[2019] UKFTT 310 (TC)

TC07138

Appeal number: MAN/2008/1322

VALUE ADDED TAX – penalty for under-declaration – whether delays in proceedings have interfered with Appellant's Article 6 Convention rights – whether the Appellant was dishonest within the meaning of s 61 of VATA – credibility issue of witness evidence – the test of dishonesty for civil evasion penalty –* Ivey v Genting *– whether apportionment of penalty due – penalty liability not 'discrete' – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

KARL BYERS **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON
MR LESLIE BROWN

Sitting in public at Teesside Magistrates' and Family Court, Victoria Square, Middlesbrough on 9 and 10 May 2018

Mr Hammad Baig, Counsel instructed by Vincent Curley & Co Ltd, for the Appellant

Ms Joanna Vicary, Counsel instructed by Solicitor's Office and Legal Services of HMRC, for the Respondents

DECISION

Introduction

1. Mr Karl Byers, appeals against a VAT Civil Evasion Penalty Notice by the respondents ('HMRC') pursuant to s 61 of the Value Added Tax Act ('VATA').

2. The penalty in the sum of £46,876.20 in relation to the period from 1 June 2004 to 31 January 2007 is imposed on Mr Byers on the basis that an under-declaration of VAT by BSL Auto Services (South) Limited ('**BSL (South)**' otherwise '**BSL**'), a company of which Mr Byers was a director, was attributable to his dishonest conduct.

3. The disputed decision is HMRC's assessment notice dated 6 October 2008, in which HMRC held that BSL's conduct which resulted in the under-declaration of VAT was in whole or in part attributable to Mr Byers' dishonesty.

4. The appeal does not raise any challenge to the quantum of the underlying VAT assessment of £78,141.87, which gave rise to the penalty, nor to the percentage of mitigation granted by HMRC of 40%.

Relevant legislation

5. For the purposes of this appeal, the provisions under s 61 VATA is to be read in conjunction with s 60 VATA. Section 61 provides that a penalty involving dishonesty which has been assessed on a corporate body under s 60 VATA may, in certain circumstances, be recovered from an officer of that corporate body as if that officer were personally liable. The relevant parts of ss 60 and 61 are as follows:

> **60 VAT evasion: conduct involving dishonesty**
>
> (1) In any case where –
>
> (a) for the purpose of evading VAT, a person does any act or omit to take any action, and
>
> (b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),
>
> he shall be liable, subject to subsection (6) below, to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct.
>
> (2) The reference in subsection (1)(a) above to evading VAT includes a reference to obtaining any of the following sums –
>
> (a) a refund under any regulations made by virtue of section 13(5);
>
> (b) a VAT credit;
>
> (c) a refund under section 35, 36 or 40 of this Act or section 22 of the 1983 Act; and
>
> (d) a repayment under section 39,
>
> in circumstances where the person concerned is not entitled to that sum.
>
> […]

61 VAT evasion: liability of directors, etc

(1) Where it appears to the Commissioners –

(a) that a body corporate is liable to a penalty under section 60, and

(b) that the conduct giving rise to that penalty is, in whole or in part, attributable to the dishonesty of a person who is, or at the material time was, a director or managing officer of the body corporate (a "named officer"),

the Commissioners may serve a notice under this section on the body corporate and the named officer.

(2) A notice under this section shall state –

(a) the amount of the penalty referred to in subsection (1)(a) above "the basic penalty"), and

(b) that the Commissioners propose, in accordance with this section, to recover from the named officer such portion (which may be the whole) of the basic penalty as is specified in the notice.

(3) Where a notice is served under this section, the portion of the basic penalty specified in the notice shall be recoverable from the named officer as if he were personally liable under section 60 to a penalty which corresponds to that portion; and the amount of that penalty may be assessed and notified to him accordingly under section 76.

[…]

(5) No appeal shall lie against a notice under this section as such but –

(a) where a body corporate is assessed as mentioned in subsection (4)(a) above, the body corporate may appeal against the Commissioners' decision as to its liability to a penalty and against the amount of the basic penalty as if it were specified in the assessment; and

(b) where an assessment is made on a named officer by virtue of subsection (3) above, the named officer may appeal against the Commissioners' decision that the conduct of the body corporate referred to in subsection (1)(b) above is, in whole or part, attributable to his dishonesty and against their decision as to the portion of the penalty which the Commissioners propose to recover from him.'

but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), ... above, another assessment may be made under that subsection, in addition to any earlier assessment.

(6) [definition of 'managing officer'] …

6. Section 70(1) of VATA provides that HMRC (or on appeal, a Tribunal) may reduce the penalty to such amount (including nil) as they think proper.

Case law

7. The authorities referred to in this Decision or in parties' submissions are listed in the alphabetical order of their short case names in the Annex to this Decision.

Procedural history

8. The Notice of Appeal was received by the then VAT and Duties Tribunal on 17 October 2008. The appeal has had a protracted history before it came to be heard in May 2018, almost a decade after the first lodgement of the appeal.

9. The chronology of the proceedings is summarised as follows, with the relevant dates in brackets (date/month):

(1) In 2008 – HMRC applied for an extension of time to serve their Statement of Case to allow time for internal review to be carried out (24/10), and (10/12).

(2) In 2009 – HMRC applied for an extension of time to serve Statement of Case (16/01); service of Statement and List of Documents (23/2) and witness evidence of Officer Barry Rush (23/4).

(3) In 2009 – appellant served a response to the Statement of Case ('Defence') (28/5); appellant applied for a direction to stay the proceedings in order to facilitate investigation by HMRC of those matters raised in appellant's statement of defence (25/6); HMRC consented.

(4) In 2009 – Tribunal directed a pre-hearing review to be listed (1/7); a pre-trial review hearing was listed for 11 November 2009; Tribunal directions issued for HMRC to disclose documents relating to meeting of 11 April 2007, copies of all VAT returns, and Sage business records held (11/11).

(5) In 2010 – appellant served List of Documents (4/1); HMRC served witness statements of Alison Parkin and Roland Tilney (26/2).

(6) In 2011 – hearing listed (for 3 to 5 May 2011); appellant applied to vacate listed hearing on the ground of ill health (5/4); HMRC did not oppose. The case was stood over behind *Sofed Miah* (MAN/2002/0378).

(7) In 2012 – Stay continued.

(8) In 2013 – appellant made three applications for standover: (i) first time to allow representative (Mr Curley) time to read papers (5/4); (ii) second time asserting issue with legal aid funding (18/6); (iii) third time (7/10). HMRC raised no objections against any of the three applications.

(9) In 2014 – listing for preliminary hearing (15/4); appellant not available and hearing vacated; re-listing for August; appellant applied to vacate the listing on ground of no legal aid (18/6); hearing vacated.

(10) In 2015 – letter from Tribunal regarding non-compliance with directions (29/6); on three separate occasions appellant applied to extend time for compliance (6/7), (8/10), and (21/12); HMRC raised no objection.

(11) In 2016 – the following procedural steps took place:

(a) Appellant applied for the fourth time to extend time for compliance with directions (7/3); HMRC did not object.

(b) HMRC applied to extend time (30/3); appellant did not object.

(c) Appellant's fifth application to extend time (12/5) refused by the Tribunal.

(d) HMRC applied for directions (10/6).

(e) Directions from Tribunal listing to final hearing (15/8).

(f) HMRC served a second statement of Roland Tilney (18/8).

(g) Appellant applied to extend dates for compliance (14/9); HMRC did not object.

(h) Appellant applied (14/10) for stay until 30 November 2016.

(i) Appellant applied (30/11) for stay until 31 January 2017.

(12) In 2017 – Interim application hearing attended by Mr Baig and Ms Vicary before Judge Cannan (13/1); directions to list appeal for final hearing (19/1).

The interim application hearing on 13 January 2017

10. By notice dated 30 November 2016, Mr Byers' representative applied for 'the appeal to be stood over and for all time limits to be extended up to and including 31st January 2017'. The application was premised upon the need for 'time to instruct a medical expert and take advice from Counsel'.

11. HMRC opposed the application and gave their grounds as follows:

(1) The notice of appeal was served on 16 October 2008.

(2) HMRC served their Statement of Case and Lists of Documents on 23 February 2009 and witness evidence from Barry Rush (23/4/2009), Alison Parkin (26/02/2010) and Roland Tilney (16/02/2010 and 18/08/2016).

(3) The appellant served a response to the Statement of Case (28/05/2009) and their List of Documents (04/01/2010).

(4) Since 2011, the appellant had repeatedly sought to frustrate the proceedings through applications to vacate hearings and to stay, or otherwise adjourn proceedings generally.

(5) The present application 'falls to be considered against the background of delay and obfuscation caused by the appellant to date'.

(6) In addition, the following facts are material to the Tribunal's consideration:

(a) The appellant is, and has been throughout, professionally represented in these proceedings.

(b) The application asserts that time is needed to take advice from Counsel. No reason is provided as to why such advice, if required, has not been sought to date.

(c) The application states that Counsel has been appointed. No reason is provided as to why a period of 2 months is required for the requisite advice to be provided.

(d) The appellant asserts that he has been suffering from ill health from January 2006 onwards. Given the longevity of the illness relied upon, a medical report has not been obtained to date.

(e) The application is not premised upon the appellant lacking the capacity to give instruction, merely that he may be unable to attend a hearing to give evidence or instruction at the hearing. It is averred that such an inability, even if medically established, does not affect the appellant's

ability to provide a witness statement or give instruction for the onward progression of his appeal.

(7) It is plain that this appellant has been afforded every possible opportunity to participate in proceedings and that the respondents have shown considerable flexibility and leniency towards the progression of a trial table. However, there must be a finality to litigation, and the respondents seek the grant of a mandatory direction to provide evidence supported by the sanction of strike out.

An unless order to provide witness statements

12. The set of Directions issued on 19 January 2017 by Judge Cannan after the interim hearing stated as Direction 1 the following:

> 'Unless the Appellant serves on the Respondents and confirms to the Tribunal that it has done so on or before 4 April 2017 the witness statements of those witnesses on whose evidence he intends to rely in this appeal then he shall be debarred from adducing any evidence save with the permission of the Tribunal.'

Preliminary matter: appellant's application after close of evidence

13. By notice dated 3 May 2018, the appellant's representative Vincent Curley & Co Ltd ('Vincent Curley') applied to the Tribunal for the admission of a witness statement by a Mr John Colvin dated 2 May 2018, on the ground that Mr Colvin's evidence 'will assist the Tribunal with the determination of the appeal'.

14. HMRC opposed the application, on the ground that it was plainly a breach of the unless order. The Tribunal was called upon to decide on the application at the commencement of the hearing as a preliminary matter.

Application to lodge Mr Colvin's witness statement

15. The application was accompanied by the following documents in addition to the witness statement, which were paginated by hand as follows:

(1) Letters from Mr Byers' GP of 13 and 18 December 2017, (pp376-377);

(2) A letter or a statement purported to be from the late Mr Stanley Welsh, and purported to be signed and dated on 16 March 2009 (pp378-379);

(3) A scanned document showing a fax transmission header dated 15 April 2009 at 10:37 from DWF LLP based at St Paul's Square, Old Hall Street in Liverpool to the then VAT and Duties Tribunal in Manchester. The letter gave Mr Colvin as the contact, and was in relation to the Preliminary Hearing listed for 14 May 2009 at 2pm. The scanned document only revealed the first three paragraphs with the fourth paragraph being truncated at the end of the page. The rest of the letter was not included and the document was paginated as p386.

(4) The witness statement by Mr John Colvin of 2 May 2018, (lodged with the application of 3 May 2018), pp387-388.

16. On 4 May 2018, HMRC notified the Tribunal that they opposed the appellant's application to admit further documents after the close of evidence on 4 April 2017 as directed by the Tribunal, and would make submissions to that effect at the hearing.

17. It was not just the witness evidence of Mr Colvin that was lodged late, but the appellant's skeleton argument was lodged on 4 May 2018, after the date directed for compliance. An application by Vincent Curley for an extension of time accompanied the skeleton argument to vary the date for its lodgement from 1 May 2018 to 4 May 2018, and the ground for the application was stated as follows:

> '… we have had continuing difficulties with the Legal Aid funding. The Legal Aid Agency only provided us with conformation of the additional funding required for preparation and attendance at the hearing on 1 May 2018 and we were only then able to confirm Counsel's instructions.'

18. On the day of the hearing, in addition to the witness statement which accompanied the application of 3 May 2018, the appellant produced a further document, paginated by hand as pp384-389. The document is a six-page letter dated 20 July 2009 by a Mr Ian Shirley (acting for Mr Byers) to HMRC's Specialist Investigations in relation to the employment income Mr Byers received from BSL as his employer from which no PAYE had been deducted.

19. On behalf of Mr Byers, Mr Baig asserted the relevance and importance of the said documents, especially in view of the fact that 'two key players' in the business of BSL had since died: Mr Welsh on 1 November 2009, and Mrs Jacques in 2010.[1] It was submitted that the evidence of Mr Colvin, who was the solicitor acting for Mr Byers in relation to the VAT enquiry, would be critical since Mr Colvin had a discussion with Mr Welsh on the matter at the time; that it was 'imperative to hear Mr Colvin's evidence'.

20. As to the reason for the delay in furnishing the documents, Mr Baig asserted that it was due to the difficulties in obtaining confirmation for the legal aid funding before instructing counsel, which in turn caused the delay in identifying the said documents as crucial for inclusion.

Respondents' objections to the application

21. On behalf of the respondents, Ms Vicary opposed the appellant's application to include the witness statement and accompanying documents, and also the letter from Mr Shirley on the following grounds:

(1) From 2011 onwards, the appellant had made application after application for the matter to be stayed. HMRC had raised no objection on each of these occasions that these might be 'delaying tactics' and had instead given the appellant 'every opportunity to get the house in order'.

(2) Contrary to what counsel for the appellant stated in the skeleton argument, HMRC were not responsible for the delay as all that HMRC did was to accede to the appellant's applications for 'stay' or for 'extension of time' repeatedly.

(3) The latest application to admit the listed documents was served on the respondents on 4 May (a Friday) before the Bank Holiday on Monday. When it

[1] These were the dates given by Mr Baig as he addressed the Tribunal in relation to the application. After the adjournment during which the Tribunal considered the application after parties' submissions, HMRC produced a copy of the obituary published in Hartlepool Mail on 7 October 2008; the date of death of Susan Jacques was stated as 5 October 2008.

was served, the application was incomplete, and did not include Mr Shirley's six-page letter.

(4) The morning of the hearing was the first opportunity for the respondents to see the six-page letter. While the letter dealt with the investigations of PAYE related to the appellant's earnings, HMRC is a large organisation with separate departments. It is unreasonable to expect that this letter would have been referred to the VAT enquiry team in relation to the penalty matter.

(5) HMRC's officer Mr Tilney never worked for the specialist investigations team. The PAYE investigations ended in mid-2007, two years before this letter was written by Mr Shirley.

22. Turning to the reason given by the appellant for the late inclusion of the said documents, Ms Vicary produced a four-page document showing the award of Legal Aid funding by the High Cost Civil Team of Legal Aid Agency. The covering letter was dated 5 January 2017, and attached a copy of the funding certificate with the following details:

(1) The substantive certificate for 'Full Representation' was issued on 19 April 2012, and limited the costs to be incurred (including disbursements and any counsel's fees but excluding VAT) to a maximum of £2,500.

(2) Amendment to the substantive certificate was made on 5 January 2017, on the same terms as formerly stated, with maximum being varied to £5,000.

(3) 'Limitation' is stated on the certificate as 'Limited to all steps up to and including trial/final hearing and any action to implement (but not enforce) the judgment or order'.

23. Ms Vicary submitted that by the time the first hearing in front of Judge Cannan on 19 January 2017, which was attended by herself and Mr Baig, the appellant would have had received the legal aid funding confirmation two weeks previously. The principal ground of delay as asserted by the appellant was not supported by the date of the amended legal aid funding, given that the limitation had been specified as 'including trial/final hearing'. Ms Vicary further questioned the authenticity and relevance of the documents. In particular, in relation to the statement purported to be by Mr Welsh, she asked why 'if it was factually true on its face, it was not right at the forefront' and was 'only produced at this late stage'. As to Mr Shirley's letter, it could not be verified that the letter was indeed the one sent to HMRC.

24. In response, Mr Baig alluded to emails from the Legal Aid Agency questioning any work that was done prior to the actual hearing, and that only allowed fees in relation to preparatory work for the actual hearing by email on Tuesday 1 May 2018.

The Tribunal's reasons for admitting the evidence

25. The hearing was adjourned for a short duration for the Tribunal to confer on the application. We decided to allow the application for the following reasons:

(1) We accept HMRC's contention that there was an unless order made by Judge Cannan as regards the lodgement of witness statements, and the last-minute submission of a witness statement contravened the unless order. We also accept that the certificate from the Legal Aid Agency clearly stated the date of confirmation of funding, including representation at the hearing, to be 5 January

2017. Mr Baig clearly was funded to attend the case management hearing on 19 January 2017. Though without production of the alleged email, we accept Mr Baig's explanation that there was a delay in obtaining confirmation as to whether preparatory work leading up to the final hearing was covered by the funding. We consider that a litigant, acting with foresight and due diligence, would have obtained such confirmation from the funding authority in good time, and the way the matter was handled by the appellant was not how litigation should be conducted.

(2) As to the admissibility of the documents in question, we weigh up the significance asserted by the appellant against the reasons given by HMRC for their objection. We consider that on balance, it would be in the interests of justice to allow the appellant to make the case as he sought to make based on the evidence he relied on. If the evidence was not admitted, and as the appellant claimed that it supported his case, then he would want to comment upon these documents in his evidence. Not admitting the evidence does not mean that it would not get referred to by Mr Byers in his evidence.

(3) By admitting the evidence for these proceedings, HMRC would be given a proper opportunity to cross-examine witnesses on the documents so relied on. Concerning the credibility of the evidence and the weight to be accorded, it would then be a matter for the Tribunal to decide, if the evidence has been properly admitted for the proceedings.

26. On the basis of the Tribunal's decision, the three witnesses for the appellant were called in the following order:

(1) Mr John Colvin ('Colvin') who acted for Mr Byers from August 2008 until February 2010 whilst being employed by DWF LLP; his witness statement was lodged on 3 May 2018.

(2) Mr Karl Byers ('Byers'), who is the appellant, and his witness statement was lodged on 31 March 2017.

(3) Mr Terence Michael Flannagan ('Flannagan'), chartered accountant since 1992 and in practice until February 2012, returning to practice on 1 November 2016. He acted for BSL from 14 February 2001 to 8 March 2007; his witness statement was lodged on 4 April 2017.

The Respondents' evidence: the issue of adoption

27. HMRC called the evidence of Officer Ronald Tilney ('Tilney'), who was an Inspector of Taxes in the Teeside area dealing with Corporation Tax and associated Income Tax enquires, and was the chief officer in relation to the enquiries opened into BSL's corporation tax position and the associated income tax of its directors.

28. Tilney's First witness statement ('TWS1') was lodged on 26 February 2010, which spoke to Notes of meeting on six occasions between May 2006 and April 2007. The last of this series of meetings was on 2 April 2007, in which HMRC discussed the matter of VAT deficiency of BSL with Flannagan and Mrs Jacques. Officer Rush was brought into the enquiries and attended the meeting of 2 April 2007 with Tilney.

29. In Tilney's Second witness statement ('TWS2') lodged on 18 August 2016, Tilney adopted Rush's witness statement lodged on 23 April 2009. Officer Rush had since

retired and his witness statement was to be adopted by Officer Tilney as part of Tilney's evidence.

30. Ms Vicary submitted that there was no need for an application for such an adoption, since in Tilney's second statement, he clearly stated as part of the preamble:

> 'In the intervening period Officer Barry Rush has retired. I have therefore read his statement dated 23rd April 2009 (together with the exhibits) and agree with it.'

31. Tilney's Third witness statement ('TWS3') was dated 6 June 2017, and was made in response of Byers' and Flannagan's witness statements provided on 31 March 2017 and 4 April 2017 respectively.

The appellant's objections

32. Mr Baig raised two objections against HMRC's witness statements:

(1) First, that Tilney's third witness statement was lodged out of time, after the compliance date stipulated by Tribunal's Directions of 4 April 2017.

(2) Secondly, Mr Baig objected to the adoption of Officer Rush's statement by Officer Tilney for the following reasons:

(a) That Tilney was the inspector for the direct taxes and Rush for VAT; there was no cross over and Tilney was not present at the key meeting (to which Officer Parkin's handwritten note relates, see below);

(b) That it is 'not an uncommon thing' to call a retired officer to give evidence; that the VAT investigation took place under circumstances that could result in a criminal liability and it was a 'travesty' that Rush should decide not to come and give evidence;

(c) The absence of Rush to be cross-examined raised issues of probity of his evidence, especially in the light of his conclusion in fixing the liability 'solely' on Mr Byers;

(d) That Rush's statement was 'inadmissible' and 'at best allowed as "hearsay" evidence';

(e) While it was 'a suppression case' common to both direct and indirect taxes, there were two enquiries; Tilney as the direct tax investigator 'cannot be allowed to comment on the thought process' that resulted from the VAT investigation; which was 'not the direct tax investigation'; the direct tax investigation had 'come to nothing' – 'no assessment, no penalty'.

The respondents' rebuttal of the objections

33. In response to the objections, Ms Vicary submitted that:

(1) First, the status of Officer Rush's statement was read through and agreed by Officer Tilney: that is what is said in TWS2;

(2) Secondly, the appellant does not dispute that the company had suppressed takings, as Mr Baig has just referred to 'suppression' being the common factor to both direct and indirect taxes.

(3) Thirdly, the Tribunal has 'sole' jurisdiction over both direct and indirect taxes; the jurisdiction is '100% and not something less'.

(4) In these circumstances, there was no need to comment on the thought process of Officer Rush which has been stated in his statement; nor does Officer Tilney seek to expand on what Officer Rush has already stated.

(5) While accepting that Officer Rush was not present to speak to his statement, there was no dispute that his Notes of the meeting are 'reasonable resume' of the discussions which had taken place.

(6) 'Hearsay' is a technical term in relation to evidence. It is surprising for the appellant to raise an objection that Officer Rush's evidence is 'at best hearsay' when Mr Colvin's evidence relied upon by the appellant would seem to be 'premised on the recollection of individual statement and notes'.

(7) As to the 'weight' to be attached to the VAT Report which forms part of Officer Rush's evidence, insofar as that can be undermined, Mr Flannagan was in a position to do so, both at the time and in his evidence. Mr Flannagan is 'a professional who knows how to toe the line on the right side' and has 'a close relationship' with the appellant 'though not losing his professional independence in all circumstances'. Mr Flanngan was given the opportunity to object to the VAT Report – the material fact remains that Mr Flannagan did not disagree to the conclusions drawn from the VAT Report at the time.

The Tribunal's decision regarding the appellant's objections

34. In relation to the objection that the third witness statement by Tilney was lodged after the compliance date of 4 April 2017, the Tribunal told the appellant that it was not a fair objection in the light of the foregoing. First, the Tribunal had admitted Mr Colvin's statement lodged on 3 May 2018, within a week of the start of the hearing. The extension of time of nearly 13 months granted to the appellant to allow Mr Colvin's statement to be admitted exceeded many times of the extension of two months in admitting Officer Tilney's third statement. Secondly, the timing of when Officer Tilney could have lodged his third statement was entirely predicated on the timing of the lodgement of the witness statements by Byers and Flannagan, since the third statement was supplemental and a response to the statements lodged by Byers (on 31 March 2017) and Flannagan (on 4 April 2017). These dates were close to or on the compliance date. The third statement by Officer Tilney lodged on 6 June 2017 was within a reasonable time frame subsequent to the lodgement of statements by Byers and Flannagan.

35. As to the second objection concerning the adoption of Officer Rush's statement by Officer Tilney, the Tribunal accepts Ms Vicary's submissions that there is no inherent bar to our jurisdiction in hearing the evidence from Officer Tilney in charge of the direct tax investigations into BSL. The VAT Report was a document that was under discussion by the parties at the material times and its veracity and validity is a matter of weight to be assessed by the Tribunal. In that regard, the status of Officer Rush's evidence in these proceedings, as adopted by Officer Tilney, is no different from that of Mr Colvin's: it is a matter of weight for the Tribunal to accord.

36. Consequently, HMRC called the evidence of Officer Tilney, who adopted the witness statement of Officer Rush, followed by the evidence of Officer Parkin, who was a VAT Assurance Officer, and attended the meetings with Officer Rush on 13

March 2008 and 8 April 2008 at Mr Flannagan's office. Her witness statement was lodged on 26 February 2010, together with her hand-written notes taken of the points discussed during the meeting.

The Witnesses

37. It is common ground that HMRC bear the burden of establishing that the penalty is imposable according to the legislation. Given that HMRC have the burden, their evidence should have been called first.

38. The Tribunal did question the proposed order of the appellant's witnesses being called first. Mr Baig, however, said that Mr Colvin was only available on the first day of the hearing and it was for practical reasons that Mr Colvin would be called first. Further, if Mr Byers' evidence was called after HMRC's, he would have to be excluded from a large part of the proceedings until after he had given evidence. Mr Byers was keen to be present in the course of the hearing and had asked for reasonable adjustments to be made so that the appellant's witnesses could be called before HMRC's.

39. HMRC raised no objection. The Tribunal therefore heard the evidence of the witnesses in the following order:

> For the appellant: *First*: Mr Colvin; *Second*: Mr Byers; *Third*: Mr Flannagan,
>
> For the respondents: *Fourth*: Officer Tilney, and *Fifth*: Officer Parkin.

40. Central to the determination of this appeal is the credibility and reliability of the individual witnesses. In this appeal, numerous aspects of the evidence heard are contradictory. It is necessary to set out the material aspects of each witness' evidence before making our findings of fact under the 'Discussion' section of this Decision.

41. In presenting the evidence led in this appeal, we have followed in the main the *chronological* order of events happening, and of the timing of certain pieces of evidence surfacing in these proceedings, and not necessarily the order of the witnesses appearing. We have found chronology not only gives structural order to the evidence, but is also an invaluable aid in assessing the veracity of evidence in this case.

Factual background

42. The following background facts are not in dispute:

> (1) During the period from 28 September 2002 to 24 April 2007, BSL was registered for VAT, and carried on a business de-waxing new cars, and supplying flooring services.
>
> (2) Mr Byers and his father-in-law, Stanley Welsh were the directors and shareholders of BSL at all material times. Mr Flannagan was the accountant to BSL, and Mrs Susan Jacques was the book keeper.
>
> (3) Mrs Jacques died on 5 October 2008, and Stanley Welsh passed away in November 2009.

(4) On 28 February 2007, BSL entered voluntary liquidation and was subsequently dissolved on 8 June 2012.

(5) At the date of liquidation, BSL had a deficiency as regards non-preferential creditors of £431,427.66, of which £279,642.23 represented unpaid Crown debts; £86,039.61 being undeclared VAT.

43. The appealable decision is the Notice of Penalty by letter dated 6 October 2008, which states as follows:

> 'It has been reported to the Commissioners of Customs and Excise that **BSL Auto Services (South) Limited** has failed to account for the full amount of Value Added Tax which was due for the period from **1 June 2004 to 31 January 2007**.
>
> This has resulted from the deliberate suppression of sales from your business leading to an under declaration of tax on your VAT returns amounting to £78,127.00.
>
> The Commissioners consider that in respect of this matter, [BSL] has rendered itself liable to a penalty under Section 60(1) of the VAT Act 1994 for an evasion, through dishonesty, of Value Added Tax in the sum of £78,127 …' (emphasis original)

44. In relation to the mitigation given under s 70 of VATA, the penalty notice states:

> '… the Commissioners have, after giving full consideration to the extent of the disclosure and co-operation given to their officers, decided to reduce the penalty to £46,876.20. … This reduction takes into account the invitation given to [BSL] on 8 April 2008 to attend a meeting and is in recognition of the assistance given.

45. In relation to raising the penalty on the appellant, the notice states as follows:

> 'The Commissioners also consider that the conduct of [BSL] is attributable in whole to the dishonesty of Karl Byers (Director). In accordance with Section 61(2) of the VAT Act 1994, the Commissioners intend to recover 100% of the penalty from Karl Byers.'

Substantive Evidence

Officer Tilney's evidence

First meeting with Tilney on 4 May 2006

46. At the start of the first meeting with Officer Tilney, a cheque for £10,000 was handed over by Byers ahead of the examination of BSL records for the express purpose of covering 'unspecified company irregularities'. Flannagan explained that entertaining expenses and mileage allowances had been treated incorrectly which he had identified from a 'deeper examination of the records'; that there were no specific omissions, but that the treatment of some expenses was not as HMRC would expect; the £10,000 was an offer in advance.

47. The Note of meeting is summarised as follows:

(1) Business operations: de-waxing was its main business with floor laying being the secondary; that dewaxing was operated from ports at Newcastle, Grimsby and Sheerness; that Byers was negotiating a contract in Zeebrugge in the period of enquiry but that fell through.

(2) In relation to directors' roles, the meeting note recorded:

> 'Byers explained that Mr Welsh was pretty much retired from the business and Byers was mainly involved in organising things.
>
> Tilney asked Byers what exactly would he describe his role as being. Byers described himself as director of operations and effectively worked as a contract/project manager within the business.'

(3) Obtaining work: Byers explained that BSL would target freight companies to get contracts for dewaxing at the ports; he would quite often entertain the staff to discuss contractual arrangements; for floor laying it was by 'word of mouth'.

(4) Customers: Byers explained that the actual contract for dewaxing was not with the car manufacturers but with the freight company (acting as a releasing agent); United European Car Carriers ('UECC') being the main customer; that BSL lost the Vauxhall contract in 2004 but work was still coming steadily in. Flooring was for industrial customers (not householders) who requested the work.

(5) Staff: BSL employed around 20 to 23 at the ports; recruitment was by a foreman at each port; Byers would visit the foremen periodically and deal with any staff management and contractual issues.

(6) Invoicing: a report would be sent from each port detailing the number of cars dewaxed and other significant information; invoicing was done weekly to the three ports. Upon receipt of the invoices, BSL would receive BACS payments by return via the bank. Byers showed Tilney one of the forms showing 174 cars had been dewaxed in that particular week. Similar invoicing practice for flooring.

(7) Finance: Banking was dealt with by Jacques in the office, who also dealt with petty cash and wages.

(8) Premises: BSL had been on the premises at Usworth Road at Hartlepool for three years.

(9) Sale of property: Flannagan raised the point of a property sale in Byers' personal return, that the completion statement showed £115,000 while the actual consideration paid was £105,000.

48. Tilney examined records made available on the day: bank statements with cheque stubs, purchase invoice binders, sales invoice and credit note binders; cash book binder, petty cash book and receipts, a full copy of the nominal ledger on back-up disk were taken away for further analysis.

Second meeting with Tilney on 18 October 2006

49. Byers did not attend. Tilney discussed issues with Flannagan concerning wages paid to Byers' daughters, hotel and mileage expenses, taxi and Football club expenses and bills related to Mrs Byers' car being included, mileage claims by Mr and Mrs Byers, and matters relevant to evidence led in this appeal being the following:

(1) Journal entries for Directors' Loan account: Welsh's account was overdrawn by £86,060 as the opening balance; Tilney queried how it was reduced

to £35,560; Flannagan explained that Byers' credit loan account was netted off against Welsh's overdrawn account at year end of August 2004.

(2) Prissick Street property: a bungalow inherited by Byers in 1997 had been rented to Flanngan. In 2002, Byers advised Flannagan he intended to sell the property, which was ultimately bought by Flannagan with a purchase price of £105,000 while the completion document stated £115,000.

(3) Sale of Hunter House Industrial Estate: income from this sale omitted from Byers' SA return with net proceeds of £32,716.29 being paid to Byers and Welsh, but no capital gains computation was provided. Flannagan advised that it was a mistake of Flannagan Accountants (ie the firm) and would rectify.

(4) Trading losses claimed in SA return: losses carried forward claimed of £90,000 being amassed from BSL Auto (North East) Ltd in 2001. Flannagan agreed to provide a bank statement or information explaining the source of the £90,000 prior to the transfer of the company.

50. Tilney also met with Susan Jacques, whose replies to questions were as follows:

(1) Byers would sign cheques for cash and Jacques would take them to the bank and draw the cash out.

(2) The cash drawn on the cheques would be kept in a petty cash tin and Byers would take money from the petty cash for his expenses.

(3) Not all the expenses would have receipts.

(4) Byers would give Jacques blank receipts to write out, and then attribute it to expenditure to be claimed as a business expense from petty cash.

(5) Byers would give other receipts to Jacques and claimed out of petty cash.

(6) A range of invoices supplied with the business records as business expenses had been crudely altered so that an invoice for £45 had been changed to show £450 and so on. The altered invoices were given to Jacques by Byers.

(7) Invoices by Evergreen Garden Maintenance totalling £7,859.50 were claimed as BSL's expenditure when the company premises did not have a garden.

Third meeting with Tilney on 15 November 2006

51. Byers attended with Flannagan. Tilney discussed the issue of personal expenditure being incorrectly treated as business expenses which was uncovered by the ongoing investigation. Other specific matters raised included:

(1) Byers acknowledged that Evergreen Garne Maintenance was a mixture of expenditure for himself and Welsh, and odd jobs and removals related to BSL. Byers was unable, however, to provide the details of the person to whom this money had been paid to for business purposes.

(2) Expenses allegedly incurred in respect of meals at a local pub (Spotted Cow) had been claimed as business expenses amounting to £3,597.66; the invoices appeared to be false and did not match an original obtained from the pub in question. Byers claimed that these were Welsh's expenses.

(3) Byers denied that the altered invoices were attributable to him.

(4) The year-end balance for petty cash should be £7,000. Tilney considered the possibility that cash had been systematically extracted from the business throughout the year. Byers said it was for cash wages.

(5) Tilney drew attention to the fact that a previous company liquidated under the control of Byers had been subject to liquidator's concerns over cash extraction.

Fourth meeting on 17 January 2007

52. Byers attended with Flannagan, in which the following was discussed:

(1) A range of expenses claimed to have been business expense were agreed to be reclassified as Byers' personal expenses, and to be charged as debits to Byers' Director's loan account ('DLA'):

(a) Cheque stubs debit of £4,000 to be treated as a DLA debit;

(b) Purchase invoice and taxis total debit of £1,693 as DLA debit in proportion to Byers and Welsh as set out in a schedule;

(c) Purchase invoices of £2,652 agreed to be business entertaining and a corporation tax add back; (no DLA adjustment);

(d) Vehicle costs of £1,904.19 as a DLA debit;

(e) Mrs Byers' mileage claim of £3,670 contested to be wages, but Tilney noted that from previous discussions Mrs Byers did not appear to have a company role; Tilney would consider further;

(f) Meals of £6,500 accepted as business entertaining and a tax add back;

(g) Hotels of £7,405.90 accepted as unvouched private expenses of Mr Byers; hence add back and DLA debit;

(h) Evergreen Maintenance of £7,859.50, of which £1,000 was suggested as attributable to Byers and Welsh and £6,859 was allowable business expenditure, but Byers would not provide details of the service provider; Tilney would consider matter further;

(i) Petty cash receipts allegedly from the local pub (Spotted Cow) of £3,597; company tax add back and a DLA debit to Welsh;

(j) Altered invoices of £3,158.42 accepted as a company tax add back and a DLA debit to Byers;

(k) Petty cash of £4,682.31, accepted as business entertaining; add back.

(2) Cash cheques of £21,962, which Flannagan stated was cash wages although no records were held; further discussion required. The meeting note recorded:

> 'Byers was keen to point out that he had not had this money personally. As a result, the treatment of this expenditure should be to charge PAYE and NIC.'

(3) Bank account expenditure in BSL unvouched of £25,000 –

(a) The figure arose as part of the £51,032 being unidentified deposits in Byers' bank account;

(b) Flannagan explained that there was an expenses account for Byers with approximately £51,000 and would represent the unknown deposits.

(c) Tilney disagreed, showing the breakdown of the bankings from the respective accounts of Byers, which accounted for £80,000 of the money received from BSL. The expenses account figures would have been incorporated within this figure of £80,000; hence the £51,000 was in addition to his expenses account from which Tilney had identified the unvouched bank account expenditure of £25,000.

(d) Byers said that he did not think he had had the money; Tilney stated that it was in Byers' personal bank account so it had been in his possession.

(e) Tilney suggested a £25,000 debit to DLA as a compromise; that at least 50% of the £51,032 would be undeclared sales and a reasonable adjustment. Flannagan accepted the £25,000 add back as a way forward.

53. During this meeting, Tilney explained that the company assessments had been raised, but HMRC retained the alterative right under Regulation 72(5) of the PAYE Regulations to render Byers personally responsible for the company debts. In turn,

(1) Byers informed Tilney that the Company was 'now in financial difficulty' and he expected a liquidation, but not before 12 March 2007. Byers explained that BSL was in financial difficulty because cars were to be covered in plastic wrap instead of in wax, rendering his business ineffective.

(2) Byers confirmed that he intended to set up a new company, though he said did not know what type of business would the company be involved.

Fifth meeting on 28 February 2007 – a Creditors' meeting

54. The Creditors' meeting held pursuant to s 98 of the Insolvency Act 1986 was at Mazars' office in Leeds, attended by Byers and Robert Adamson of Mazars with Tilney representing HMRC, along with Officer Baird. Aspects of Tilney's 5-page Note of meeting were examined in evidence:

(1) Byers explained that BSL failed due to the price uplift in kerosene, losing contract, vehicles put into shrink wrap instead of being covered in wax, and Byers' ill health since September 2006.

(2) Tilney asked why previous companies: BSL Auto North East Ltd and BSL Automotive Services Ltd went into liquidation. Byers said it was due to non-payment of customers' debts.

(3) Tilney said it was strange since many of these same customers went on to become BSL's customers, and that this appeared to be 'phoenixism' at face value.

(4) BSL South stopped trading in December 2006. A new company 'BSL Resources Limited' was set up, trading from the same premises as BSL South. Staff was transferred (though Byer was unable to confirm the number); the existing contract with Skoda was transferred.

(5) Byers said that 'this company is nothing to do with me', and that his wife was the director. Tilney said Byers was a connected person of the new company, which appeared to be doing the same kind of business as BSL South from the

same premises. Byers explained they had a contract with Skoda but had lost 65% of BSL South's business.

(6) Byers confirmed that cheques and the staff of the new company were dealt with by Jacques; the payroll and PAYE by Jacques and Flannagan. Byers said that his salary was around £60,000 per year from BSL South, and Welsh £30,000.

(7) Byers said he was owed £57,000 by the company. HMRC's examination of the company's records showed in real terms more money was extracted by Byers than he had put in, and that Byers did not sustain a genuine loss of funds.

55. The assets of BSL showed a net worth of at least £75,000 at year end August 2005. By the time of the Creditors' meeting, very few assets were shown on the Statement of Affairs. Byers explained that the bank overdraft had been paid off by Mr Welsh; Tilney suggested that was a preferential treatment of creditors. Byers said the bank would have had a charge over the assets so it would not have made any difference.

Report on the Meeting of Creditors

56. This document, paginated as 369-375, was bundled under 'Other Documents' with copies of the VAT returns filed by BSL. The Report was prepared by Mazars in relation to the meeting of creditors convened pursuant to s 98 of the Insolvency Act 1986. Neither party had referred to this document in evidence, though its contents supplemented Tilney's evidence of the creditors' meeting, and of some details contained in Byers' witness statement.

57. The Report contains the following relevant details:

(1) Under 'Schedule of statutory information':

(a) BSL was incorporated on 14 February 2001; registered office address being Mazars House in Leeds;

(b) £100 share capital was issued and fully paid;

(c) Shareholders: Byers (10 ordinary shares); Welsh (90 ordinary shares);

(2) Under 'Directors' History of the Company':

> 'In 2005 the Company suffered acute cash flow problems due to a 125% increase in the cost of kerosene. …
>
> Late 2006 brought more pressures on the Company due to the VW Group changing vehicle protection systems from wax to plastic. …
>
> On 30 January 2007 the directors instructed Mazars LLP …
>
> The directors attribute the failure of the Company to the following:-
>
> 1 Loss of Vauxhall Motor Contract …
> 2. Dramatic increase in cost of raw materials
> 3. Loss of business in mid 2006 resulted in a dramatic drop in turnover
> 4. Poor cash flow
> 5. Ill health of Mr Byers in 2nd half of 2006'

(3) Under 'Reporting Accountants Comments':

> '1. I [ie the liquidator Robert Adamson] was first consulted on this matter on 11 January 2007. Paul Charlton has previously acted for the

> directors of the Company when he was appointed as Joint Liquidator of BSL Automotive Services Limited on 7 November 2001.
>
> […]
>
> 3. The Company banked with HSBC Bank plc in Hartlepool. …'

The Statement of Affairs (Exhibit 3 to TWS2)

58. The date of the resolution for winding up BSL South was 28 February 2007. A Form 4.20 was filed by Mazars LLP as the liquidators, and was accompanied by an Affidavit signed by Mr Byers dated 28 February 2007 with the following declaration:

> 'I K Byers of [address] make oath and say that the several pages exhibited hereto … are to the best of my knowledge and belief a full, true and complete statement as to the affairs of the above named company as at 28 February 2007 the date of the resolution for winding up and that the said company carried on business as Automotive logistics services.'

59. The affidavit was sworn at Brearleys Solicitors, and duly signed by them as a solicitor of oaths. The signature part of the affidavit is followed by the following note:

> 'Before swearing the affidavit the Solicitor or Commissioner is particularly requested to make sure that the full name, address and description of the Deponent are stated, and to initial any crossing-out or other alterations in the printed form. …'

60. The Summary of Liabilities in the Statement listed the following unsecured debts as owing to HMRC:

(1) PAYE of £93,602; (significantly above the declared figure held by HMRC);

(2) Corporation tax of £100,000;

(3) VAT of £86,039.61; (significantly higher than the £1,797 declared).

61. The other unsecured creditors were: (1) redundancy to employees of £30,354; (2) insolvency services of £70,453; and (3) Byers' DLA balance of £57,277. It is clear from the Summary that no trade creditors were included; it would appear that trade creditors were accorded preferential treatment and were paid off ahead of the liquidation.

62. The value of assets was at £9,379 in the Statement, and consisted of the depreciated book value of vehicles and equipment, most of which had a finance charge over them, and therefore 'available for preferential creditors'.

Sixth meeting on 2 April 2007

63. The meeting was held at Flannagan's office; Byers was absent. For HMRC, Officers Tilney and Rush attended. The meeting was to discuss issues arising from the Statement of Affairs on winding up BSL South.

64. The matter of VAT deficiency at £86,039.61 was the first matter being discussed. Officer Rush requested a breakdown of the deficit. Susan Jacques joined the meeting on being called by Flannagan, and explained how the VAT arrears arose (see below).

The history of companies being liquidated

65. Tilney's second witness statement spoke to the official documents in relation to the winding up of BSL on 28 February 2007: (a) the extraordinary resolution; (b) the notice of appointment of liquidator; (c) the liquidators' statement of affairs; (d) a return of the final meeting in the creditors' voluntary winding up of BSL dated 2 March 2012 and filed at Companies House; (e) the final statement of receipts and payments of BSL dated 2 March 2012; (f) a notice of dissolution of BSL on 8 June 2012.

66. Officer Rush's witness statement referred to BSL Resources Ltd (formed in December 2006) ceasing to trade, owing HMRC £20,620 (in VAT). In Tilney's second witness statement, exhibits are included to show that BSL Resources changed its name to 'Alpha Resources North East Limited on 22 January 2008. Furthermore, shortly after Officer Rush's statement, the company was dissolved on 24 March 2009.

67. Tilney produced Companies House's warning notice dated 9 December 2008, which named the Directors of Alpha Resources North East Ltd, together with Flannagans Chartered Accountants, and stated:

> 'The Registrar of Companies gives NOTICE that, unless cause is shown to the contrary, at the expiration of 3 months from the above date the name of Alpha Resources North East Ltd will be struck off the register and the company will be dissolved.'

68. The Notice was under section 652 of Companies Act 1985, with a note stating that: 'Upon dissolution all property and rights vested in, or held in trust for, the company are deemed to be *bona vacantia*, and accordingly will belong to the crown'.

69. Tilney's third statement was accompanied by the five exhibits in relation to the history of other companies of which Mr Byers had been a director and/or a shareholder. The exhibits show HMRC's internal computer system for corporation tax ('COTAX) with details of the company and the accounting periods during which HMRC remitted corporation tax on the basis that the company was insolvent.

(1) BSL Automotive Services Ltd (UTR: 67296 20829) incorporated on 26 November 1996, liquidated 7 November 2001;

(2) BSL Automotive Services (North East) Ltd (UTR: 75026 07751) incorporated on 4 September 1998; liquidated 13 November 2002; a letter of 4 February 2003 from the liquidators Armstrong Watson based in Darlington, County Durham, the liquidator of BSL Automative Services (NE) Ltd;

(3) BSL South (the Company in this appeal) was incorporated on 14 February 2001 and liquidated 28 February 2007.

70. The letter from Armstrong Watson of February 2003 was addressed to Inland Revenue North, Insolvency Compliance Unit in relation to BSL Automotive Services (NE) Limited ('BSL (NE)') which ceased trading on 30 September 2002 with no accounts prepared after 30 November 2001. The liquidators stated the company undertook two types of business: de-waxing of cars and flooring, and continued at:

> '4. A new company has been formed by the former directors named BSL Auto Services (South) Limited which has taken over the de-waxing operation only of the company now in Liquidation. I understand that there are no plans to revive the flooring side of that previous business.

[…]

12. The company's wage records indicate that no remuneration was paid to either of the directors, K Byes and S Welsh, for any of the 7 months relating to the fiscal year 2002/03 up to the date of cessation of trading on 31 October 2002. …However, the company's cash book suggests that payments were in fact made to the directors as 'drawings' and those transactions are being investigated.'

Officer Rush's evidence

71. Officer Rush was a Higher Officer of HMRC in charge of the enquiry into the VAT position of BSL. His involvement was prompted by the VAT deficiency stated at £86,000 in the Statement of Affairs, which came to light at the Creditors' meeting on 28 February 2007. In terms of chronology, Officer Rush had attended the meetings:

(1) On 2 April 2007 with Tilney, and recorded as Tilney's Sixth meeting.

(2) On 13 March 2008 at Flannagan's office, attended by Flannagan for the appellant; Rush and Officer Alison Parkin ('Parkin') for HMRC;

(3) On 8 April 2008 at Flannagan's office, attended by Flannagan and Byers; with Rush and Parkin representing HMRC.

72. Officer Rush's witness statement was dated 26 February 2010, and spoke to the following documents:

(a) A VAT Summary Report dated 2 April 2007 with 4 pages of schedules summarising the VAT arrears for each quarter, being details extracted from primary documents in a lengthy VAT Audit Report;

(b) A Note of the meeting held on 13 March 2008;

(c) A letter from Rush (13 March 2008) to arrange a meeting with Byers;

(d) A Note of the meeting held on 8 April 2008, attended by Byers.

The meeting on 2 April 2007

73. The meeting was the Sixth meeting convened by Tilney at Flannagan's office, and the first meeting convened by HMRC following the Creditors' meeting of 28 February 2008. Byers was absent; Flannagan attended; Jacques joined this meeting on receiving a phone call from Flannagan. (BSL was already liquidated, and Jacques was by then working for BSL Resources Ltd.) Officer Rush established with Jacques at this meeting that BSL (South) accounted for VAT by cash accounting, but output VAT was not fully declared on the monies received in the bank due to cash flow problems; the amounts withheld increased from April 2006 onwards.

74. According to Jacques, she completed the VAT returns on the instruction of Byers, and the VAT liabilities were calculated based on what the company could afford to pay. She confirmed that the input VAT claimed was correct, and that a computerised accounting package called Sage was used to record sales and purchases of the business and to prepare figures for the VAT returns.

The VAT Audit Report

75. The VAT Audit Report analysed the figures from VAT periods 06/04 to 01/07, with columns of figures showing the banking totals for each quarter, and the output due on the banking totals, compared with the output VAT declared on the relevant returns. The cumulative arrears from output VAT alone totalled £78,141.87.

76. The VAT Summary Report (pp77-80) lists the discrepancies between the declared VAT on the returns and the actual output VAT liabilities, and are underpinned by primary documents; namely: HSBC bank statements for BSL covering the period from 2 August 2004 to 31 July 2006 (pp231-302), and the nominal ledger of 'Customer Receipts' summarising monthly sales from August 2004 to January 2007 (pp303-332).

77. *Mr K Byers* is the addressee shown on every single bank statement included in the bundle; *BSL Auto Services (South) Ltd* is the name of the account.

The meeting on 13 March 2008

78. The meeting on 13 March 2008 was attended only by Flannagan, and advised:

(a) That Byers has been suffering from stress (since September 2006),

(b) Welsh has been unwell from general disabilities and cancer, and

(c) Jacques has been diagnosed with terminal illness.

79. There are two aspects in the meeting notes recording replies from Flannagan which are at odds with Flannagan's subsequent witness evidence:

(1) Flannagan was asked about the nature of the business activities and the directors' roles within the company. He advised:

> 'The directors of the company were Karl Byers who was the managing director and Stanley Welsh who was a non-executive director and due to ill health had only a small involvement in the company.'

(2) Flannagan was then asked if there was anything he wished to 'reveal about irregularities in his client's tax affairs':

> 'Mr Flannagan replied that there was nothing other than what we were already aware of and that it had been discussed at a previous meeting in which Sue Jacques the bookkeeper who was present at the meeting had advised that she had been instructed by Mr Byres to complete inaccurate VAT returns.'

80. At the start of this meeting, Flannagan acknowledged that he had read and understood the Public Notice 160; that notes would be taken of the meeting and that 2 copies could be requested, one of which to be signed and returned to HMRC along with any comments Flannagan wished to make.

The meeting on 8 April 2008 – the PN160 meeting

81. Byers was present at this meeting held at Flannagan's office. Rush handed a copy of the Public Notice 160 to Byers and read through the notice aloud so that Byers would be fully aware of its contents, excerpts of which are:

> '1.2 What we mean by dishonesty

> Dishonesty is where a person does something or fails to do something that would be regarded as dishonest according to the ordinary standards of reasonable and honest people.
>
> 2. How does this affect me?
>
> If we identify irregularities due to conduct involving dishonesty, a civil evasion penalty may be charged. If we also identify irregularities due to deliberate behaviour during our check we will normally apply a deliberate penalty or a deliberate and concealed penalty.'

82. The meeting notes record: 'Byers confirmed that he now understood the notice.' Rush then asked Byers to explain any irregularities in his tax affairs. He stated that he only knew of the irregularities that HMRC were aware of.

83. Byers said that he had no idea how sales were recorded, or to any questions put to him as to how BSL (South) came to accumulate VAT arrears of £86,000. Byers refuted any suggestions that he had been dishonest, and said that Jacques was at fault.

84. At this meeting, Byers was recorded as having stated that Jacques was on £30,000 per annum and she would benefit from keeping the business afloat; that Welsh was the chairman and he was the Contracts Director; that the VAT returns were prepared by Jacques; signed by Byers prior to August 2006 (when he became ill from stress), and after that, signed by Welsh.

85. Rush asked where the records of BSL Resources were kept; Byers replied they were kept at Welsh's home address, and that BSL Resources had ceased trading.

86. Rush asked if Byers or Welsh were involved in other business activity; Byers stated that Welsh was in poor health and they were not involved in any other business activity. As of family members' business, Mrs Byers had a holiday business under the company called 'Hart on the Hill Country Cottages Limited' and involved the building and letting of holiday cottages. Rush asked if any VAT repayments were due on the construction costs of the holiday cottages would he be willing to off-set these against the VAT arrears of BSL; Byers said he would think about it.

Request of notes of the meetings and reply of confirmation

87. Flannagan did request copies of the meeting notes of 13 March 2008 and 8 April 2008. These were sent out under two separate covering letters dated 18 April 2008 by Officer Parkin. To each set of meeting notes, the covering letter stated:

> 'After agreeing the details can you please sign and return one copy.
>
> Any comments/ amendments should be listed on a separate sheet and attached to the notes.'

88. By letter dated 7 May 2008 (document page 221) Mr Flannagan replied to HMRC as follows:

> 'We refer to your letter 18th April 2008 and the enclosed notes of meetings.
>
> We are able to confirm our agreement that each note forms a reasonable resume of what transpired at the meeting. However the notes are not verbatim.'

Officer Rush's 'thought process' behind the penalty assessment

89. At paragraph 10 of his witness statement, Officer Rush related his 'thought process' that led to the imposition of the penalty on Byers, which is as follows:

- 'Mr Byers although refuting the fact that he was involved in any wrong doing did admit that the company benefitted from the underpayment of VAT.
- The bookkeeper stated that she was acting under the instructions of Mr Byers.
- Other companies in which Mr Byers was a director, have also gone into liquidation owing the department various amounts of taxes.
- The same bookkeeper has been involved in these businesses and if she had been the cause of the various companies problems (as suggested by Mr Byers) then surely Mr Byers would have dismissed her. I suggest that she was retained because she did as she was told.
- The latest company (BSL Resources Ltd – VRN [number]) has ceased to trade owing HMRC £20,0620.14. The director of this company is the wife of Mr Byers.
- Mr Byers signed the majority of the VAT returns and had access to the bank statements and the VAT records.
- Although Mr Byers continued to refute all allegations of dishonest conduct, and categorical proof cannot be obtained, in all probability, on the evidence listed in this summary and based on historical facts, Mr Byers has been dishonest in knowingly singing and rendering inaccurate VAT returns.'

Officer Parkin's evidence

90. Officer Parkin attended the meetings on 13 March and 8 April 2008 with Rush, and her hand-written notes taken during those meetings are produced. She confirmed that the contents and substance of the typed Notes for the two meetings, though not verbatim of what was said, matched those of her hand-written notes.

91. Officer Parkin's handwritten notes for the meeting on 8 April 2008 recorded the following which was relied upon by the appellant:

> 'Mr KB refuted any involvement or awareness of VAT/tax problems. KB explained that he employed B/keeper on £30K per year and she was responsible for VAT/Tax matters. On regular occasions she [not eligible] for [not eligible] amounts of money to pay VAT etc. He had also put his own money into funding business.
>
> KB gave example of how S Jacques operated: he had found out that she had signed lease on property without informing him – only became aware of this when landlord sued.
>
> KB advised that Bank was solvent and he had no idea why VAT/Tax would not be paid. Adamant that he had no idea why VAT was underpaid; Sue Jacques was at fault.'

Mr Colvin's evidence

92. John Colvin's witness statement dated 2 May 2018 was lodged on 3 May 2018 by application as related earlier. Colvin advised Byers in relation to the VAT arrears and

penalty matter when he was employed by DWF from August 2008 to February 2010. In his witness statement, Colvin stated:

> '[4]. My recollection of matters has been assisted by the production of a Defence to Statement of Claim ("the Defence") which I can see was signed by me on 23.02.09, and a facsimile of a statement from Mr Welsh ("the statement"). Clearly I cannot give a detailed recollection of the details of this case given the passage of time. Nor have I seen the contemporaneous DWF file in this matter.
>
> [5]. I sought factual instruction from Mr Byers and have particular reason to remember the unusual factual background involving his former fellow Director of BSL Auto Services Limited ("the Company"), Mr Stanley Welsh, and how Mr Welsh' [sic] indiscretions with an employee Mrs Jacques had led to this woman falsifying VAT returns in the comfort that Mr Welsh' [sic] vulnerable position would not have led to him exposing her conduct.'

93. The Statement of Defence was included in the appellant's list of documents. Paragraph 11 of the Defence stated as follows:

> 'In the course of July 2004, upon advice from the Company's Accountants, it was discovered that Mrs Jacques had without permission, increased her wages by over 100%. The Appellant took the view that this amounted to dishonesty and theft, and informed Mr Welsh. In light of Mr Welsh's previous indiscretions with Mrs Jacques, the latter requested that the discovery of misappropriated funds, should go no further. The Appellant duly contacted his Accountant for further advice. Upon being confronted by the Appellant, regarding the possibility of repaying the wages taken without authority, Mrs Jacques replied in a curt manner "No chance".'

94. Apart from the alleged misappropriation of funds, the Defence contained further allegations against Mrs Jacques in paragraph 23, of which:

> '(iii) During the course of December 2006 Mr Welsh drive the appellant to his Doctors for an appointment, and they decided to make an impromptu visit to the Company's offices. Mrs Jacques was in suit and was observed to be generally producing false invoices from a Company called "Port Side Contractors", in respect of which the Company had no record of ever dealing with that entity. The Appellant recalls that Mrs Jacques accepted that she had been caught in the process of generating false invoices and agreed immediately to destroy the same. The Appellant again sought further advice, but was informed by his legal advisor at the time that there was insufficient evidence to support a plea of fraud against the employee Mrs Jacques';
>
> […]
>
> (xxvi) Failure to render accurate VAT returns: 'the motivation behind Ms Jacques' failure to render accurate VAT returns was not known until Mr Welsh indicated his willingness to provide a formal statement, and has since done so. No adverse inference should be drawn from Mr Byers' failure to provide this explanation during the meeting with the Respondent.' [End of Defence]

95. Paragraph 23 (xxvi) is the last paragraph of the Defence, which is followed by a 'Statement of Truth' in a box declaration signed by Mr Colvin on 28 May 2009. Colvin confirmed that Mr Welsh's formal statement referred to in the last paragraph of the Defence must have been provided for him to be able to sign the declaration.

96. In relation to the formal statement Welsh was to provide, Colvin's witness statement states as follows:

> '[8]. … I cannot say that I specifically saw the Statement. I am informed it was located some time later in the DWF file. I cannot comment on what happened following its receipt or why it's [sic] attention [sic] was not brought to the attention of HMRC (if it was indeed the case). ...'

97. In oral evidence, Colvin acknowledged that it was 'some considerable time ago', and that his witness statement was prepared 'prompted by recall of dealing with this matter'; that he 'can't remember the specific details of this case'; that he 'recalled a conversation' with Byers and Welsh 'over the phone', 'one of them on a loudspeaker'.

98. The Tribunal asked when it was that Byers became one of his clients; Colvin replied: 'mid-2008'. When asked if he had actually met Mr Welsh, Colvin said: 'No'. When asked if the statement of 16 March 2009 purported to be by Mr Welsh was the statement that was produced at the time, Colvin replied: 'I can't confirm whether it was Mr Welsh's. No, I can't confirm.'

99. In cross-examination, Colvin confirmed that the witness statement was prepared without seeing the purported statement by Mr Welsh. It was put to Colvin that: (a) it was a 'powerful inference' he was stating in paragraph 5 of his witness statement if he had not in fact seen the purported statement by Welsh; (b) that he was *not* positively asserting that he had seen this particular document; and (c) that he was not definite that he had seen this document. In reply, Mr Colvin said all he asserted was that he would not have signed the declaration if a formal statement had not been provided by Welsh.

The statement purported to be by Mr Welsh

100. The statement purported to have been signed by Mr Welsh on 16 March 2009 starts with: 'Prior to 2004, I had committed sexual indiscretions with Mrs S.S. Jacques, the Office Manager at BSL (The Company).' There follows two pages of closely typed up allegations laid upon Mrs Jacques, the chief of which had been included in the Defence, (though not all of which has been reproduced above). The purported statement represents elaboration in detail which adds nothing in substance to the allegations and is distinctively distasteful at places. In the light of these allegations being piled against a deceased person who could no longer defend herself, the Tribunal sees no reason to reproduce any part of the statement here: its content is potentially defamatory in nature.

101. The following passage in Welsh's statement was referred to in cross-examination:

> 'In December 2006 I drove Mr Byers to his Doctors and then decided to make an "impromptu" visit to the Company Offices.
>
> Mrs Jacques was observed to generically producing false invoices from a Company called Portside Contractors, I said,
>
> "I hope you are not doing what I think you doing"
>
> she replied "caught red handed"

I told her to destroy the false invoices immediately, she agreed.'

Mr Byers' evidence

102. Two letters dated 13 and 18 December 2017 from the same doctor from the GP surgery stated that Byers has been a patient for over 20 years and that he has been 'off sick since 19/09/2006 and has never returned to work'; that he suffered a fall in October 2017 with posttraumatic stress disorder and was unfit to attend the court hearing scheduled for 15 to 17 January 2018.

103. Byers' witness statement was dated 31 March 2017, and excerpts of which are:

(1) Under the heading of 'Key dates' –

(a) 'Approximately in 2005, I discovered that Mr Welsh, the Managing Director of BSL and Mrs Jacques, BSL's bookkeeper were having an extra marital affair, I confronted both and insisted that it must cease.'

(b) 'On or around July 2006, I discovered that Mrs Jacques was stealing from the Company by increasing her wages 3-fold. I confronted her with BSL's accountant, Mr Flannagan, so that she may replenish the funds but she stated that "she has deserved it" for having a relationship with Mr Welsh.'

(c) 'On or around September 2006 I fell ill and … I never returned to work since. Around this time, Mr Welsh had prostate cancer and Mrs Jacques discovered on set [sic] of tumor [sic].'

(d) 'BSL closed in 2007 and Mrs Jacques and Mr Flannagan have [sic] meetings with HMRC in 2007 without my knowledge.'

(e) 'In 2008 I had a meeting with a VAT officer and only then discovered this matter and I was still ill at this time.'

(2) Under 'Background to BSL' –

(a) 'BSL was a company that de-waxed new cars that would arrive to various shipping port [sic] in the North East of England. I had a ten percent shareholding in BSL, whilst Mr Welsh had a ninety percent shareholding. My role within BSL was that of a Contracts Manager, I would ensure that the contracts that we had were being carried out properly and to develop the business further. Mr Welsh's role was that of the managing Director/CEO as he owned the larger share of BSL.' (para 11)

(b) 'BSL stopped supplying flooring services in circa 2002' (para 14)

(c) 'I was not the Managing Director as I have been portrayed, I was the Contracts Manager. My job role was operational insofar as making sure that the contracts were being fulfilled and carried out properly and to develop that business alongside. Mr Welsh was the Managing Director.' (para 15)

(d) 'I recall that a meeting did take place in February 2007 and I also recall that Mr Welsh refused to attend. I have already stated that I was not the Managing Director of BSL.' (para 16(a))

(e) 'The VAT returns were signed by me and Mr Welsh after they were completed by Mrs Jacques. Although I cannot say categorically, I

understand that some VAT returns purportedly singed by me were in actual fact forged by Mrs Jacques.' (para 20)

(f) 'I do not know why Mr Flannagan would state that the wrong figures were entered on to the VAT returns, unless he was also involved with Mrs Jacques, … *I do not agree that BSL had cash flow issues* and I certainly do not agree with the statement that I would have benefitted from the under declared VAT returns. I am aware now that Mr Jacques was paying herself £45,000 per annum, …' (para 21, emphasis added)

(g) In relation to the meeting on 8 April 2008, Byers made four comments in relation to HMRC's Statement of Case, the fourth of which was:

> 'I recall I was asked if nay VAT payments that were due on the construction costs on the holiday cottages would be used to offset the VAT under declaration by BSL, at the time I did not understand what was meant by this and just said that I would think about it, but in reality this could not have been done as the new company was my wife's and not mine.' (para 23(d))

104. Byers' witness statement ended with the sentence: 'I had no knowledge of any wrong doing and I deny all allegations of wrong doing.'

105. In cross-examination, Byers was asked sets of questions, some of which we list:

(1) That Sue Jacques had said she completed inaccurate returns as instructed by Byers, which was categorically denied by Byers, who stated: 'It is her fault'. Byers was then put to a series of questions: that in 2006 Jacques was discovered to be stealing huge sum of money from BSL and why Byers would still allow Jacques to become the Company Secretary of his wife's company. Counsel put to him: 'you had a thief in your midst', to which Byers replied: 'yes, embezzlement from 2004 to 2006'. Counsel then asked: 'Large sums of money were taken from your company; your wife was going to form a new company and appoint the thief as a Company Secretary, this was dishonest, was it not?' Byers denied this was dishonest.

(2) When asked if Byers would say Flanagan knew the roles of the directors in BSL and the affairs of the Company well, Byers replied: 'I would say so.' When asked about the meeting notes of 13 March 2008, in which Flannagan was recorded to have stated Byers to be the Managing Director and Welsh the non-executive Director, Byers replied: 'I was the Contracts Director and Mr Welsh was the Executive Director; the Accountant was mistaken.' When Byers was referred to the letter of 7 May 2008 from Flannagan confirming receipt and agreement to the contents of the meeting notes of 13 March 2008, Byers replied: 'it was signed by J Dunn on behalf of the Accountant. I can't comment.'

(3) Byers was referred to the signed VAT returns for BSL, paginated as 333 to 367, and confirmed which ones were signed by him. He said 337 was falsified; he said 'no' to a few; 'not 100% sure' or 'not sure' to some, 'yes' and then immediately 'no' to some.

(4) When asked if Mr Welsh really did have a bigger role to play in the business as Byers' witness statement tried to assert, why was Mr Welsh paid £30,000 per annum while Byers was paid £68,000 in 2006. Byers' answer was to say Welsh had a big balance on his Director's Loan Account.

(5) Sale of Prissick Street to Flannagan: the discrepancy between the actual price paid and the price stated on completion document; whether it was for mortgage fraud; Byers replied: 'Can't tell you to be honest'. Asked if he declared property sale for capital gains; Byers replied: 'Yes, I believe Mr Flannagan did'.

(6) About the net proceeds of £32,000 received on the sale of Hunter House Industrial Estate, but no declaration of capital gains, when asked whether he was trying to reduce his tax liability; Byers replied: 'Not at all.'

(7) When asked about the claim of losses of £90,000 in his SA returns supposed to be from previous companies but without any substantiation, Byers replied: 'No, can't remember.'

(8) The integrity of the witness statement was challenged on many levels: from the fact that BSL was no longer doing any floor-laying and only de-waxing, to the claim that the company had no cash flow issues which clearly contradicted the Statement of Affairs from the Liquidators. Mr Byers said at first: 'can't remember; don't know'; then went on to say a person called 'John Marwell', who 'wanted to use same company contact' to do floor laying; that John Marwell worked for the company; that 'some of the contracts were carried out in the name of BSL but were actually carried out by John Marwell'.

(9) When asked about the liquidators Armstrong Watson's report wherein the cash book of the company (BSL Automotive Services (NE) Ltd) suggested that payments were made to the directors as 'drawings', Mr Byers was unable to give an explanation as to why that was the case.

(10) As to the alleged misconduct of Mrs Jacques, Byers was asked a series of questions, excerpts of which are as follows:

> Qt: Were you aware of the two sets of records being kept?
>
> Ans: No, not aware.
>
> Qt: The 'Day Books' print out on p 303 shows £52,472.90 being entered for Sales, and there was a handwritten note stating: 'Bank Receipts 53,626.51'. Have you seen the Day Books?
>
> Ans: No, I haven't.
>
> Qt: You are the Director of the Company, right?
>
> Ans: Yes, as well as Mr Welsh.
>
> Qt: [Byers was asked what information he would ask his book keeper.]
>
> Ans: How are we trading? How is the bank situation?
>
> Qt: Was that true throughout the time the Company traded?
>
> Ans: Yes, I would say so.

(11) Byers was questioned as to why he carried on employing Mrs Jacques when he became aware of the alleged affair in 2004, why he kept her as a book keeper. Byers replied: 'On the advice of Mr Welsh'; otherwise 'would have been regularised'. He was then asked: 'Why, going forward that Sue Jacques would still be the person you would go to when you wanted to know how the Company was doing'. Byers replied that he was concerned that Jacques 'would claim sexual harassment' and if 'everything was out', that would upset the wider family. Byers was asked whether he thought he had better kept an eye on Jacques, to which he

replied: 'Mr Welsh was based mainly in the office' while Byers was 'rarely in the office'. When challenged on that answer, which should have made 'all the more reasons to keep an eye' on Jacques, Byers' reply was inchoate.

(12) When asked about the VAT Audit Report, Byers replied: 'I didn't know there is a VAT liability.'

(13) When asked why Flannagan did not contradict Mrs Jacques in the meeting of 2 April 2007 for her explanations as to how the VAT arrears arose, Byers replied: 'Not sure'. When asked whether he did not know if Flannagan had the authority to be present at that meeting, Byers replied: 'Can't be sure.' Byers was equivocal when asked if Flannagan was 'positively putting forward that Mrs Jacques was instructed to put through inaccurate returns' at the meeting of 13 March 2008 when it was recorded:

> 'Mr Flannagan replied that there was nothing other than what we were already aware of and that it had been discussed at a previous meeting in which Sue Jacques the bookkeeper who was present at the meeting had advised that she had been instructed by Mr Byers to complete inaccurate VAT returns.'

(14) When asked of the various expenses put through the company:

(a) On the £8,000 to Evergreen Garden Maintenance, Byers said: 'I accept that it should not have happened'.

(b) On the £3,500 to Spotted Cow pub, Byers said Mr Welsh lived opposite the pub, but 'can't recall giving bank receipts'; to the various questions as to why receipts found to be 'false' in form and VAT number were found in the company's records, Byers replied: 'I don't know'.

(c) On wife's mileage claim, Byers said his wife came to meetings with him; that it was an 80-mile round trip to Newcastle; that her car was used for these trips. When put to him that 8,000 miles in a year seemed excessive, Byers replied: 'does seem huge'; as to the 100% claim of servicing Mrs Byers' car; Byers replied: 'shouldn't have happened' that there should have been a reduction for private usage.

(d) In respect of altering invoices to inflate the amounts, drawing cash out by the company by cheque, of falsifying expenses, of 'unidentified' deposits of £80,000 into his personal bank account, of netting off of Directors loan accounts balances to avoid a tax charge, Byers replied: 'Don't remember'.

(15) On the transfer of assets with an overall value of £75,000 when BSL was liquidated, Byers was challenged to give details on what happened to the assets if Welsh owned 90% of the company, and how the assets came to be used in BSL Resources in which Welsh had not got an interest. Byers was unable to give a clear account as to the 90% that would have belonged to Welsh. He at first said Welsh's shares were sold to him, but also said that they were transferred into his wife's company by Welsh as her father.

(16) When asked if BSL Resource was in fact phoenix trading out of BSL (South), Byers denied all involvement, claiming that BSL Resources was his wife's company. When asked how BSL (South) failed, Byers said it was because he fell ill. When asked why BSL Resources continued to trade in de-waxing when

Byers had said one main reason for BSL (South) failing was due to new cars being transported in shrink wrap, Byers was unable to give an answer.

(17) In relation to allegations against Mrs Jacques, Byers was asked why the investigations with the first meeting on 4 May 2006 that there was no mention once of Mrs Jacques' misconduct until the ninth meeting on 8 April 2008 for him to mention Jacques as having an interest in 'keeping the company afloat' for being paid £30,000 per annum.

(18) Even in April 2008, there was none of these full-blown allegations of theft, forgery, and extra-marital affair. Byers replied that he was trying to protect his father-in-law; did not want Jacques to tell his wife; that he was not aware of what Jacques told HMRC about keeping a separate schedule to log the amounts of VAT that became arrears.

(19) Mrs Jacques died in October 2008, it was put to Byers that after Jacques' death, he took the opportunity to shift the blame on her entirely. Byers reply started with saying how much Welsh was drawing a salary of £35,000 with £160,000 overdraft; went on to say: 'Where would she [ie Mrs Jacques] get a job or the salary level she wold have; that there was collusion to protect him [Welsh].'

(20) On the statement purported to be by Welsh, counsel referred to the 'major piece of detective work' in catching Mrs Jacques 'red-handed' falsifying invoices, and that was in December 2006. Yet, in the meeting on 17 January 2007, when Byers was faced with assessment amounting to over £147,000 he made no mention of catching Jacques out only a month ago. Byers replied: 'I was ill at the time.'

(21) When challenged as to Welsh's state of health as a cancer patient in his terminal stage on 16 March 2009 (7 months before his death), that with his high dosage of medication for pain relief, whether Welsh was indeed in a fit state to compose and sign such a statement, Byers replied: 'He didn't know he was dying.' When asked whether the purported statement was 'no more than your words', Byers replied: 'No, I don't agree.'

106. In re-examination, Mr Baig focused on Officer Parkin's hand-written notes of 8 April 2008 which referred to what Byers said during the meeting, especially in relation to the lease alleged to have been signed by Mrs Jacques without informing him. Mr Byers reiterated in oral evidence: 'I remember very vividly the signing of the lease; I sorted them both out.'

Mr Flannagan's evidence

107. Flannagan is a chartered accountant and in oral evidence, he stated he had acted for Byers since 1995-96 and ceased in 2009-10. (His involvement with Byers pre-dated acting for BSL as the company.) In 2012 he sold his practice of clients based in north east and north west of England; in 2012-13 he returned to practice on the invitation of the new owner of the practice (T/A Trident Accountancy Services) to look after the NE clients. In his witness statement, Flannagan said:

> 'I was aware that Mr Welsh was the Managing Director of BSL and Mr Byers was the contracts Director. From my interaction, I was aware that Mr Byers did not take part in the day to day running of BSL and that it was Mr Welsh and Mrs Jacques who managed the administration affairs

> and it was Mr Byers who looked after the sales and Customer service in the field.'

108. In cross-examination, Flannagan said he had no involvement with Mr Byers since their professional relationship ceased; that he was 'never a friend of his, but a sceptical observer and assistant'; that the only 'social event' he attended with Byers was on 2 March of 2001 it was on a boat used for social event cruising to Yarmouth, and was attended by the Byers who bid for Middleborough in aid of the Hartlepool Hospice.

109. In relation to the property at Prissick Street he rented and then bought from Byers, Flannagan maintained that it was 'a commercial transaction at commercial value'; that he was bound by ICAEW guidance not to transact with clients other than at market value. When asked if the inflated completion price was for mortgage fraud, Flannagan stated that he had 'a house in Preston worth £300,000' and can afford plenty of security and had 'a very very good relationship with his bank manager' and there was no need for any mortgage fraud. The reason he bought the property was because of his client base, with 75% in NE and 25% in NW; hence he spent a lot of time in NE and to have a base in Hartlepool allowed him to have a second residential home on which he can claim private residence exemption on disposal, which happened two years afterwards. (The date of 5 May 2006 was given.)

110. Other issues being cross-examined included:

(1) The offer in settlement of £10,000 at the start of the first meeting (4 May 2006) with Officer Tilney: Flannagan replied it was on a payment on account basis. When asked if he 'knew' Byers was not treating mileage and entertainment expenses correctly; he replied 'Yes'.

(2) In relation to Mr Welsh's role in BSL, Flannagan was asked how he could change his statement from Welsh being a 'non-executive director' (on 13 March 2008) to Welsh being 'the Managing Director' in his witness statement. Flannagan replied: 'the Draft [witness statement] was sent to me; emailed to me by Mr Byers; I didn't know who wrote it; suggest that it was by a legal person but can't be sure.'

(3) When asked whether it had been discussed what Byers wanted him to do at the hearing, Flannagan replied 'No'. He was then reminded: 'You are on oath, and you are a C.A.', Flannagan then replied as follows:

> 'What happened 14 years ago [pause]. From 1996 onwards, two people were heavily involved. Towards the end of BSL's era, Mr Byers and Mr Welsh were ill. Mrs Jacques carried out all the duties which she would not be carrying out if she were an employee of mine. She was making decisions, doing things … my perception.'

(4) When asked if he had spoken to Mr Baig, Flannagan said he telephoned him three times, the last one got an answer phone, and Mr Baig called him back; that at 8:30am (on the second day of hearing when Flannagan gave evidence) he met with Mr Baig to discuss the case; they went for coffee. When asked how he discussed the case without talking through what was discussed at court the day before, Flannagan said by 'looking through the papers'.

(5) When asked when he discovered Mrs Jacques was a problem, he replied: '*it would be just a couple of months before the investigation: February / March 2006*.' Counsel persisted and asked the same question again: 'When did you

discover there was a problem with Mrs Jacques?' Flannagan changed his answer to: 'In 1996, she was not a good bookkeeper'. When asked any other problems, he replied: 'No, not at that stage.'

(6) On the role of Mrs Jacques, the sequence of Counsel's questions and Flannagan's replies continued as follows:

> Qt: When did you find out about Mrs Jacques' wrongdoing?
>
> Ans: When doing year end account of 31 March 2005; looked at the wages record. At that point it was clear Mrs Jacques paid herself a lot more money than was due; *that was in September 2005*.
>
> Qt: That was prior to the meetings in 2006. Did you confront Mrs Jacques?
>
> Ans: No. I confided in the Director, Mr Byers.
>
> Qt: Had you spoken to Mrs Jacques about this?

(7) Flannagan was directed to following paragraphs of his witness statement:

> '5. Having refreshed my memory, I am able to say that I was aware after the fact that Susan Jacques was prepared to be dishonest in her role as bookkeeper.
>
> 6. An instance, of her dishonesty was that she had inflated her wages and those of her co-worker. When *I spoke to her about this matter*, I gained the impression that she felt she had a right to inflate the remuneration. This matter was brought to the attention of Mr Byers who had invested large sums of money into BSL. I advised him to report to the Company solicitors, Messrs Smith and Graham.' (emphasis added)

(8) Flannagan was challenged to explain the inconsistency: that he had just said he had never spoken to Jacques about the inflated wages, while the witness statement was stating that he had spoken to her and was retorted. Flannagan replied: 'whoever made the note- can't remember amending that sentence'; and on being challenged further, replied: 'must have spoken to her then'; on being reminded that he had signed the witness statement as truthful, replied: 'must have *felt* in April 2017 that I spoke to her.'

(9) Flannagan was taken to the Notes of meeting for:

> (a) 18 October 2007 at paragraph 12 concerning 'Petty Cash and Cash Book', Officer Tilney asked Mrs Jacques for a 'walk through of how things worked'; 'Susan explained that really she just did what she was told'; 'that she would be given a receipt from Karl Byers and he would explain what expenditure had been incurred and she would then appropriate this to petty cash'; Flannagan was present at this meeting and was asked if he disagreed with the discussion; he replied: 'No.'
>
> (b) 2 April 2007 when Mrs Jacques explained how the VAT arrears arose, of the schedule for banking and the Sage print, of the two sets of records not agreeing and how VAT returns were made according to cash flow, yet Flannagan made no comments as to the truthfulness of the explanation. Flannagan replied: 'I am not in a position to agree or disagree'; 'that is the role I played in the meeting';

(c) 13 March 2008, when Flannagan was referred to the following entry in the Note of meeting, he replied he did positively affirm Jacques' statement to HMRC:

> 'that it had been discussed at a previous meeting in which Sue Jacques the bookkeeper who was present at the meeting had advised that she had been instructed by Mr Byers to complete inaccurate VAT returns.'

(10) When asked by the Tribunal 'what was wrong with Mrs Jacques' bookkeeping in your view back in 1996', Flannagan replied: 'sloppy'; 'wrong data used to record keeping'; 'apparent the whole page of transactions written in sentence'; 'the keeping of invoices'; 'when asked to see such invoices, could take a long time to find the invoices'. When asked what recommendations he made to improve the system; Flannagan replied: 'adopt the Sage system in late 1990s before Sage went to Windows'.

111. In re-examination, Mr Baig asked Flannagan to 'shed light on the role of Sue Jacques in early 2000s'; 'what she was doing in the Company'; the reply was:

> 'Actual work – she would be liaising with foremen organising the recruitments, the disposal of employees – Decisions of that nature attributable to a director – she was fulfilling them.'

The Appellant's case

112. The grounds of appeal, as advanced by Mr Baig's submissions, can be summarised as follows:

(1) The appellant's Article 6 rights are infringed by the delays in proceedings, and the appeal should accordingly be allowed.

(2) The appellant is not the 'named officer' for the purposes of s 61 VATA, and is not liable to any part of the penalty charged under that section.

(3) Even if the appellant is held to be a 'named officer', his liability should be apportioned.

113. Mr Baig raised issues with the delay in the proceedings in relation to the appellant's Convention rights:

(1) Section 60(1) VATA penalties are criminal in nature of the purposes of the Article 6 of the European Convention on Human Rights ('Convention'): *CCE v Han & Yau*. In the Court of Appeal and the ECHR confirm that penalties imposed for under-declaration of tax are criminal in nature.

(2) The Charter of Fundamental Rights applies to these proceedings; Mr Byers relies on his fundamental and enforceable rights under Article 6, which states:

> 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

(3) In *Morris and Others* the Tribunal in deciding on the issue of delay in a penalty appeal emanating from VAT assessments held at [95] the following:

> 'It seems to me that if the failure to hear an appeal within a reasonable time prevents a fair trial of an appeal involving a criminal charge for

> Convention purposes, perhaps through the death of a vital witness or the loss or destruction of crucial evidence, the Rules must if this is possible be interpreted and applied so as to give effect to an appellant's rights under Article 6.1 and if appropriate to allow the appeal.'

(4) In the instant case, there has been an inordinate delay (more than 10 years), through no fault of Mr Byers in listing a hearing and that the appeal ought to be struck out on the grounds of delay.

(5) There have been the deaths of vital witnesses and the loss and destruction of crucial evidence; hence the delay caused contravene Mr Byers' Article 6 rights.

(6) Furthermore, there is substantial Strasbourg jurisprudence where delays of 10 years or more have been determined to breach Article 6. In many cases, delays substantially less than 10 years have been found to breach Article 6: *H v UK* where proceedings lasting 2 years and 7 months were held to be unreasonable.

(7) AG Eleanor Sharpston QC opined at [57] of *Ufficio IVA*, which concerned delays by Italian authorities:

> '… the need to comply with the "reasonable time" requirement in Article 6(1) of the ECHR (27) (and Article 47 of the Charter of Fundamental Rights of the EU, which applies to the Member Stats when they are implementing EU law) does appear to be a clear and especially powerful justification for a rule such as that in the disputed provision. With regard to the requirements of legal certainty, 10 years seems a particularly long time for judicial proceedings to be pending, unless justified by the specific circumstances of the case. … I do not think that the EU law obligation to ensure effective collection of VAT can require maintaining for more than 10 or 14 years a situation of legal uncertainty as regards a disputed amount of tax in relation to which the taxable person has already received two favourable judgments.'

114. In relation to the premise upon which HMRC stake their case, that the conduct of BSL in evading VAT was 'attributable in whole to the dishonesty of Karl Byers (Director)', Mr Baig challenged the respondents' grounds on three bases:

(1) That Byers alone was dishonest in managing the VAT affairs of BSL.

(a) To prove dishonesty, HMRC must establish, to a high degree of probability, that the conduct of the body corporate is wholly or partly attributable to the named officer's dishonesty: *Marina Travel; Candy*.

(b) The appeal bundle does not go beyond an allegation of dishonesty, in that HMRC have not presented any evidence to establish Mr Byers' dishonesty, or to show a personal gain by Mr Byers or evidence of a lifestyle suggestive of him living beyond his means.

(c) Paragraph 2 of Article 6 ECHR provides that everyone charged with a criminal offence shall be presumed innocent until proven guilty. Accordingly, it is for HMRC to prove that the penalty is due and all the necessary factors underpinning their decision to impose the Personal Liability Notice.

(d) Due to the delays in the proceedings, deaths of key witnesses and loss of vital evidence and documents Mr Byers has formally notified HMRC

that they are put to strict proof to establish all of the facts and matters that they rely on in the proceedings.

(2) On Mrs Jacques informing HMRC that the VAT arrears had arisen on the instructions of Mr Byers who had asked her to file returns, due under cash accounting, on the basis of what they could afford to pay.

(a) Mr Byers was not present at that meeting and Mr Flannagan in his witness statement had said that Sue Jacques was being untruthful.

(b) The interview notes were neither signed by Mrs Jacques nor Mr Flannagan and my instructions are that Mr Flannagan does not agree with the full account of the HMRC notes. This takes away any weight in HMRC's assertion. Furthermore, Mrs Jacques is deceased adding to the glaring evidential difficulties faced by HMRC.

(3) That Mr Byers was involved in 3 previous companies which had been liquidated and these companies had unpaid VAT obligations to HMRC. This, they say, are Phoenix companies. In response, Mr Baig submitted:

(a) Mr Byers will state that the 3 previous companies were closed due to monies being owed to the companies by its clients. There was no wrong doing involved. Furthermore, HMRC were aware of the situation and chose not to pursue the companies or the directors/managers for any wrong doing.

(b) In addition to these companies, HMRC also attempt to link Byers to a fourth company of which he is not a director. This company was formed by Mr Welsh along with his daughter, Mrs Byers, it did not trade, it owed no money to HMRC and Mr Byers had no involvement in it.

115. The third issue raised concerned the apportionment of the penalty, which Mr Baig submitted the penalty should be apportioned between Mr Welsh and Mrs Jacques:

(1) Mr Welsh was the majority shareholder with 90% holding and had the most to lose or gain as he had a very high personal loan account and was a personal guarantor for the company's debt.

(2) Mrs Jacques was responsible for filing the VAT returns and that she used her position as the senior managing officer to syphon funds earmarked for VAT to give herself a 100% pay rise without the knowledge of Mr Byers. Mr Welsh was complicit in this, due to his affair with Mrs Jacques, and chose not to stop her or report her to the authorities or Mr Byers.

(3) The penalty ought to be raised against Mr Welsh alone, failing which it ought to be apportioned between Mrs Jacques and Mr Welsh as there is no evidence that Mr Byers gained or participated in the under declaration of VAT.

(4) HMRC's internal guidance (CEP 4650 How to Apportion) states as follows:

> '… whether or not there has been personal gain, fi the corporate body is in insolvency or suspected of incipient insolvency, you should apportion the penalty to the directors/managing officers/managing members for whom there is evidence of dishonesty. This applies even if it is suspected that it would be the imposition of the penalty that would cause the insolvency. You should obtain details of the insolvency or of the information which suggest that the corporate body is about to become insolvent.

> Where a penalty is attributable to more than one person, you should divide the penalty equally between them unless there is clear evidence that one dishonest named officer has gained more financially from the evasion than another. In this case you may apportion a greater percentage of the penalty to them.'

HMRC's case

116. Ms Vicary submitted that the penalty was raised on the basis that:

(1) During the period 1 June 2004 to 31 January 2007, BSL deliberately suppressed its sales, resulting in an under-declaration of VAT totalling £78,127.

(2) Mr Byers was the Managing Director of BSL.

The Appellant's role within the Company

117. Ms Vicary submitted that the appellant was the 'controlling mind' of the Company as evidenced by his actions, such as the following:

(1) In the first meeting on 4 May 2006, Byers himself explained that he was 'mainly involved in organising things', and Mr Welsh was 'pretty much retired from the business'.

(2) In the meeting on 13 March 2008, Flannagan informed HMRC that Byers was the 'Managing Director' and Welsh 'a non-executive director' and had little involvement with the company owing to Welsh's ill health; Flannagan confirmed the notes of meetings to be a reasonable resume of what had been discussed.

(3) That the appellant was responsible for the actions of the Company was further confirmed by Mrs Jacques as the Company book keeper:

(a) In the meeting on 18 October 2006, Mrs Jacques stated: 'I do what he says' and went on to describe a process whereby the appellant would give her blank receipts (for the alleged expense and petty cash withdrawal) to write out.

(b) In the meeting on 2 April 2007, Mrs Jacques stated that on the instruction of the appellant she completed the Company's VAT returns on the basis of the Company could afford.

Matters demonstrating dishonesty

118. The matters relied on by the respondents that the appellant has, by the standards of ordinary decent people, acted in a dishonest manner for the purpose of evading VAT are summarised as follows:

(1) Inaccurate VAT returns: on the instruction of the appellant, VAT returns were completed according to the BSL's cash position rather than true liability;

(2) Treatment of expenses: in the first meeting the £10,000 payment on account was a candid admission to the improper treatment of expenses;

(3) Private expenses claimed as business expenditure:

(a) £7,859 in respect of Evergreen Garden Maintenance;

(b) £3,597 for monies spent at the Spotted Cow pub with receipts being forged, which differed from the receipts obtained by HMRC from Spotted Cow both in form and the VAT number cited;

(c) £4,870 for mileage claimed for Mrs Byers, which would require her to drive 8,000 miles on BSL business; yet the appellant had initially told HMRC that Mrs Byeres did not work for the Company;

(d) £24,297 claimed for 'meals and hotels' without receipts to vouch;

(e) Cheque stubs indicated sums claimed for amounts that were not legitimate business expenses; e.g. £4,000 in respect of 'security' which the appellant was unable to substantiate.

(4) Systematic cash extraction from the Company:

(a) The appellant would sign cheques for cash and she would then take the cheques to bank to draw cash out as 'petty cash' for which the appellant used for his expenses.

(b) The appellant gave the book keeper blank receipts to write out and attribute these personal expenses as business expenditure; cash would then be taken out of petty cash.

(c) A further number of cheques totalling £21,962 had been drawn for cash, but had not been put into petty cash. No proper explanation for this was provided ; no records were held to substantiate the assertion that wages had been paid in cash. Further no PAYE or NIC had been paid in respect of the same.

(d) On analysis by the respondents, the explanation provided byte ha appellant suggested that there should have been a cash balance within the petty cash of some £7,000; the balance was not considered to be realistic.

(5) Alteration of invoices:

(a) Invoices for business expenses had been crudely altered for actual amounts to read higher, such as £45 changed to £450; £132.80 changed to £780.80 (with the ink used for the alteration differing from that of the original invoice). The appellant provided these invoices as altered.

(b) The invoices identified to have been altered totalled £3,158.12.

(6) Unidentified bank deposits:

(a) The appellant had banked some £80,000 into his personal account.

(b) No explanation was provided for this other than to say that he did not think that he had this money.

Propensity to dishonesty

119. Ms Vicary also submitted that there was a 'propensity to dishonesty' as evidenced by the appellant's various dealings which came to HMRC's attention in the course of the investigations, and she listed the following incidents:

(1) The sale of 3 Prissick Street by Byers to Flannagan, who had been renting the property since 1997. In collaboration with Flannagan, Byers had deliberately

misrepresented the purchase price: the consideration paid was £105,000 but the completion statement showed a price of £115,000.

(2) The proceeds from the sale of a property at 11 Hunter House Industrial Estate was not included in Byers' tax return.

(3) The 'loss' from previous companies was stated as £90,000 in Byers' tax return, but no information was provided to legitimate the claim of loss.

(4) Directors' loan accounts in BSL were incorrectly treated in the BSL's accounts. Byers' account was said to be in credit, while Welsh was overdrawn by £86,060, which was reduced to £35,560. Flannagan explained that it was by 'netting off' the two directors' loan accounts, setting off Byers' credit balance against Welsh's debit balance. No tax had ever been paid in respect of the Directors' loan accounts.

(5) At the creditors' meeting on 28 February 2007, it was noted that in 2005 there had been an excess of £75,000 company assets, but very few assets were left at the date of the meeting. BSL ceased trading in December 2006, and BSL Resources Limited was formed in January 2007. Byers' wife was the director of the new company, which traded from the same premises, retained most of BSL's existing staff, and took over existing contracts in car de-waxing. This appeared to be a clear example of 'phoenix trading'.

(6) BSL Resources Ltd had been created to perform the same work as the Company and was entirely contrary to the explanation given by the Byers as to why the Company had failed; namely due to the increase in the price of kerosene, and cars being placed in shrink-wrap rather than wax.

(7) Further examples of Phoenix Trading from two previously liquidated companies. Byers had previously been a director of two other companies which ended in liquidation: BSL Auto (North East) Limited and BSL Automotive Services Limited. Byers informed HMRC that these companies failed because customers defaulted, but many of the clients of these previous companies were noted to be the clients of BSL (South).

120. Ms Vicary submitted that both Mr Byers and Mr Flannagan should be treated as 'dishonest and unreliable' witnesses. In particular, Mr Byers' evidence contradicted statements he made earlier in the various meetings with HMRC; the inconsistencies are 'plentiful and striking':

(1) In May 2006 in the context of Byers 'running the business' and Welsh being 'retired'. In Byers' witness statement lodged in March 2017, there was 'a cynical and opportunistic attempt' to evade the penalty by stating Mr Welsh as the 'chairman'.

(2) In his oral evidence, and in relation to the signing of VAT returns, Mr Byers was found to say confidently in the space of seconds that they 'had definitely been signed by [him]' and then 'not signed by [him]'.

(3) In the history of liquidating the companies of which Mr Byers was a director and shareholder, he was the signatory.

(4) Both Byers and Flannagan were involved in property dealings which involved dishonest declarations of the sums of actual consideration paid as to inflate the stated price for completion documents.

(5) The matter of the property sale with capital gains implications was omitted in Byers' SA return without explanation.

(6) In BSL's financial records, receipts were forged; huge sums were claimed as expenses without the support of receipts (such as the garden maintenance);

(7) Personal expenditure was routinely put through as company expenses.

Allegations against Mrs Jacques

121. The appellant and his accountant, Mr Flanngan sought to lay the blame for the under-declaration of VAT on Susan Jacques. In this regard, Ms Vicary submitted:

(1) No mention of any impropriety by Mrs Jacques was made until 8 April 2008, this being the ninth meeting between the appellant or his representative and the respondents. At this time the allegation appeared to simply be that Mrs Jacques would '*benefit from keeping the company afloat*' because she was paid £30,000 per annum; no actual wrong doing was alleged at this time.

(2) The allegation that Mrs Jacques was '*stealing from the company by increasing her wages 3-fold*' was not raised at all during the course of the investigation. The allegation appears for the first time in the appellant's witness statement dated 31 March 2017.

(3) Mrs Jacques was retained as a book keeper of the new company BSL Resources Limited. Yet the statement of 31 March 2017 says the alleged 'theft' was discovered by the appellant in July 2006. It is averred that if there was any substance in this allegation then Mrs Jacques would not have been retained to act for the new company when it was incorporated in January 2007.

(4) None of these allegations were made in the presence of Mrs Jacques. The assertion that Mrs Jacques had a relationship with Mr Welsh and might therefore bring a sexual harassment claim against the Company was not made until the production of the appellant's witness statement in 2017.

(5) Mrs Jacques passed away in October 2008 and Mr Welsh in December 2009. Neither of them are therefore able to answer these allegations. The only beneficiary of the accounting impropriety appears to have been the appellant.

On the apportionment issue

122. Ms Vicary's closing submissions focused on the issue as to whether the entirety of the penalty should fall on the appellant or partly on Mr Welsh. Section 61(1)(b) provides '*that the conduct giving rise to that penalty is, in whole or in part, attributable to the dishonesty of a person who is, or at the material time was, a director or managing officer of the body corporate (a "named officer")*'. It was submitted:

(1) Susan Jacques did not fall within the definition of a 'named officer'; and only there were only two persons in BSL upon which the penalty could fall; namely Byers or Welsh.

(2) All the assertions made in relation to Jacques fall within the responsibility of Mr Byers as the managing director.

(3) Mr Byers said it was for personal reasons that he did not want to embarrass his father-in-law, and that was why Mrs Jacques was retained as an employee.

(4) It is immaterial for the purposes of s 61(1)(b) what Mrs Jacques had done as alleged by the appellant.

(5) The material fact is that Mr Byers was the managing officer for the purposes of s 61(1)(a).

On the issue of delay and impact on the appellant's rights

123. Whilst agreeing that the respondents bear the burden in this case, and that the appellant has the benefit of the right to Article 6, since the imposition of a penalty is akin to criminal proceedings insofar as Convention rights are concerned, Ms Vicary submitted that the reasons of delay in this case were due to the repeated requests of the appellant that matters be stood over or vacated, and for dates of compliance to be extended. The respondents in turn had 'afforded every latitude' to the appellant in accommodating the requests and had acceded to the requests in order to accord the appellant his Article 6 rights.

124. As to the fact that Officer Rush was not in attendance to be cross-examined, nothing turns on Officer Rush's thought process. The Tribunal has full appellate jurisdiction in this case; the outcome of this appeal does not hinge on Mr Rush's thought process.

125. Furthermore, every single one of the nine meetings of which the witness evidence had referred to was covered with the attendance of either Officer Tilney or Officer Parkin. Both officers were available for the appellant to cross-examine as regards any aspect of the nine meetings that had taken place. There can be no prejudice to the appellant's Article 6 rights as a consequence.

Discussion

The issues for determination

126. The Tribunal considers the issues raised in this appeal in the following order:

(1) Whether the appellant's Article 6 rights are infringed by the delays in these proceedings;

(2) Whether the conduct giving rise to the evasion penalty was, in whole or in part, attributable to the dishonesty of Mr Byers as a director of BSL;

(3) If so, whether any apportionment is due.

Whether Article 6 rights infringed

127. It is common ground that the appellant's Article 6 rights are engaged; see the Court of Appeal decision in *Han and Others* at [80].

Article 6.1 right to a hearing within a reasonable time

128. Mr Baig's submission in respect of the appellant's Article 6.1 right has relied on the VAT Tribunal's decision in *Morris and Others*, in which the subject matter of the three conjoined appeals was against the dishonest evasion penalty imposed in relation to VAT under-declaration (as in the instant case). The appellants applied to the Tribunal (as a preliminary matter) for a direction to allow their appeals under Rule 19(3) of the

Tribunal Rules 1986 on the ground that there had been a breach of their rights under Article 6.1 in being 'entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. The conjoined appellants were all represented by Vincent Curley & Co (as is in the instant case).

129. The VAT Tribunal in *Morris and Others* considered if the appellants' Convention right to a hearing within a reasonable time was breached, and concluded at [86]:

> 'It is necessary to take account of the circumstances of each case in deciding whether there has been unreasonable delay, including the complexity of the case, the conduct of the parties and what is at stake. While an appellant is not required by Article 6 to co-operate actively with the judicial authorities (see *Eckle*, para 82), he is required "to show diligence in carrying out the procedural steps relevant to him, to refrain from using delaying tactics and to avail himself of the scope afforded by domestic law for shortening the proceedings (see *Union Alimentaria* 12 EHRR 24, at para 35). I accept the submission … that the Tribunal is only concerned with delays which are the responsibility of the authorities. Delays for which an appellant is responsible do not give rise to a breach of his right to a hearing within a reasonable time.'

130. The procedural history of this appeal dates back to 17 October 2008 when the Notice of Appeal was lodged, and culminated in the Unless Order of 19 January 2017. From the procedural history that has been set out earlier in some detail, it is plain that the delays in progressing with the appeal to a hearing had been occasioned, in the main, by the appellant, by the various and numerous applications to stay, to vacate, and to extend time. While HMRC had applied to extend time for compliance with directions, such as with the service of their Statement of Case, the duration of extension on each occasion was reasonable, and cannot be described as having caused or contributed to the overall delay of these proceedings. The Tribunal finds as a fact that the inordinate delay to these proceedings was due to the appellant's conduct and not HMRC's. On this fact alone, it is not arguable that the appellant's Article 6.1 right has been breached.

131. If anything, the respondents had afforded great latitude to the appellant at every juncture in the course of these proceedings, to conduct his appeal as he wished. In our judgment, the respondents' accommodation of the appellant's circumstances was the very opposite to breaching his Article 6 rights: it had enabled the appellant to exercise his Article 6 rights, despite the delays, to have his case heard eventually.

132. The VAT tribunal in *Morris and Others* continued by considering whether an appeal should be allowed as a procedural issue in the event a hearing did not happen within a reasonable time, and cited a reference by the Attorney General at [90]:

> 'In Attorney General's Reference [2004] 2 AC 72 Lord Bingham pointed out at [23] that "the Strasbourg jurisprudence gives no support to the contention that there should be no hearing of a criminal charge once a reasonable time has passed". … "The sole matter to be taken into consideration is thus the prejudice possibly entailed."'

133. The appellant has submitted that the unavailability of key witnesses: Welsh and Jacques through death, and Rush through retirement was prejudicial to his case. While we make no judgment as to whether 'delaying tactics' had been deployed by the appellant in causing the inordinate delays to these proceedings, we do not agree that the consequences of the delays had caused prejudice to the appellant's case:

(1) First, the unavailability of Welsh and Jacques meant that HMRC are deprived of the opportunity to cross-examine these two witnesses: the respondents are prejudiced as a result.

(2) Secondly, the allegations against Jacques would most probably to have been severely contradicted by Jacques, if she were able to give evidence. Her unavailability was not prejudicial to the appellant. On the contrary, her unavailability had allowed the appellant to say a host of things about her, the veracity of which cannot be put to her to be tested. For the same reason, if Welsh had been available to serve as a witness, it would be highly doubtful whether Welsh's evidence would indeed support the appellant's case, which would mean rendering Welsh himself the named officer and personally liable to the penalty.

(3) Thirdly, the only part of Officer Rush's evidence that he alone could have testified concerned his 'thought process' as set out in his witness statement. As Ms Vicary submitted, the full appellate jurisdiction of this Tribunal means that there is no prejudice to the appellant, since the Tribunal does not need to rely on Officer Rush's thought process to reach its own conclusion.

Article 6.2 right: presumption of innocence

134. By email correspondence to the Tribunal on 27 May 2018, Mr Baig attached the decision of *Janet Addo* with the following comments:

> 'I … respectfully point the Tribunal's attention to paragraphs 9-12 of … *Janet Addo*. I present this case for the Tribunal to consider in regards [sic] to the sequence in which the evidence was heard and the Appellant's submissions in regards [sic] his Article 6 rights.'

135. Ms Vicary was copied into the same email correspondence, but has not made any submission in response. We accept Mr Baig's post-hearing submission as a response to the Tribunal's comments during the hearing as to the order of the evidence being led, and as relevant to the point he has made in regard to Article 6.

136. The statutory burden on HMRC to establish the basis of the penalty imposable in this case accords with the appellant's right under Article 6.2: 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'.

137. Since Mr Baig has put forward *Janet Addo*, we consider its likely relevance to the present case. In *Janet Addo*, HMRC raised discovery assessments under s 29 of the Taxes Management Act 1970 against *Ms Addo*, whose application to the Tribunal for the discovery issue to be determined as a preliminary matter was refused.

138. Ms Addo then applied for a case management direction that HMRC should be required to open and put their case on the discovery issue first at the substantive hearing. The application clearly envisaged that if HMRC failed to discharge their burden on the discovery issue, then Ms Addo's appeal should be allowed by making a submission of no case to answer. Judge Richards observed at [9]:

> '… HMRC do not object to the principle of presenting their case first. … since ultimately one party has to open and, in circumstances where they both bear the burden of proof on different issues, the order in which cases are presented cannot be determined by reference to burden of proof alone.'

139. By referring to *Janet Addo* as relevant to the appellant's Article 6 rights, we infer that Mr Baig is saying that Mr Byers had intended to adduce evidence and not to make a submission of no case to answer after the presentation of the respondents' evidence. While HMRC have the legal burden of proof, which necessarily comes with the evidential burden of proving what is asserted, the appellant bears the evidential burden in proving what he asserts. The reference to *Janet Addo* by Mr Baig would seem to be saying that the order in which the evidence is presented therefore cannot be determined by reference to burden of proof alone, insofar as both parties bear the evidential burden of proving their respective cases. We accept Mr Baig's point as regards *Janet Addo* as we understand it.

140. In relation to the substantive aspect of the first ground of appeal, we conclude that while there had been inordinate delays to the proceedings, the delays were not occasioned by the authority, in this case HMRC. Furthermore, insofar as there is prejudice, it is not one-sided as against the appellant alone. Neither does any prejudice represent a material impediment to the assessment of evidence on the whole, for the purpose of determining the principal issue under appeal, namely, whether Mr Byers is a 'named officer' for the purposes of s 61 VAT penalty. Consequently, this ground of appeal is dismissed.

Whether evasion attributable to the dishonesty of Mr Byers as a director

The test for dishonesty

141. The fact in issue in this appeal is whether the evasion of BSL's VAT was attributable to Mr Byers' dishonesty as a director. It is a fact that the Tribunal has to find, by applying the test for dishonesty as formulated in case law.

142. The test for dishonesty apposite to civil proceedings was distinguished from the two-stage test in *Ghosh* applicable in criminal proceedings until the Supreme Court decision in *Ivey v Genting*, which makes it clear that *Ghosh* is no longer good law, even for criminal proceedings. Following *Ivey v Genting*, the test for dishonesty to be applied in both criminal and civil proceedings is Lord Nicholls' test in *Royal Brunei v Tan*, as clarified by Lord Hoffmann in *Barlow Clowes*.

143. Lord Nicholls' test was applied in determining 'dishonesty' in the context of a penalty under s 60 VATA by Judge Pelling QC (sitting as a High Court Judge) in *Sahib Restaurant Ltd v HMRC* (Case M7X 090, 9 April 2009, unreported):

> 'In my view, in the context of the civil penalty regime [contained in what was then s 60 of the Value Added Tax Act 1994] at least the test for dishonesty is that identified by Lord Nicholls in *Tan* as reconsidered in *Barlow Clowes*. The knowledge of the person alleged to be dishonest that has to be established if such an allegation is to be proved is *knowledge of the transaction sufficient to render his participation dishonest* according to normally acceptable standards of honest conduct. *In essence the test is objective* – it does not require the person alleged to be dishonest to have known what normally accepted standards of honest conduct were.' (emphasis added)

144. That the civil test of dishonesty is essentially objective is confirmed by Lord Hoffmann in *Barlow Clowes*, where it is stated at [10]:

> 'Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards.'

145. While the test for dishonesty is primarily objective, Lord Nicholls has remarked on the subjective element that remains relevant to the test as follows:

> 'Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart, dishonesty, are mostly concerned with advertent conduct, not inadvertent conduct.'

146. In respect of how this 'subjective element' is to be taken into account by the court, Lord Nicholls' guidance is:

> 'Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party such as his experience and intelligence, and the reason why he acted as he did.'

147. A s 61 penalty is predicated on a s 60 penalty being imposable on the body corporate in the first place. Section 60(1) of VATA provides:

> '(1) (a) for the purpose of evading VAT, a person does any act or omit to take any action, and
>
> (b) his conduct involves dishonesty …'

148. It is clear from the statutory wording under sub-s 60(1)(a) that the conduct involving dishonesty is not restricted to the commission of an action, but includes an *omission* to act. The statutory wording in this regard accords with case law authority on the meaning of dishonesty, as Lord Nicholls in *Royal Brunei* stated at p106:

> 'Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless.'

The burden and standard of proof

149. The statute has expressly provided for the Commissioners to bear the burden, which is compliant with the appellant's right under Article 6.2. In relation to a civil evasion penalty imposed under s 60 VATA, sub-s 60(7) VATA provides that: 'the burden of proof as to the matters specified in subsection (1)(a) and (b) above shall lie upon the Commissioners', and by corollary, that burden applies to the imposition of a s 61 penalty on a named officer too.

150. While penalty proceedings of the nature at issue in this appeal are 'criminal' for the purposes of Article 6.2 of ECHR, it is established that such penalty proceedings are civil proceedings under domestic law for the purposes of determining the standard of proof required: see *Khawaja*. The standard of proof for the present appeal is therefore

the civil standard of the balance of probabilities: *Khawaja* at [25], and *Krubally N'Diaye* at [53] - [83].

151. As a special rule in judicial decision-making on matters of fact, the burden of proof has been explained by Lord Hoffmann in *Re B (Children)* as follows:

> 'The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened.'

The weight of evidence

152. The weight of evidence lies in its cogency and probative value in relation to the fact in issue. In the present appeal, the witness evidence forms a large part of the overall evidence. Though documentary evidence is relied upon, HMRC's case is also staked a version of facts as given by Mr Byers, Mr Flannagan and Mrs Jacques during the enquiry meetings between 4 May 2006 and 13 March 2008, excepting the last (the ninth) meeting on 8 April 2008: the PN160 meeting saw the emergence of inconsistencies.

153. Only Byers and Flannagan gave witness evidence, and their witness evidence contradicted in material aspects the accounts given by Sue Jacques a decade ago. The considerable passage of time since the events to which the evidence relates adds complexity to the task of fact-finding. Furthermore, the appellant brought in evidence from parties not involved at the time of those enquiry meetings: (a) Mr Colvin's witness statement; (2) a statement purported to be by Mr Welsh; (c) Mr Shirley's letter to the PAYE investigation team. These aspects of evidence add another dimension of complexity to the evaluation of the witness evidence.

154. In *Gestmin*, Legatt J had to assess the credibility of a number of witnesses who gave evidence on a large number of issues over a considerable period of time. Similarly, this Tribunal is faced with witnesses (especially those for the appellant) who are making allegations largely based on their memory, which as Legatt J observed:

> '[15] An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.'

155. In the context of litigation, the role of memory in evidence is a factor for any trier of fact to consider, and Legatt J observations in this respect are particular pertinent to our assessment of Mr Colvin's evidence:

> '[19] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. …
>
> [20] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for a trial. A witness is asked to make a statement … The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case …'

156. In the light of these considerations concerning the unreliability of human memory, Legatt J considered 'the best approach for a judge to adopt' is 'to base factual findings

on inferences drawn from the documentary evidence and known or probable facts' (at [22]). In this regard, the value of oral testimony lies:

> '[22] … in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness …'

157. The Notes of the nine meetings conducted by Officers Tilney and Rush in the period from 4 May 2006 to 8 April 2008 represent the contemporary documentary records in this appeal, and are the records against which the evidence of the witnesses, especially that of the appellant, is scruntised.

158. On the issue of 'credibility' of witnesses, Mostyn J cited in *Lachaux* at [36] the dissenting speech of Lord Pearce in *Onassis*:

> '… Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? … It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance…. it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness: they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.'

159. Mostyn J continued at [37] by referring to Robert Goff LJ in *The Ocean Frost*:

> '… it [is] essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to documents in the case, and also to pay particular regard to their motives and to the overall probabilities.'

160. With these precepts in mind, we consider the credibility of each witness in turn in relation to the weight that it can be accorded.

(1) Mr Colvin: we find him to be a credible witness on the whole.

(a) He was judicious about what he could testify with the passage of time, acknowledging that it was 'some considerable time ago', and stated the document that had assisted him in his recollection, namely the 'Statement of Defence' signed by him on 23 February 2009.

(b) He referred to the '*unusual factual background*' as the 'particular reason' why he remembered the case: of 'indiscretions with an employee',

of 'a woman falsifying VAT returns', of Mr Welsh's 'vulnerable position', of 'the comfort' drawn by Jacques that her conduct would not be exposed.

(c) He also said he 'can't remember the specific details', but was clear in stating that he '*can't confirm*' the statement purported to be by Mr Welsh was indeed the statement that was produced and filed at the time; that he did not see the contemporaneous DWF file in preparing his witness statement. Colvin nevertheless said that there must have been a statement from Mr Welsh filed with the Defence, or else he would not have stated so in the Defence nor signed it.

(d) In oral evidence, Mr Colvin said he was involved with Byers' case from mid-2008, which means Byers sought legal advice after the PN160 meeting on 8 April 2008, and before the release of HMRC's penalty notice of 6 October 2008. We infer that by the time Byers sought legal advice, he had become well aware of the implications of the Public Notice 160 read out to him on 8 April 2008: of the basis of 'dishonesty' for a civil evasion penalty to be imposable on him.

(e) The Statement of Defence was signed in February 2009. Colvin stated that he '*sought factual instruction from Mr Byers*', so all the 'unusual factual background' contained in the Defence was no more or less than from the details that would have given by Byers to Colvin.

(f) To that end, Colvin's evidence adds nothing substantive to the appellant's evidence: it has no additional probative value whatsoever. If anything, to an objective observer, the choice of adjective '*unusual*' to describe the factual details as given by Byers to Colvin raises issues of plausibility of that account, rather than gives credence to its veracity.

(g) As to the statement purported to be signed by Mr Welsh, we conclude that on the balance of probabilities, it is not the statement that was filed with the Defence in the contemporaneous DWF file. If 'the unusual factual background' was enough to assist Colvin's recollection, the substance of the produced statement with its defamatory connotation and lurid details would have made an impression on Colvin at the time of his first reading and would have assisted Colvin in his recollection that he had seen this before. Yet, Colvin was categorical in not being able to confirm that the statement was the statement that was filed with the Statement of Defence at the time. Consequently, we can give no weight to the statement purported to have come from Mr Welsh and signed by Mr Welsh.

(h) We conclude that there is no probative value in Colvin's evidence, not because Colvin was not a credible witness, but because his evidence merely recorded what Byers instructed him to record in the Statement of Defence. (The letter from Mr Shirley that was handed up on the day of the hearing suffered the same defect as a piece of evidence, in not having any probative value beyond Byers' own testimony, and is the reason why the Tribunal has not related it.)

(2) Mr Byers: we find him to be a wholly incredible and unreliable witness in relation to the matter under appeal, though we find him truthful in certain aspects of the information given during the enquiry meetings with Officer Tilney.

(a) Factually, Byers contradicted himself in relation to some material facts, such as the respective roles of the directors he had stated in the meeting of 4 May 2006 (from Welsh being 'pretty retired') to his later assertions that Welsh was the 'Chairman' in the office most of the time, while Byers was only the Contracts director and mainly out of office.

(b) An example of factual inconsistency in relation to Byers' allegations against Sue Jacques concerns the timing of Byer's discovery of the alleged theft by Jacques by increasing her salary without authorisation.

(c) In Byers' witness statement filed on 31 March 2017, he stated that he discovered *around July 2006* Jacques was stealing from BSL, and went on to say that Jacques was paying herself £45,000 per annum.

(d) If it was factually true that Byers discovered the embezzlement as early as July 2006, he would have that knowledge in his mind when he attended the PN160 meeting in April 2008. Yet Byers mentioned nothing about the discovery he had made some 21 months ago of Jacques' stealing from the Company at that meeting when 'dishonesty' was the central issue.

(e) If this discovery of theft was true and was as early as July 2006, we do not find Byers' explanations satisfactory as to why Jacques was retained after the discovery (presumably continued to be paid the salary of £30,000 too), was not watched more closely for her actions, and was made the Company Secretary of the BSL Resources in December 2006, and was telephoned by Flannagan to join a meeting on 2 April 2007, and to give explanations about the VAT arrears in that meeting.

(f) In our assessment, the meeting of 8 April 2008 with Officer Rush was the turning point, when the Public Notice 160 was read out to Byers. At this meeting, Byers refuted that he had been dishonest, and started to implicate the bookkeeper Sue Jacques, but only to the extent that she was paid £30,000 (not the later £45,000) per annum and 'benefit from keeping the business afloat'.

(g) Byers' witness evidence lacks integrity and overall cogency, as counsel's able cross-examination highlighted which we need not rehearse here. In terms of motivations, we consider that Byers started to divert from his earlier account of his own role in BSL after the 8 April 2008 meeting. He realised from that meeting he had a stake in distancing himself from any involvement that caused the VAT arrears.

(h) Byers sought legal advice in mid-2008. Sue Jacques died on 5 October 2008, one day before the penalty notice of 6 October 2008 to impose a s 61 penalty on Mr Byers. Jacques' death at that juncture made her the convenient scapegoat for the VAT arrears.

(i) It would appear that thereafter, a highly '*unusual*' factual account (to use Colvin's adjective) was given to DWF to compile the Statement of Defence. This unusual factual account formed the basis for subsequent witness statements by Byers and Flannagan, and the purported statement attributed to Welsh.

(j) For these reasons, while we consider aspects of Byers' disclosures to Officer Tilney as recorded in the Notes of meeting to be credible, we can

give no credence to Byer's evidence during and subsequent to the PN160 meeting on 8 April 2008.

(3) Mr Flannagan: we find him unreliable in relation to his witness evidence, but that he was truthful as a professional accountant in discharging his obligations when assisting HMRC during the enquiries into BSL's tax affairs.

(a) Flannagan was engaged as the accountant to Byers' business concerns from 1995, and had been advising him for over 10 years when the enquiry by Officer Tilney started.

(b) In relation to Prissick Street property, there were dealings between Byers and Flannagan in their personal capacities, as landlord and tenant, and then as vendor and purchaser. The discrepancy in the price paid and stated in the completion statement raised a host of issues that the Tribunal considers no satisfactory explanations have been given by either Byers or Flannagan. This casts doubt on the full extent of independence as a professional acting for his client.

(c) Flannagan was most likely to be aware of the irregularities within BSL as regards the treatment of company expenses. He would have advised Byers to offer a settlement with the £10,000 at the outset of Officer Tilney's enquiry. Flannagan and Byers appeared to have a working relationship whereby Flannagan was aware of what was going on in BSL under Byers' directorship, and would go along with it in his role as the accountant.

(d) On 2 April 2007, Flannagan telephoned Jacques to join the meeting and to explain how the VAT arrears arose. Flannagan was a witness to Jacques' explanations that: (a) the VAT returns were prepared according to what BSL could pay in terms of cash flow, and (b) that Byers instructed her to complete inaccurate VAT returns.

(e) On 13 March 2008, we consider Flannagan was truthful when he informed HMRC that *Karl Byers was the managing director and Stanley Welsh was a non-executive director*, giving as an explanation that '*due to ill health [Welsh] had only a small involvement in the company*'.

(f) Significantly, Flannagan had confirmed that the meeting notes containing Jacques' explanations of the arrears and of Flannagan's own statement in relation to the directors' role in BSL were 'reasonable resume' of what had transpired in those meetings.

(g) The roles of the two directors as described by Flannagan on 13 March 2008 were consistent with what Byers said of himself (as the 'director of operations') and Welsh ('pretty much retired') in the meeting with Officer Tilney on 4 May 2006.

(h) Flannagan's description of Welsh's small involvement is consistent with documentary records for BSL: Welsh was noticeably absent as an actor in BSL business. The non-executive director description was also consistent with the fact that Welsh was suffering from ill health as a cancer patient, and died in November 2009. On account of Welsh's ill health, it made the subsequent assertion by Byers that Welsh had an active role to play in BSL in the relevant periods improbable.

(i) In contrast, Flannagan's witness evidence at the hearing was not only inconsistent with what he had said during his meetings with HMRC, but also contradicted Byers' witness evidence. In relation to the discovery of Jacques increasing her wages: (i) Byers' witness statement said it was July 2006 that *I* (ie Byers) discovered the unauthorised wage increase; (ii) Flannagan said that it was in September 2005 when he was looking at the payroll records for the year end accounts for 31 March 2005; (iii) Byers' witness statement said he 'confronted' Jacques *with BSL's accountant, Mr Flannagan*; (iv) Flannagan's witness statement also said that 'I spoke to her about this matter'; (v) in cross-examination, Flannagan categorically stated that he never spoke to Jacques about the matter, until he was shown to be contradicting his own witness statement. A confrontation with an existing employee on a matter of this nature is most likely to be remembered. One may not remember the details of what was said, but one would remember having 'spoken to her about it'.

(j) If Flannagan had discovered Jacques to be dishonest as alleged in September 2005, it was somewhat inexplicable that Flannagan should trust Jacques to explain to Officer Tilney how the VAT arrears arose on 2 April 2007. We note in particular that Flannagan had telephoned Jacques to join the meeting, and we consider that Flannagan was sincere in assisting HMRC in this matter by enlisting Jacques' assistance.

(k) The inconsistencies cast doubt on the veracity of the whole account related to Jacques' embezzlement (Incidentally, BSL's accounting year end would seem to be August and not March for 2005, but we read nothing into the incorrect year-end reference.)

(l) In relation to Flannagan's evidence, we conclude that we can give weight to the contemporary declarations by Flannagan when his office signed and returned a copy of the meeting notes of 13 March and 8 April 2008. Flannagan's comment of these meeting notes was: '*each note forms a reasonable resume of what transpired at the meeting*'. On that basis, Flannagan had confirmed: (a) Sue Jacques' explanation that she had completed inaccurate VAT returns on the instruction of Mr Byers, and (b) of the respective roles of Byers and Welsh in the Company.

161. In the light of what had transpired in the two meetings on 2 April 2007 and 13 March 2008, the 40% mitigation of the penalty was due largely to the assistance given by Flannagan and Jacques in those meetings, and not to any assistance given by Byers.

162. As to the witnesses called by the respondents, we find both Officers Tilney and Parkin to be reliable and credible. They spoke chiefly to the documentary evidence in which they had involvement, and those contemporary documents represent a fair view of the state of affairs and what the witnesses for the appellant had said at the time.

163. We note also those parts of the evidence, such as Officer Parkin's handwritten notes taken on 8 April 2008, which recorded Byers' allegation against Jacques for signing a lease without the authority to do so. Mr Byers sought to rely on that piece of evidence to assert the over-stepping of Jacques in carrying out her duties. As related earlier, that meeting was the turning point in Byers' account, and that recorded comment about the lease originated from Byers and was not further proved by any documentary evidence. In oral evidence, Mr Byers referred to the incidence and how

he had to sort things out subsequently. If that really was the case, the 'sorting out' confirms Byers role as the person in charge of the business, rather than detracts from it.

The test for dishonesty applied to the facts of the case

Whether a prime facie case for s 60 penalty

164. The dishonesty issue of a named officer under s 61 is founded upon the dishonest evasion of the body corporate under s 60. There are two elements to the provision under sub-s 61(1), which are:

> (a) that a body corporate is liable to a penalty under section 60, and
>
> (b) that the conduct giving rise to that penalty is, in whole or in part, attributable to the dishonesty of a person who is, or at the material time was, a director or managing officer of the body corporate (a "named officer").

165. In relation to the VAT deficiency in BSL, we make the following findings of fact:

(1) The VAT deficiency figure stated in the Statement of Affairs by the liquidators Mazars was at 86,039 on 28 February 2007. That figure of itself was a plain admission that BSL had been underpaying its VAT liabilities.

(2) The affidavit was sworn by Mr Byers on 28 February 2007 to testify that the Statement of Affairs was 'to the best of [his] knowledge and belief a full, true and complete statement' as to the affairs of BSL as at 28 February 2007.

(3) The respondents, as the main creditor, were unaware of, nor made aware of, the VAT arrears throughout the course of the 22-month enquiry conducted by Officer Tilney, which started in May 2004.

(4) It was at the Creditors' meeting on 28 February 2007 that HMRC first became aware of the VAT arrears.

(5) The respondents then carried out a VAT audit to quantify the extent of VAT under-declared. The date of the VAT Audit Report of 2 April 2007 set the time limit, and determined the time-period for the VAT arrears to be assessable as from 1 June 2004 to 31 January 2007.

(6) The source documents for the VAT Audit were the bank statements of BSL, which gave the listings of lodgements in each VAT quarter, and the quarterly lodgements total was then compared with the actual amounts used for preparing each VAT return per nominal ledger printouts.

(7) The basis upon which the total VAT arrears was established was solely referential to the source documents provided and maintained by BSL.

166. There is a prime facie case that a s 60 penalty was imposable on BSL, in that the VAT arrears in BSL was in consequence of a person's action, or omission to take any action, and that person's conduct involves dishonesty. As a matter of fact, Mr Byers raises no challenge that a s 60 penalty would have been imposable on BSL.

The objective element in the test for dishonesty

167. As to the second element whether the conduct giving rise to BSL's penalty was, in whole or in part, attributable to the dishonesty of Mr Byers at the material time as a

director of BSL, we have regard to the strength of the contemporaneous documentary evidence, and in particular, of the explanations given by Sue Jacques during the meeting of 2 April 2007 as to how the inaccurate VAT returns came to be prepared.

168. In the final analysis, the fact in issue in this appeal is whether the VAT arrears happened as explained by Sue Jacques. While Sue Jacques was not able to testify to her explanations given at the time, her explanations were *expressly* confirmed by Flannagan in having requested the Note of meeting of 13 March 2008, which he referred to Jacques' explanations on VAT arrears given at the meeting of 2 April 2018 as 'a reasonable resume' of what had transpired.

169. If a fact in issue remains in doubt, the Tribunal must decide whether or not it happened upon the burden of proof. Applying the legal rule of burden, and in the words of Lord Hoffmann: '[t]here is no room for a finding that it might have happened'; '[t]he fact either happened or it did not', we find on the balance of probabilities, the VAT arrears did arise as explained by Sue Jacques. It is not material, for the purpose of this appeal, who ultimately signed each of the inaccurate returns; the material fact is that the inaccurate returns were prepared as a result of Byers' instructions.

170. Our finding in this respect is not an isolated incidence of tossing a coin. We find Sue Jacques' explanations in this regard to be entirely consistent with the irregularities within BSL, disclosed, discovered or admitted by Byers and Flannagan to Officer Tilney during the enquiry into BSL's affairs in relation to the direct taxes.

171. Furthermore, our finding of fact upon the burden of proof in relation to the fact in issue is supported by all our findings on the credibility of the witness evidence as detailed above, and on the probative value of the contemporary documentary evidence which has an internal cogency.

172. Based on our finding of fact that BSL's VAT returns had incorrectly stated its liabilities under Byers' instructions, ordinary honest people would consider that conduct to be dishonest.

The subjective element in the test for dishonesty

173. Mr Byers' subjective attributes in relation to his 'propensity to dishonesty' have underpinned the respondents' case, and we need not repeat here. In considering the subjective element in the test for dishonesty, we focus on what Mr Byers knew in relation to the VAT arrears. We have regard to the following facts:

(1) In his oral evidence, Byers said he would ask Jacques about the cash position of BSL. The HSBC bank account of BSL supports a finding that Byers was the main operator of the account. While the account name was in the name of BSL, Byers' name was the addressee for the account on all BSL bank statements. BSL had cash flow difficulties as stated in Mazars' report.

(2) Other evidence that supports Byers had control and access to the BSL bank account includes: he wrote cheques out to be encashed as petty cash; he handed a cheque of £10,000 to HMRC at the first meeting; there was fluidity in the movement of funds between the BSL bank account and Byers' personal account; £80,000 deposited into Byers' personal account was unexplained, which

suggested a pattern of 'drawing' that had been highlighted by the liquidators of BSL (NE) Armstrong Watson for investigation.

(3) Byers signed the affidavit to the Statement of Affairs confirming that the debts listed in the Statement was to his best knowledge, true and complete as at 28 February 2007, which included the VAT debt stated at £86,039. To maximise the benefit of dissolution, which is to wipe out historic debts owed by the company which are likely to be enforced, it is in the interest of the directors to state all known liabilities.

Conclusion on dishonesty

174. Based on the foregoing, we conclude that HMRC have proved to the required standard, that on the balance of probabilities, the conduct giving rise to the s 60 penalty is, in whole or in part, attributable to the dishonesty of Mr Byers as a director of BSL.

Whether the penalty to be apportioned

175. It remains to be decided whether the whole sum of s 61 penalty is to be imposed on Mr Byers. The relevant part of the statutory wording to define a 'named officer' is: *a person who is, or at all material time was, a director or managing officer of the body corporate'.* A 'named officer' is not restricted to the category of a director, but extends to the class of 'managing officer', which is defined under sub-s 61(6) of VATA as:

> '(6) In this section a "managing officer", in relation to a body corporate, means any manager, secretary or other similar officer of the body corporate or any person purporting to act in any such capacity or as a director; and where the affairs of a body corporate are managed by its members, this section shall apply in relation to the conduct of a member in connection with his functions of management as if he were a director of the body corporate.'

176. We note Ms Vicary's closing submission that Sue Jacques did not fall within the meaning of a 'named officer' for the purposes of s 61 VATA. While Mrs Jacques was not a director, that fact of itself did not remove her from falling within the definition of a 'managing officer' as defined under sub-s 61(6) VATA.

177. The penalty regime with which this appeal is concerned has since been replaced by the regime under Schedule 24 to the Finance Act 2007 for 'inaccuracies in returns', which came into force from 1 April 2008. Schedule 24 to FA 2008 has departed from its predecessor provisions in significant respects. For precedents, we look to s 14 of the Finance Act 1986, which was the predecessor provision of s 61 VATA, and provided:

> '(1) Where it appears to the Commissioners –
>
> (a) that a body corporate is liable to a penalty under section 13 of the Finance Act 1985 … , and
>
> (b) that the conduct giving rise to that penalty is, in whole or in part, attributable to the dishonesty of a person who is, or at the material time was, a director or managing officer of the body corporate (a "named officer"),
>
> the Commissioners may serve a notice under this section on the body corporate and the named officer.'

178. The reference to s 13 of FA 1985 corresponded to s 60 of VATA, and apart from the respective references to the related provision, the statutory wording for s 61 VATA is identical to that under s 14 of FA 1986. For this reason, Sedley J's exegesis of s 14 of FA 1986 in *Bassimeh* (on appeal by the Commissioners to the High Court from the then VAT Tribunal) is directly relevant to our consideration.

179. Mr Bassimeh ('B') was one of the three directors of a restaurant company opened in 1983, and in 1988 one of B's fellow directors resigned. In 1990, Customs and Excise officers established that the company's liability for VAT was being fraudulently concealed, and formed the view that B had taken an active part in running the business throughout the relevant period and that the dishonest conduct of the company had been at least in part attributable to B's dishonesty. B was assessed for the whole of basic penalty save for the apportionment in relation to the time period for which the provision came into force. On the issue of apportionment, the VAT tribunal concluded:

> 'We hold the Appellant is liable to a third of the penalty up to April 1988 (the preceding quarter) and one half since. …
>
> In this case where the Appellant denies dishonesty and the Commissioners contend that relative dishonesty is immaterial there is some difficulty in arriving at an appropriate portion. On the evidence which we have heard, however, we are not satisfied that the Commissioners have shown that the Appellant was any more to blame than the other directors' [paras 173-174 of the tribunal's decision].

180. Sedley J observed that the tribunal's conclusion was 'based on no positive evidence' about the second director's role: 'its predicate was that the commissioners had not shown Mr Bassimeh to be any more to blame than the other directors' (at 918). Sedley J stated at 920 the critical test of liability for acts of dishonesty in which more than one director has participated:

> 'In applying s 14 of the 1986 Act, in my judgment, the proposition that the whole of a dishonest course of conduct agreed upon by two or more directors is prima facie attributable to the dishonesty of each of them is the correct starting point in law. *If undisplaced and unqualified by evidence*, it is sufficient to enable the commissioners to establish that an individual in Mr Bassimeh's position has been wholly responsible for the company's dishonest conduct.The tribunal (at 24, para 174) has in my respectful view erred, therefore, in testing relative culpability in this situation by asking whether the commissioners have shown that the appellant was any *more* to blame than the other directors; the right question was whether on the evidence the appellant was shown to be any *less* to blame than the other directors with whom he had colluded in bringing about the company's dishonest conduct.' (emphasis added)

181. The VAT Tribunal *Bassimeh* was found to have erred in law in concluding that 'relative culpability' was required to be established by the Commissioners before imposing the penalty on one director who was in business with other directors. Sedly J's decision made it clear that there was no relative culpability to be established before the Commissioners could lawfully impose the penalty on one of the directors. In conclusion, the principles in determining on the issue of apportionment in relation to s 14 FA1986 were set out as follows at 920:

> '(a) Where the directors have collaborated in procuring the company's dishonest conduct, each is prima facie responsible for the whole.

(b) There is no prior limitation of law on the grounds upon which a named officer may seek to establish that less than the whole of the basic penalty should be levied on him or her.

(c) In the present case, there was no evidence to show that the appellant was any less to blame than his fellow directors.'

182. Applying the principles to the facts of the instant case:

(1) Mr Byers was a director procuring BSL's dishonest conduct as set out above; he is prime facie responsible for the whole of the basic penalty. The Commissioners' decision to impose the penalty on Mr Byers was lawful.

(2) As a 'named officer', Mr Byers can adduce evidence to establish that less than the whole of the basic penalty should be levied on him, which he had indeed done so in the course of these proceedings, and has sought to hold Welsh and Jacques (not Byers himself to any extent) as liable to any part of the penalty.

(3) Taking the evidence in its totality, the Commissioners' decision to impose the sum of penalty on Mr Byers alone remains 'undisplaced' by any credible evidence to the contrary.

183. The critical aspect to the interpretation of section 61 VATA is that liability under this section is not meant to be 'discrete'. The test for the Tribunal to apply in considering apportionment is whether Mr Byers was *less* to blame for the VAT deficiency. Even if we had found that BSL's conduct was attributable to Mr Welsh as the non-executive director, and Mrs Jacques as the bookkeeper, the fact remains that the appellant was no *less* to blame than the other two. We have concluded that the evidence to support Mr Byers' case for apportionment has little to no probative value. Consequently, there is no justification for any apportionment of the penalty imposed.

Disposition

184. For the reasons stated, the penalty notice under section 61 of the Value Added Tax Act 1994 served on Mr Byers in the sum of £46, 876.20 is confirmed in full.

185. The appeal is accordingly dismissed.

186. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 13 MAY 2019

ANNEX

Case law

The authorities referred to in this decision are listed in the alphabetical order of their short case names:

(1) *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37 ('***Barlow Clowes***')

(2) *Customs and Excise Comrs v Bassimeh* [1995] STC 910 ('***Bassimeh***')

(3) *Mrs G Candy v HMRC* [2013] UKFTT 146 (TC) ('***Mrs G Candy'***)

(4) *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) ('***Gestmin***')

(5) *R v Ghosh* [1982] 2 QB 1053 ('***Ghosh***')

(6) *Customs and Excise Comrs v Han and Yau and other appeals* [2001] EWCA Civ 1040, [2001] STC 1188 ('***Han and Others***')

(7) *Ivey v Genting Casions (UK) Ltd t/a Crockfords* [2017] UKSC 67 ('***Ivey v Genting***')

(8) *Janet Addo v Revenue and Customs Comrs* [2018] UKFTT 93 (TC) ('***Janet Addo***')

(9) *Revenue and Customs Comrs v Tahir Iqbal Khawaja* [2008] EWHC 1687 (Ch) ('***Khawaja***')

(10) *Krubally N'Diaye v HMRC* [2015] UKFTT 0380 ('***Krubally N'Diaye***')

(11) *Lachaux v Lachaux* [2017] EWHC 385 ('***Lachaux***')

(12) *Marina Travel and Shipping Agency Ltd v Customs and Excise Comrs* (1990) VAT Decision 5000 (Part V12) ('***Marina Travel'***)

(13) *Karl Morris, Kenneth Cecil Fitch, Marcus Paul Hattersley v Revenue and Customs Comrs* [2005] E00894 ('***Morris and Others'***)

(14) *The Ocean Frost* [1985] 1 Lloyds Rep 1 ('***The Ocean Frost***')

(15) *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403, HL ('***Onassis***')

(16) *Re B (Children)* [2008] UKHL 35 ('***Re B (Children)***')

(17) *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 ('***Royal Brunei'***)

(18) *Ufficio IVA di Piacenza v Belvedere Costruzioni Srl* (Opinion) (Case C-500/10) ('***Ufficio IVA***)