expert evidence the tribunal has received has been improperly influenced.

*The grey market*

376 Detailed evidence was given about the operation of what, it is common ground, was a legitimate market in mobile handsets in 2006. Both Mr Fletcher and Mr Attenborough made careful estimates of what they believed would have been the conditions of that market, basing themselves on the limited number of hard facts available and making informed estimates for the rest. And it will be seen that in the evidence of these two witnesses the views of the one often contradict the views of the other, both in detail and in regard to the broad picture.

377 Thus, there was disagreement over the size of the legitimate grey market in 2006 and in regard to the extent to which the 2010 figures are likely to be falsified by MTIC fraud directed against other EU states, if there is any. There are also serious gaps in the information regarding the position outside a restricted area of mainly western Europe, when it is entirely possible that the situation is related to trading beyond.

378 Of particular concern to us, however, was the disagreement as to what types of trading can be regarded as authentic and which not, leaving the tribunal in doubt as to one of the crucial issues in the case - whether HMRC are right in asserting that CCA's trading was uncommercial and contrived in the way that Mr Kerr suggests. While these two witnesses were clearly competent persons in the context of their respective professions, it is no criticism of them to say that neither has had any firsthand experience of the operation of this market, and that they were able draw on the experience of others only to a limited extent.

379 It is regrettable that there is therefore no impartial evidence before the tribunal about how the legitimate trade in the grey market in question actually functioned; there is no trader from that era to say from firsthand knowledge: 'that is – or is not – how things were done'; 'this is, or is not, typical of authentic trading'. We are concerned with what seems, in principle, to be a specialised trading market and it is common knowledge that specialised markets do not operate in the way that simple retail distribution chains do. While it may well be appropriate to take judicial notice of the manner in which commerce at large is normally conducted, it can be unsafe to attempt the same exercise in regard to a specialised market.

380 Many of the practices and patterns of trade revealed by the evidence seem to require explanation: the buying and selling of large quantities of goods with little or no subsidiary detail in regard to them; the apparently formulaic nature of the trading in the UK to UK deals; the standard margins of profit in such deals; the substantial absence of written terms of business; the payment of monies decoupled from the passing of title; the use of the UK as a trading hub for intra-European continental trade; the use of sterling as the currency in the case of all

the export trades; the course of trading between the same parties; the peak in trade volumes in 2006, and so on.

381 The fact that expert evidence was adduced by both parties as to the functioning of this market, however, underlines the point that the assessment of behaviour in the grey market as authentic trading or as contrived activity requires specialist knowledge. Messrs Fletcher and Attenborough have assisted the tribunal to the best of their abilities, but the evidence of each throws doubt on the adequacy of the reasoning adopted by the other in areas in which there can clearly be legitimate disagreement. And although Mr Attenborough has not addressed this case specifically, his evidence touching the types of behaviour to be expected is consistent with the view that CCA's trading was not necessarily untoward or suspicious.

382 We are left therefore to assess the facts, conscious of having inadequate information about this market, and to remember that the burden of proving contrivance lies on the Revenue. In the circumstances, we cannot regard any of the peculiar features just described as inevitably pointing to uncommercial trading or as clear indicators of bad faith. They may do so, but it has not been shown that the probability is that they do so point and the only firsthand evidence of the way this market works is that of the appellant himself.

*The underlying frauds – the law*

383 It has been accepted that CCA's transactions were as a matter of fact linked to other transactions that involved a fraud on the Revenue, and it is very probable from the pattern of the transactions described in evidence that they were, seen from the perspective of a bird's eye, contrived overall for a non-commercial purpose. It is equally accepted that the transactions under appeal in which CCA were immediately concerned were themselves in 'clean' chains.

384 It is a common feature of this type of appeal that tribunal is obliged to reach conclusions with regard to persons or companies which are not before it and who have had no opportunity to refute what is now said against them. Unsatisfactory though that situation may be, the potential for mischief in it is lessened by the conclusions of fact now reached being determinative only between the parties to this appeal. For the purpose of this appeal therefore, we are satisfied on the balance of probabilities that the evidence shows that all three suppliers to CCA in the appeal period were contra-traders using their supplies to the taxpayer to mask fraudulent activity elsewhere.

385 There is, however, one aspect of the knowledge of the taxpayer required to be proved that remains in dispute. Is it necessary for HMRC to show that CCA knew or should have known in effect who the contra-traders were and that they were contra-traders? Or is it enough to show that CCA knew or should have known that their dealings were connected with fraud, without more detail?

386 In this instance also, we accept Mr Kerr's submissions that the formulation by Lewison J first in *Livewire* and repeated in *Brayfal* cannot be understood as requiring us to depart from the very plain formulations by Moses LJ at [59], [61], [62], [82] and [84] of *Mobilx*. The law is as stated by Moses LJ, namely that it is enough to show that CCA knew or should have known that the only reasonable explanation of their dealings was that they were connected with fraud.

*A split decision*

387 For the reasons already given, we have not found this an easy case to determine and it would be fair to describe it as a borderline case, some evidence pointing in one direction and other evidence in another. In spite of careful efforts to reach a common view, the members of the tribunal remain divided on the issues outlined in the following paragraphs. In the event, the judge has exercised his casting vote in favour of the appellant pursuant to article 8 of the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008. Paragraphs 388 to 411 which follow record the views of the tribunal judge, while those at paragraphs 412 to 421 are those of the second Member.

*Mr Trees's knowledge*

388 The impression of Mr Trees in the witness box was that he was a tense but truthful witness. Faced with a question to which he did not know that answer he said so, even when it would have suited his case better to have improvised a response. When he should, arguably, have taken some step in due diligence such as visiting a trader or taking up a reference and he had not done so, he admitted it - when he could quite easily have claimed that the action had been taken but that there was no surviving record of it. I was therefore the more inclined to believe him on those occasions when he did rely on that explanation.

389 The same was true when it came to the question of the rationality of trading patterns now apparent – for example, CCA's main suppliers also selling direct to CCA's EU customers (of which Mr Trees was unaware), or the customers not cutting CCA out as they could have done. The case was very properly put to Mr Trees that these and suchlike factors indicated a contrived pattern of trade designed to suit a non-commercial purpose. The responses Mr Trees made included the assertion that he did not spend time speculating idly about possible other trade patterns that might be taking place, but that he just got on with buying and selling when the opportunity was there. My impression was of a businessman who was essentially pragmatic in his approach to situations and not given to theorising about how the markets could most efficiently operate knowing that they frequently do not do so, and being unable to know of course what other factors – commercial or otherwise – might or might not be at work.

390 Thus, on the question of the apparent inefficiency of importing goods to the UK from the EU and then re-exporting them back to the EU, which could suggest an irrational market, Mr Trees's response was that he never thought of querying the situation because, whatever its explanation, it offered an opportunity for him; he evidently contended himself with the knowledge that there are all sorts of reasons why markets don't function as an uninitiated observer might expect them to. It is crucial to this issue that much of what is now clear about the trading patterns surrounding CCA's transactions has been discovered as a result of the commissioners' lengthy investigations; and it is relevant also that Mr Attenborough's evidence is consistent with imports to and exports from the UK being a feature of the legitimate market, with the UK functioning as a trading hub.

391 It is inherently improbable that, in all the circumstances of close, constant and well-established monitoring by HMRC and of checks being made on CCA's trade connections by KPMG and Deloittes at CCA's request (especially in connection with the very transactions under appeal), Mr Trees was at the same time consciously collaborating in an organised fraud. There is no evidence of bad character or duplicity on the part of Mr Trees to make it probable that he was knowingly playing a double game for high stakes.

392 Not can it be irrelevant that the criminal investigation begun on 1 June 2006, leading as it did to trials and convictions of one of CCA's main trading partners, paid no attention to Mr Trees, to the point of not even taking a formal witness statement from him. The conspiracy encircling CCA's trading was, as Mr Birchfield put it, a very large scheme in which it was possible for an innocent party to be caught up. It is quite credible that traders who had built up the trust of CCA over several years by offering them advantageous trading terms, should have seen the company as a useful cog in their machinery – and one which, if things went wrong, would be exposed to risk on its own account alone while leaving the conspirators holding the profits of the fraud.

393 I therefore conclude that it has not been established on the balance of probabilities that CCA through Mr Ashley Trees was a knowing participant in a fraud on the Revenue. The evidence is of course consistent with Mr Trees being well aware that his trading transactions risked being connected with such a fraud: throughout the three years preceding the appeal periods such an awareness on Mr Trees's part was manifest and there is no reason to see it as having ceased in May, June and July 2006.

394 HMRC's officers all agreed that CCA could not have verified the transactions upstream and downstream of its own. Mr Kerr has nonetheless put forward a list (at paragraph 354 above) of some 20 grounds on which Mr Trees must have known that there was no reasonable explanation for his transactions other than a connection to fraud. These concerns relate essentially to the pattern and manner of

CCA's trading in regard to which it has been indicated that the expert evidence about the market is conflicting; features which appear to the outside observer as unusual - the types of trade, the peaks in volumes, the apparently incestuous character of dealings, and so on - may on Mr Attenborough's evidence be consistent with the peculiarities of a specialised wholesale market, especially during the boom years of the economy.

395 I do not see therefore an adequate basis on which to support the conclusion that a *bona fide* trader, taking reasonable precautions and being of normal prudence, should have realised that his transactions *were* connected to fraud. That the transactions might have been so connected, or even that it was 'more likely than not' that they were so connected, could well be argued and on that basis I might be persuaded; but that is in itself insufficient to lose the appellant its right to deduct input tax.

*Banking evidence*

396 The common use of FCIB banking facilities looks, with hindsight, to be an unusual and sinister feature of the transactions pointing to guilty knowledge or devious intent. But that is without reckoning with the fact that in early 2006 no one knew that FCIB would be caught up in money-laundering allegations and would be closed down, or that it was otherwise than an innovative and efficient competitor to the slow-moving and costly traditional banking system. There can be no presumption that the use of this bank was in itself untoward.

397 I see Mr Birchfield's banking analysis of six transactions (which are not those in this appeal) as inconclusive, capable of more than one explanation and as establishing, in so far as CCA's involvement is concerned, no more than a *prima facie* case requiring further investigation. That is not to deny that the evidence from the FCIB statements is suggestive of uncommercial behaviour overall or to deny that it is consistent with a large scheme of organised fraud potentially involving several parties. It is not, however, sufficient to demonstrate on the balance of probabilities that CCA were knowingly participating; to my mind, it only shows the probability that some or all CCA's partners were themselves implicated.

398 Throughout Mr Birchfield's analysis, there is the constant problem of correlating the invoices and the money payments, probably for the reason explained by Mr Trees that Mrs Ryan's annotations and the actual payments differed; without that aspect having been examined further, the banking evidence is susceptible of more than one explanation and fails to establish the likelihood of CCA being aware of an uncommercial and contrived pattern of business. It is perhaps not surprising that this is the case, given that, as we have noted, the analysis was not prepared for the purposes of this appeal; and Mr Birchfield accepted that it was possible for an innocent trader to be caught up in what he described as "a very large scheme".

399 Moreover, the banking evidence does not demonstrate that CCA were not free to choose their trading partners; it says nothing about the obvious possibility, which is as likely as not, that CCA's customers had been put forward by the conspirators to trade with CCA – and it must be remembered that it was these customers who first made contact with CCA, and not the other way round. Where the evidence is equally consistent with honesty as it is with dishonesty, the burden of proof has not been discharged.

*Due diligence*

400 The Court of Appeal, as will have been seen, has warned against an excessive focus on 'due diligence' in MTIC cases and urged a more general realistic overview of the steps actually taken by a trader to avoid involvement in fraud in the commercial context in which it operated, thus very much reinforcing HMRC's own warning that a merely formal compliance with the guidelines in Notice 726 was not what they were inviting.

401 Moreover, it is apparent that Notice 726 was not designed to address the type of liability which arises in these appeals and in some of its parts was clearly inappropriate, for example the expectation that fraud would be characterised by price reductions in the chain. What is required may be described as a duty of responsible enquiry in all the circumstances of the case. In most cases the details suggested in Notice 726 were at one time or another obtained in respect of CCA's main trading partners, although there is no denying that the evidence does not show scrupulous attention to detail, particularly in record keeping. That is not the standard laid however envisaged by the authorities: the Court in *Mobilx* was quite explicit that:

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

402 Whatever criticisms can be made of the detail of CCA's due diligence at particular times (and we have already noted the evidential shortcomings in this area and discussed the reasons for them), CCA's trading was at all material times heavily monitored by Mr D'Rozario. While there is no question of Mr D'Rozario having accepted on behalf of HMRC that the due diligence was adequate, still less that it was perfect, the only significant area in which he was dissatisfied with CCA's performance was in respect of the recording of the serial numbers, or IMEI numbers, of the phones traded.

403 Here, it was a question of who should bear the cost of collecting data that would assist the Revenue, but was of only limited use to the taxpayer in avoiding contamination with fraud; the evidence shows that Mr Trees addressed the issue frankly and openly, and that it is

improbable that his opposition to collecting the data was the result of a calculated desire to conceal fraudulent trading over at least three years.

404 The reasons given by CCA for not – with certain exceptions – cooperating with HMRC on this matter appear to me to have been honestly put forward, even if it can now be shown that they were less compelling than Mr Trees thought they were. The imposition by law of an obligation on all traders to record this information in September 2006 resolved the issue, as a matter of public policy, in favour of HMRC.

*Insurance*

405 The evidence with regard to insurance shows that it was not uncommon for traders themselves not to insure their goods when they could rely on insurance by warehousekeepers and freight forwarders; when that ceased to be the case at the end of 2005, due to changes in legislation, Mr Trees in principle acquired genuine and adequate cover for his operations.

406 The most important lapse recorded, in relation to the maximum quantity to be covered in a single transit, was due to the improper conduct of the freight forwarder. The other, relating to Belgium, was clearly not the act of a fraudster: I may not speculate on its cause, and I merely note Mr Trees's explanation that it was an oversight. But it cannot seriously be thought to have been deliberate, because to omit cover for the one country for which it was needed most and yet pay for cover where it was not needed would have served no conceivable purpose for a fraudulent trader anxious to cover his tracks.

*Reliance on HMRC*

407 Any suggestion that HMRC, through Mr D'Rozario's thorough work, created a legitimate expectation that the company would be guided in its trading or somehow kept safe from involvement in fraudulent schemes must be rejected. The authorities from the Court of Justice downwards make it clear that it is always the responsibility of the trader to conduct his business with proper care and responsibility in the circumstances, and the circumstances here were ones in which Mr Trees was well aware that he was, as it were, swimming in shark-infested waters.

408 However the very close, not to say bothersome, attention which Mr D'Rozario paid to CCA's trading and the routine checking of the circumstances of the transactions which he put in hand, are an additional reason why Mr Trees should not be taken as seeing as the only reasonable explanation for the circumstances of the transactions being concluded was that they were connected with fraud. If HMRC, who had much more information about the surrounding circumstances at their disposal, were checking the deals and releasing repayments of input tax after doing so, how could CCA nonetheless have concluded

that the only reasonable explanation for them was that they were connected with fraud?

409 CCA, through Mr Trees, would have entertained the view that there was risk that their transactions might be connected with fraud - that was at this period almost a certainty with any grey market transaction in mobile phones – but the authorities make it very clear that that does not disentitle the trader to the repayment of input tax on his transactions: see, for example, *Mobilx* at [60].

*Samsung Serenes*

410 The case of the apparently non-existent Samsung Serenes and the Sony Ericsson P990s remains for comment. We have found that these handsets probably did not exist on the market in the quantities sold at the relevant time, and that therefore CCA was trading in non-existent goods; this episode it is then submitted should colour the tribunal's attitude to the cases that are under appeal. But I consider that if the handsets did not in fact exist in the required quantity, as we have found, it is more likely that CCA was duped by people who it is now known are persons convicted of serious fraud, than that CCA themselves were knowingly trading as a pretence.

*The tribunal's decision*

411 Having regard to all these considerations, neither of the two circumstances required by the authorities to be present has been established on the balance of probabilities in relation to the transactions under appeal and the appeal must therefore succeed.

*Statement of dissent by Mr John Agboola*

412 Based on the evidence, my conclusion is that the appeal should fail. The following points lead me to that conclusion.

413 Evidence relating to an analysis of the FCIB account of CCA regarding six transactions - three UK-to-UK suppliers and three UK-to-EU suppliers – was illustrated by charts showing the flow of money coming in and going out (in loops) between traders (not specific to CCA but includes CCA) relating to six transactions of CCA. The appellant did not dispute the flow (in and out) of monies in these charts. The charts clearly demonstrated to me that there was a fraudulent scheme going on. The order, timing, how the money split and re-amalgamated must be more than a mere coincidence. Also when it was put to Mr. Trees, he agreed that there appeared to be non-commercial activities connecting CCA's customers.

414 If the view holds that the flow of monies was more than a mere coincidence and that Mr. Trees conceded there were non-commercial activities going on, the question then is whether or not CCA was knowingly a party to a fraudulent scheme. The answer can be

deduced from CCA's business processes and the part played by CCA in the flow of monies as illustrated by the charts.

415 Regarding the part played by CCA in the flow of monies as illustrated by the charts, the appellant did not dispute the flow (in and out) of monies in these charts. The flow, as illustrated, in terms of the order, timing, how the money split and re-amalgamated would in my opinion not have been possible if CCA did not play its part in the flow.

416 In relation to CCA's business processes, Mr. Trees said that CCA did not extend credit and would receive payment before releasing the goods to customers; once CCA had received payment from the customer it would then pay its supplier. Mr Trees said that CCA's suppliers were happy for CCA to take the goods, send the goods to CCA's customers, with CCA taking the proceeds before eventually paying their suppliers - all because the suppliers trusted CCA. However, some of these suppliers were CCA's customers too.

417 It appears not credible that the trusting relationship described by Mr. Trees was only one way in that when the traders were in the status of a supplier they trusted CCA but when their status changed to customers of CCA – CCA did not trust them and must receive payment before goods were released. For example, Future Communications was CCA's supplier in April 2006 and CCA's customer in June 2006. CCA also bought from and sold to Infinity Holdings and Soul Communications. One can only deduce from this that there is more to the arrangement/relationship than Mr. Trees was prepared to share.

418 Evidence given by Mr. Trees was that CCA at no time physically inspected goods from their suppliers before the goods were sent to their customers, and their customers at no time physically inspected those goods before they paid for them. CCA had undertaken a large number of deals and their turnover during the relevant period (in particular, year 2005/06 was up to £400m). It is far-fetched (simply not credible) that at no point was there a single human error – stock was never short or wrong item sent or received, there were no damaged items or misdescribed items – everything went to plan and smoothly each and every time. This cannot be the case in the real business world.

419 CCA never buys from a supplier unless a customer is already found for the goods and therefore takes no risk on stock; it receives money from the customer before it pays its suppliers; CCA's suppliers or the freight company are liable for the goods purchased until CCA pays the suppliers; CCA never made a loss except on one occasion when Mr. Trees cut off his nose to spite his face. This business process as described by Mr. Trees has no business risk whatsoever and too good to be true. This raises the question about whether or not

some of its activities were genuine business activities. Not only that CCA's business processes had no business risks whatsoever, CCA's Balance Sheet had none either.

420 With regards to the insurance, Mr. Trees has been in business well before 2002/03 and wasn't a novice to business at the relevant dates. One can infer from the insurance situation that he knew there was no risk whatsoever and the insurance cover was only to legitimise CCA's non-commercial activities.

421 I am mindful that the standard of proof required is on a 'balance of probability' and not 'beyond reasonable doubt'. The evidence leads me to conclude that there was a fraudulent scheme going on, and on the balance of probability CCA was a willing participant in the scheme. CCA could not have been a free agent in the selection of its customers and suppliers. I would therefore dismiss the appeal.

*Costs*

422 The parties may within thirty days of the release of this decision make application for an order with regard to costs.

*Appeal rights*

423 This document contains the 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 no 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.

**MALACHY CORNWELL-KELLY**
**TRIBUNAL JUDGE**

## RELEASE DATE: 22 April 2013

# APPENDIX

| Deals/dates* 2006 | Supplier | Goods | Buyer | Same as single import? |
|---|---|---|---|---|
| A1<br>12/12/12 | Infinity Holdings UK | 1350 Sony W900i<br>1150 Nokia 8800<br>2000 Samsung SGHi 300 | Allimpex D | Yes |
| A2<br>13/13/13 | Infinity Holdings UK | 1310 Nokia N90<br>2050 Samsung SHGi 300<br>1900 Nokia 8800 | Allimpex D | Yes |
| A3<br>20/20/20 | Infinity Holdings UK | 1450 Nokia N90<br>2500 Samsung SGHi 300 | Allimpex D | Yes |
| A4<br>12/12/12 | Infinity Holdings UK | 210 Samsung Serene<br>2000 Nokia 8800 | Shabir Mahomedbhay D | Yes |
| A5<br>12/12/12 | Infinity Holdings UK | 2000 Nokia 9500 | Shabir Mahomedbhay D | Yes |
| A6<br>19/19/19 | Infinity Holdings UK | 2300 Sony W990i | Shabir Mahomedbhay D | Yes |
| A7<br>19/19/19 | Infinity Holdings UK | 2195 Nokia 9300i | Shabir Mahomedbhay D | Yes |
| A8<br>24/24/24 | Infinity Holdings UK | 1950 Nokia 8800<br>2500 Sony W900i | Shabir Mahomedbhay D | Yes |
| A9<br>25/25/25 | Infinity Holdings UK | 2820 Samsung SGHi 300 | Shabir Mahomedbhay D | Yes |
| A10<br>25/25/25 | Infinity Holdings UK | 2400 Nokia 9500 | Shabir Mahomedbhay D | Yes |
| A11<br>18/18/18 | Infinity Holdings UK | 1750 Nokia 8800<br>1500 Samsung SGHi 300<br>796 Nokia N90 | Pielkenrood Opto Electronics NL | No |
| A12<br>18/18/18 | Infinity Holdings UK | 1875 Sony W900i | Pielkenrood Opto Electronics NL | Yes |
| A13<br>11/11/11 | Infinity Holdings UK | 1500 Samsung SGHi 300<br>1255 Nokia 9300i<br>1498 Sony W900i | Universal Handels AUS | Yes |
| A14<br>27/27/27 | Infinity Holdings UK | 825 Nokia 8800<br>1825 Nokia 9500<br>2160 Nokia 9300i | Universal Handels AUS | Yes |

| | | | | |
|---|---|---|---|---|
| M1<br>8/8/8 | Future Communications UK | 1440 Nokia 9300i<br>550 Nokia N91<br>1916 Nokia 8800 | Shabir Mahomedbhay D | No |
| M2<br>10/10/10 | Future Communications UK | 1835 Samsung SGH P850<br>2000 Nokia N80 | Shabir Mahomedbhay D | No |
| M3<br>10/10/10 | Future Communications UK | 1301 Nokia 9500+128MMC | Shabir Mahomedbhay D | No |
| M4<br>15/15/15 | Future Communications UK | 1493 Nokia 9300i<br>1680 Nokia 9500+128MMC<br>1350 Nokia 8800 | Allimpex D | No |
| M5<br>16/16/16 | Future Communications UK | 1290 Nokia N80<br>1900 Nokia 9500+128MMC<br>1325 Samsung SGH P850 | Universal Handels AUS | No |
| M6<br>19/19/19 | Future Communications UK | 710 Samsung SGHi 300<br>1540 Nokia N80<br>2000 Nokia 9500+128MMC | Universal Handels AUS | No |
| M7<br>22/22/23 | Future Communications UK | 2000 Nokia 8800<br>2000 Samsung SGHi 300 | Pielkenrood Opto Electronics NL | No |
| M8<br>22/22/23 | Future Communications UK | 500 Nokia<br>876 Samsung SGHi 300 | Pielkenrood Opto Electronics NL | No |
| M9<br>23/23/24 | Future Communications UK | 2400 Samsung SGHi 300<br>1285 Samsung Serene | Pielkenrood Opto Electronics NL | No |
| M10<br>25/25/25 | Future Communications UK | 1500 Nokia 9300i<br>1000 Samsung SGHi 300<br>1960 Nokia N80 | Universal Handels AUS | No |
| M11<br>26/16/16 | Future Communications UK | 1820 Nokia 9500+128MMC<br>800 Nokia N90<br>1000 Samsung SGH P850 | Pielkenrood Opto Electronics NL | No |
| M12<br>30/30/30 | Future Communications UK | 1800 Samsung SGHi 300<br>2000 Samsung SGH P850<br>2000 Nokia 9500+128MMC | Universal Handels AUS | No |
| J1<br>15/15/15 | Soul Communications UK | 2250 Nokia N90<br>2950 Nokia 8800 | Allimpex D | Yes |
| J2 | Future | 1500 Nokia 8800 | Allimpex D | No |

| | | | | |
|---|---|---|---|---|
| 23.2,12.4,10.5,28.6 /28/28 | Communications UK | 2390 Nokia N90<br>1000 Sony W900i<br>500 Cartrek 200 | | |
| J3<br>29/30/29 | Future Communications UK | 1700 Nokia N93<br>2100 Tom Tom | Allimpex D | Yes |
| J4<br>30/30/30 | Infinity Holdings UK | 2190 Nokia 8800<br>1000 Samsung Serene<br>900 Nokia N91 | Allimpex D | Yes |
| J5<br>19/19/19 | Soul Communications UK | 1605 Sony M600<br>1850 Nokia 9500+128MMC | BHS Vertriebs D | Yes |
| J6<br>19/19/19 | Soul Communications UK | 2555 Samsung SGH P850 | BHS Vertriebs D | Yes |
| J7<br>13/13/15 | Soul Communications UK | 1547 Nokia N80<br>2200 Samsung SGHi 300 | Pielkenrood Opto Electronics NL | Yes |
| J8<br>29/30/30 | Future Communications UK | 1500 Nokia 8800<br>2000 Nokia N80 | Pielkenrood Opto Electronics NL | No |
| J9<br>12/12/12 | Soul Communications UK | 580 Nokia 8800<br>1150 Nokia 9300i<br>950 Nokia 950 | Universal Handels AUS | Yes |
| J10<br>14/14/14 | Soul Communications UK | 987 Nokia 8800<br>1250 Nokia 300i<br>1905 Nokia N91 | Universal Handels AUS | Yes |
| J11<br>21/21/21 | Soul Communications UK | 780 Sony Notebook<br>955 Nokia 8800<br>550 Kenwood DVD | Universal Handels AUS | Yes |
| J12<br>23/23/23 | Soul Communications UK | 954 Kenwood CCX<br>1455 Sony HC3e | Universal Handels AUS | Yes |
| J13<br>27/27/27 | Soul Communications UK | 1350 Sony M600<br>2100 Nokia 8800<br>1400 Samsung SGH P850 | Universal Handels AUS | Yes |

*First date = import; Second date = purchase by CCA; Third date = sale by CCA.

5 A = April 2006 D = Germany
M = May 2006 NL = Netherlands
J = June 2006 AUS = Austria
*All sales to CCA were previously imported from another EU state.*