VALUE ADDED TAX — MTIC appeal — finding of actual knowledge of connection of appellant's transactions with fraud — whether HMRC's case adequately pleaded — yes — whether allegations fairly put to appellant's witness — yes — whether First-tier Tribunal's conclusions open to it — yes — appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER **Appeal No: UT/2015/0009**

BETWEEN:

TRICOR plc **Appellant**

and

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

Tribunal: Hon Mr Justice Morgan
Judge Colin Bishopp

Sitting in public in London on 8 & 9 June 2016

Mr Ian Bridge, counsel, instructed by Morgan Rose, for the appellant

Mr Jeremy Benson QC and Mr Christopher Foulkes, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the respondents

DECISION

Introduction

1. This is an appeal against a decision of the First-tier Tribunal ('the F-tT') (Judge Tildesley and Ms Myerscough) released on 3 March 2014, with neutral citation [2014] UKFTT 241 (TC). The F-tT dismissed an appeal by Tricor plc ('Tricor'), against the refusal of H M Revenue and Customs ('HMRC') of credit for input tax of, in all, about £1.85 million incurred by it in 16 purchases of mobile phones in the VAT accounting periods 12/05, 03/06 and 06/06. The ground on which credit was refused was that Tricor, or more precisely its controlling minds, Mr Joe Case, a shareholder and director, and Mr Richard Andrews, neither a shareholder nor a director but a consultant who dealt with the relevant transactions, knew or ought to have known that those transactions were connected with fraud. It was what is commonly, if not always entirely accurately, referred to as an MTIC, or missing trader intra-community fraud, appeal.

2. The hearing of the appeal began in January 2012, when Tricor was represented by its accountant, Mr David Tunney. After the evidence had been heard, the F-tT adjourned to May 2012, in order to hear closing submissions. However, in February Tricor instructed solicitors in place of Mr Tunney, and in April it made an application for the admission of additional evidence. The hearing which had been listed for May 2012 was vacated and the application for the admission of additional evidence came before the F-tT in December 2012, when it was partially successful. The feature which is of importance now is that Tricor was given permission to serve further witness statements of Mr Case and of Mr Andrews. Mr Case made two additional statements, of no apparent significance for present purposes, while Mr Andrews, who had already made four statements and had been subjected to cross-examination on them for 2½ days, made another five. The direction permitting the admission of his additional evidence was conditional on his offering himself again for cross-examination at the resumed hearing. After some further procedural skirmishing the hearing resumed in September 2013, when Mr Andrews, as required, was present for cross-examination on his later statements.

3. Although almost all of HMRC's case was in contention at the first hearing, when the resumed hearing began it was no longer in dispute that all of the chains of transactions leading to Tricor's acquisitions of the phones could be traced back to a fraudulent tax loss. The only real issue therefore was whether HMRC were right in their contention that Mr Case, Mr Andrews or both knew or should have known that the acquisitions were so connected. It was common ground that the F-tT were required to approach that issue by reference to the criteria set out in *Axel Kittel v Belgium, Belgium v Recolta Recycling SPRL* (Joined Cases C-439/04 and C-440/04) [2008] STC 1537 ('*Kittel*'), as explained by Moses LJ in *Mobilx Ltd & others v Revenue and Customs Commissioners* [2010] EWCA Civ 517, [2010] STC 1436 ('*Mobilx*'). In short, a trader who knew or should have known that the transaction into which he entered was connected with fraud forfeits the right to claim credit for the input tax incurred in his purchase. The test was explained by Moses LJ in *Mobilx* at [59]:

> 'The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who "should have known". Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should

have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in *Kittel*.'

4. At [64] he added that

> 'If it is established that a trader should have known that by his purchase there was no reasonable explanation for the circumstances in which the transaction was undertaken other than that it was connected with fraud then such a trader was directly and knowingly involved in fraudulent evasion of VAT … The principle in *Kittel* does no more than to remove from the scope of the right to deduct, a person who, by reason of his degree of knowledge, is properly regarded as one who has aided fraudulent evasion of VAT.'

5. The F-tT's primary finding was that Tricor's controlling minds, that is Mr Case and Mr Andrews, knew of the connection to fraud, and that HMRC were correspondingly correct to refuse the input tax credit. They also made a finding that Tricor should have known of the connection. Tricor's appeal was, therefore, dismissed. Permission to appeal to this tribunal was refused by the F-tT, but granted on limited grounds, following oral renewal of the application, by Judge Berner in this tribunal. The limited grounds are:

(1) that HMRC had failed adequately to plead an allegation of fraud against Tricor, in accordance with the principles set out in *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2001] UKHL 16, [2003] 2 AC 1 ('*Three Rivers*');

(2) that the F-tT erred in law in failing adequately or at all to address the allegation that Tricor was actively involved in fraud and failed to identify why the pleaded facts were inconsistent with innocent involvement;

(3) that the F-tT erred in law in finding that the contents of the fifth to ninth witness statements [that is, the statements served as additional evidence] of Mr Andrews were not true when HMRC had failed to cross-examine him on the contents of those witness statements; and

(4) that the F-tT erred in law in reaching conclusions that no tribunal could reasonably have reached on the evidence.

6. Before us, Tricor was represented by Mr Ian Bridge, who also appeared before the F-tT at the resumed hearing. HMRC were represented at the first F-tT hearing by Mr Christopher Foulkes; at the resumed hearing, as before us, Mr Foulkes was led by Mr Jeremy Benson QC.

The F-tT's decision

7. The F-tT were provided, at the resumed hearing, with an agreed statement of facts reciting what had by then become the uncontroversial details of the fraudulent defaults on which HMRC relied. Tricor's 16 purchases, as we have said, were accepted to be connected to those defaults in the sense that the goods Tricor bought could be shown to be the same as those dealt in by the defaulters. In each case Tricor was, in the jargon used in such cases, a 'broker', buying from another UK trader (a 'buffer') and selling to an overseas customer. It was also uncontroversial that Tricor's directors and Mr

Andrews were well aware of the prevalence of fraud within the grey market in mobile phones albeit, as Mr Bridge argued, they did not realise at the time quite how extensive the fraud was.

8. At [10], in the course of dealing with the background to the appeal, the F-tT described the roles played by Mr Case and Mr Andrews, and by Tricor's other director, Mr Knifton:

> 'Mr Case looked after the financial side of the mobile phone business, ensuring that the various transactions were paid for and funded. Mr Case also had the final say on whether a deal went ahead. Mr Andrews was responsible for negotiating the deals and creating the due diligence file. Mr Knifton took no role in the wholesaling of mobile phones.'

Mr Knifton did not give evidence to the F-tT, at either hearing, and the focus, particularly at the resumed hearing, was on the state of knowledge and the activities of Mr Case and Mr Andrews. In the appeal to this tribunal the focus has been on Mr Andrews.

9. Despite the narrowing of the issues the F-tT's decision described the relevant deals, and the roles played by the various traders so far as HMRC had been able to identify them, in considerable detail, a description we do not need to repeat, or summarise, now although we shall need to refer to the F-tT's findings about some of Tricor's own transactions. Much of the F-tT's decision is not subject to challenge, and in what follows we have focused on those parts of the decision which do give rise to a challenge, or which HMRC say, in answer to Tricor's arguments, were fully justified.

10. The F-tT began their discussion of the facts with an examination of the evidence relating to HMRC's case that there was an overall fraudulent scheme. By the time of the resumed hearing the existence of such a scheme was undisputed; but it was necessary for the F-tT to determine, because of the manner in which Tricor advanced its case, whether it was of the 'carousel' or 'acquisition' type. The former, for which HMRC argued, is a scheme in which the goods are repeatedly circulated, and whose aim is to generate repayment claims which fund the 'profits' in which all of the participants, including the broker, share—indeed, it is typically but not invariably the broker which makes the greatest profit. In the rather less sophisticated acquisition scheme for which Tricor argued one trader, usually the trader which has acquired the goods from an overseas supplier, sells to another trader which pays the price, including the appropriate VAT. The seller then disappears, pocketing the VAT for which it does not account. In this situation, the defaulting seller does not care what happens to the goods after it has sold them, and does not care whether the traders which follow it in the chain are able to make claims for input tax credit. At [127] the F-tT indicated that they preferred HMRC's case, but went on to add some further observations:

> 'The Tribunal is, therefore, satisfied that the fraudulent scheme matched HMRC's description of a carousel scheme. The Tribunal has already stated that the inference from such a scheme of each party carrying out a specific role is not decisive in determining the Appellant's state of knowledge, and has to be tested against the rest of the evidence. The Appellant denied that it had knowledge of the wider scheme. The Appellant asserted that its knowledge should be judged on its dealings with its suppliers and customers.'

11. Later, the F-tT focussed on some characteristics of the appellant's own transactions. One feature which the F-tT clearly thought to be significant was the scale

of the gross profit margins achieved by Tricor, a factor which appears not only to have influenced their finding that this was a carousel scheme but to have contributed to their findings about Mr Case's and Mr Andrews' knowledge. At [218] they said:

> 'The Appellant was incorrect to state that there was no evidence substantiating potential oddities with the level of margin achieved by the Appellant. First the margin was significantly higher when compared with that achieved by the other traders in the deal chain. The size of the Appellant's margin was simply not due to the higher costs borne by the exporter. The analysis done by the Appellant's first representative showed that the transport costs for the disputed deals were generally in the region of £1,500 to £2,000. Second, the Appellant secured a strikingly similar mark up in percentage terms for all the deals except one. The mark up for 13 of the deals was in the range of 7.5% to 8.1%. The mark up did not vary with the model of the mobile phone.'

12. The one exceptional deal (deal 8) to which that paragraph refers differed from the others in that, whereas in general Tricor bought from a single supplier, Sprint Communication Services, and sold to one of two customers, 3G Trade SA and Unicell, in this case it bought from a different supplier and sold to a different customer. At [220] the F-tT said:

> 'The Appellant referred to the 3.8 per cent margin for deal 8 in the 03/06 VAT period as evidence for its assertion of involvement in genuine negotiations. Deal 8 was the only one of the disputed transactions which involved Cybacomms as the supplier and Mobile World as the customer. Given those circumstances the Tribunal views the significance of the 3.8 per cent margin in a different light from the Appellant. The Tribunal considers the lower margin should have put the Appellant on notice about the bona fides of the consistently higher rates achieved with its normal supplier and customer (Sprint and 3G Trade) particularly in view of its knowledge of prevalence of fraud in the market.'

13. A significant part of Mr Andrews' evidence was devoted to the contents of daybooks which he used to record, among other things, some of the details of the transactions into which Tricor entered. The daybooks, which were simple notebooks rather than diaries, were produced at the first hearing and Mr Andrews was cross-examined about them; the statements he made between the first and second hearings were designed to expand upon what was set out in the daybooks and on the oral evidence he had given at the first hearing. One of the daybooks was of particular relevance because it covered the period during which Tricor entered into the transactions which were in issue in the appeal. The F-tT's conclusions about the daybook and Mr Andrews' evidence relating to it were as follows:

> '[376] The Tribunal makes the following findings on the notebook RA15:
>
> (1) The notebook was not a continuous and comprehensive record of Mr Andrews' dealings on behalf of the Appellant. Although the notebook recorded dates, there was not a note for every day of the year. There were often considerable gaps between the dates with some pages having lots of information whilst other pages had no or little information. Mr Andrews also stated that the information recorded under a particular date may not have happened on that date, as he did not always record dates.
>
> (2) Mr Andrews accepted that the notebook did not contain details of specific deals (4, 5, 9, and 12 03/06). The Tribunal also considers that Mr Andrew's analysis of his notebook in relation to the deals as set

out in paragraph 11 of his fourth witness statement did not show that specific deals had been brokered. Instead the analysis comprised random pieces of information that might relate to the deal in question, such as, the buyer seeking stock or price differences between buyers and sellers.

(3) Only one date in the notebook corresponded with the dates for the disputed deals.

(4) The notebook revealed that Mr Andrews talked to a limited number of companies about prices. The majority of these companies were either authorised distributors or companies (such as Wizard) that the Appellant was no longer doing business with.

(5) Mr Andrews did not record discrepancies between the documentation and the actual deals in his day book.

[377] The Tribunal concludes that Mr Andrews' notebook (RA15) was not a comprehensive and contemporaneous record of his dealings on behalf of the Appellant. The book was no more than a collection of random notes covering his personal and business life. There was no direct relationship between the contents and the deals in question. Further the entries contradicted Mr Andrews' evidence that he would not deal with certain companies. Having regard to the above findings the Tribunal decides that the contents of notebook (RA15) did not support the Appellant's claim of not being involved in contrived trading.'

14. Between [387] and [403] the F-tT described a cancelled deal. Tricor agreed to buy a consignment of phones from a trader called Wizard (the company mentioned at para [376(4)]) and sell them to a customer called Mobile World, a German company; this company was also the purchaser in deal 8, which led to the lower gross profit margin to which the F-tT referred at [220], quoted above. The explanation offered to the F-tT for the cancellation of this deal was that, when Mr Case could not verify that Mobile World had paid for the goods in deal 8, he refused to authorise the release of the phones comprised in that transaction and this. When he later discovered that payment for deal 8 had been made but not notified to Tricor by its bank the deal 8 phones were released but by now relations between Tricor and Mobile World had soured and Mobile World refused to carry on with the second purchase. Mr Andrews then had to persuade Wizard to agree to the cancellation of Tricor's own purchase. Mr Andrews' evidence was that it did agree, but only on the payment to it by Tricor of £18,000 in compensation. The F-tT's observations and conclusions about this deal are worth setting out at length, as they are illustrative of their approach to the evidence advanced by Tricor and their assessment of it. They were as follows:

'[396] The Tribunal is not satisfied with the bona fides of the cancelled deal for the reasons set out in the following paragraphs.

[397] At the January 2012 hearing Mr Andrews responded to a question put by Mr Foulkes that the Appellant as at 5 January 2006 had no intention of trading with Wizard because the Appellant had been informed in November 2005 of problems with the supply chains involving Wizard. Mr Case was also explicit about not doing business with Wizard. At the September 2013 hearing Mr Andrews qualified his earlier answer by denying that the Appellant had completely stopped trading with Wizard. Mr Andrews stated that it was a commercial decision to do business again with Wizard, particularly as the Appellant had heard nothing official from HMRC about the previous suspect deals involving Wizard.

[398] Mr Andrews' explanation for changing his evidence at the September 2013 hearing was that he had not been prepared properly for the earlier hearing and that the Appellant had been let down by its previous representative. The Tribunal is not persuaded by Mr Andrews' explanation. The Tribunal is perplexed by Mr Andrews' inability to recall details of the cancelled deal at the January 2012 hearing, particularly as it purportedly involved the payment of compensation. Further Mr Andrews' answer at the January 2012 hearing was consistent with one of the Appellant's principal arguments [which] was that it changed suppliers in response to HMRC's concerns. Further Mr Andrews' change of tack at the September 2013 hearing had wider repercussions for the Appellant in that it undermined critical aspects of its case of adhering to HMRC's advice, by only trading with known and trusted suppliers.

[399] On 16 February 2006 HMRC informed the Appellant that 11 of the 19 Appellant's transactions in the 09/05 quarter had commenced with a defaulting trader. HMRC identified Mobile World and Wizard as being parties to the transactions. HMRC produced in evidence at the September 2013 hearing a record of a telephone conversation between Mr Andrews and Officer Watson dated 20 February 2006 at 1225. The record showed that Mr Andrews had contacted Officer Watson raising concerns about the 16 February 2006 letter, and informing him that the Appellant had recently put a deal through with Wizard as the supplier.

[400] Mr Andrews stated in evidence that the deal with Wizard had been cancelled by the time he made the phone call to Officer Watson. Mr Andrews was, however, unable to give a convincing answer in cross-examination as to why he did not inform Officer Watson of the cancelled deal involving Wizard. Mr Andrews said that the Appellant did not want to forewarn HMRC of the cancellation because the Appellant hoped that HMRC would declare Wizard as bad eggs which would give the Appellant a reason not to pay Wizard compensation. The Tribunal considers that if this was the case, the Appellant already had the necessary ammunition in the form of the 16 February 2006 letter to challenge Wizard's bona fides.

[401] The Tribunal finds Mr Andrews' evidence on the details of the cancelled deal confusing and contradictory. The Tribunal was not clear when Mobile World purportedly cancelled the deal. Mr Andrews appeared in his evidence to fluctuate between Friday 17 and Monday 20 February 2006 as to when the cancellation took place. There was no documentation from Mobile World cancelling the transaction. Mr Andrews' reason for not seeking compensation from Mobile World for breach of contract was weak, particularly as the Appellant was more than ready to pay Wizard compensation in relation to the same transaction. The Appellant's transport booking confirmation indicated that the mobile phones would have been in Germany by the 17 February 2006. The Tribunal considers that the Appellant's documentation for the cancelled deal suggested that the deal was actually concluded on 16 February with delivery on 17 February 2006.

[402] The Tribunal agrees with HMRC's observation that if this deal had been cancelled legitimately it would be reasonable to have expected the following additional documents:

(1) Correspondence with Mobile World cancelling the deal.

(2) Correspondence with Mobile World claiming the loss or negotiating the same.

(3) Correspondence with the Bank about its error in respect of Mobile World's payment in deal 8.

(4) Written instructions to the freight forwarder not to ship the goods, or documents in response from them;

(5) An entry in the deal logs.

[403] The Tribunal finds that the evidence points to a deal being struck between Wizard, the Appellant, and Mobile World on 16 February 2006. When the Appellant received HMRC's letter of the 16 February 2006 which was most likely on the 20 February 2006 it cancelled the transaction. In contrast to the Appellant's assertions, the Tribunal considers that the circumstances surrounding the cancelled deal suggest contrivance on the Appellant's part.'

15. The F-tT's overall conclusions were as follows:

'[494] In the preceding paragraphs the Tribunal has summarised its principal findings. Essentially the Tribunal found that

(1) The Appellant's deal chains were highly contrived and orchestrated.

(2) Mr Andrews and Mr Case were unable to provide a rational explanation for the profit they made on deals.

(3) Mr Andrews and Mr Case did the deal but did not reflect about whether the deal made sense knowing of the prevalence of fraud in the market, and knowing that previous transactions of the Appellant had been traced to defaulting traders.

(4) The discrepancies and anomalies within the individual deals were significant, and the failures of Mr Andrews and Mr Case to act on those discrepancies undermined their assertions that they were involved in the bona fide trading of mobile phones.

(5) Mr Andrews and Mr Case were not credible witnesses.

[495] In determining what it was that the Appellant knew or ought to have known when it entered the disputed transactions the Tribunal is entitled to look at the totality of the deals effected by the Appellant (and their characteristics), and at what the Appellant did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them. Having regard to its findings, the Tribunal is satisfied that when the Appellant entered into each of the disputed transactions it knew that the particular transaction was connected with fraud.

[496] In view of its finding that the Appellant knew of the connection with fraud, it is unnecessary for the Tribunal to consider the alternative case of should have known. For the sake of completeness the Tribunal is satisfied that HMRC also made out its case for should have known.'

Tricor's arguments

16. Although Judge Berner gave permission to appeal on four apparently discrete grounds, Mr Bridge argued the first and second together, and the third and fourth together. However, in our view it is more convenient and logical to take the third with the first and second, and to deal with the fourth separately. Before doing so we need to mention two grounds on which Tricor does not have permission.

17. Its application for permission to appeal was refused by the F-tT and again by Judge Berner, in this tribunal, on paper. At that time there were six proposed grounds, the four set out above and two others: that HMRC failed adequately or at all to plead the allegation that Tricor should have known of the connection to fraud; and that the F-tT

failed to address the alternative allegation (in so far as it was pleaded) that it should have known of the connection. When the application was renewed at an oral hearing before Judge Berner those two grounds were abandoned. We pointed out to Mr Bridge that the F-tT's alternative finding of 'should have known', at [496], appeared to be sufficient for HMRC to succeed regardless of our conclusions on those grounds on which Tricor has permission. He first indicated, in response, that he wished to apply for the permission to be extended, but then argued that the existing permission was sufficient. We found that a rather surprising argument as Mr Bridge had said, almost at the beginning of his oral submissions, that actual knowledge and 'should have known' were mutually exclusive concepts—thus, his argument goes, the F-tT could not properly find actual knowledge without first excluding 'should have known', and vice versa, and their dual finding was correspondingly flawed. If that argument is correct it would seem to us to follow that if Mr Bridge were to succeed in persuading us that the finding of actual knowledge could not stand the finding of 'should have known' would survive since the conflict, if there truly is one, between the two findings would be resolved.

18. We are not, however, persuaded that the two findings are mutually exclusive in the manner for which Mr Bridge argued. It is true that it is difficult to conceive of circumstances in which a person might have both actual and imputed, or constructive, knowledge of the same fact but, although it might have been more clearly worded, that is not what we think the F-tT meant by para [496]. Rather, their conclusion was that if they were wrong to find actual knowledge, they were satisfied that HMRC had made out the alternative case that Tricor should have known of the connection. It would have been helpful if they had gone on to explain, even if briefly, why they were so satisfied, for example Mr Case and Mr Andrews closed their eyes to the obvious, but for the reasons which follow that omission does not affect the outcome of this appeal.

19. The essence of Mr Bridge's argument with respect to the first three grounds on which Tricor does have permission is that an allegation of actual knowledge of the connection of a trader's transactions to fraud is equivalent to an allegation that the trader was knowingly involved in fraud, and that in a case in which there is no direct evidence of participation in fraud, such as a confession, and it is necessary to resort to inference it is obligatory to set out precisely what are the facts relied on and why the inference should be drawn. In doing so, he said, the pleader must exclude innocent explanation of the facts alleged; similarly the fact-finding tribunal must eliminate innocent explanation of the facts found before it can properly infer fraud. In addition, it is not sufficient merely to plead involvement in fraud; the allegation must be put, fairly and squarely, in cross-examination in order that the person said to have participated in the fraud has a proper opportunity of answering the allegation.

20. Mr Bridge based the first element of that submission primarily upon what was said by Lord Millett in *Three Rivers* at [186]:

> 'The … principle … is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty

> from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.'

21. HMRC's statement of case and written submissions set out various characteristics of MTIC fraud, alleged that they were present in this case and made allegations against Tricor of knowing involvement. Mr Bridge did not now seek to challenge the allegation within the statement of case, and the F-tT's finding, that there was an overall scheme. But what HMRC had not done, he said, was explain in the statement of case why the facts alleged, if proved, must lead to a conclusion of knowledge, or constructive knowledge, on the part of Mr Case and Mr Andrews of a connection between Tricor's transactions and that overall scheme, or indeed any fraud. Mr Bridge accepted in the course of argument that he did not raise any preliminary objection to the amended statement of case prior to, or at, the resumed hearing, and that neither he nor Mr Andrews was taken by surprise in some way. Rather, his complaint was that it was not possible for them to know how to respond to HMRC's case. In addition, the pleading did not explain how the possibility of an innocent explanation of Tricor's having entered into the transactions was eliminated. The same point was made to the F-tT, which dismissed it at [57] as follows:

> 'The Tribunal is not convinced with the Appellant's contention that HMRC's case on constructive knowledge was derived from facts which were consistent with bona-fide trading. The Tribunal considers that the Appellant was confusing the question of pleadings with the legal test of only reasonable explanation to be applied once the Tribunal has determined the facts. In appeals of this nature the Appellant will inevitably challenge the facts relied upon by HMRC by offering a different explanation from that placed on the facts by HMRC. The mere fact that the evidence pleaded is capable of an alternative innocent explanation does not in the Tribunal's view undermine the integrity of the pleadings.'

22. That conclusion, Mr Bridge said, revealed an error of law, because it showed that the F-tT had misunderstood the requirement of sufficient pleading. It was not enough that the fact-finding tribunal should prefer a culpable to an innocent explanation; the innocent explanation had to be eliminated by the 'fact which tilts the balance' to which Lord Millett referred.

23. The innocent explanation in this case was raised, apparently for the first time, in a letter written by Tricor's solicitors to HMRC in the interval between the first and resumed hearings. It was to the effect that Tricor was unwittingly caught up in, and itself the victim of, a fraud committed by a Danish company, Sunico A/S, whose purpose was to defraud the UK tax authorities. Sunico was one of several defendants in an action brought in the High Court by HMRC in which HMRC sought damages for the losses they had suffered by reason of Sunico's fraudulent MTIC activities. The other defendants were all individuals or companies associated with Sunico, as directors or shareholders or co-conspirators; none was in the position of broker. Tricor was not even mentioned in HMRC's particulars of claim and only in passing, in the context of the admissibility of certain evidence, in the judgment of Proudman J in those proceedings ([2013] EWHC 941 (Ch)), yet Sunico featured in most of the chains of transactions in issue in this case. Mr Bridge argued that HMRC had based their High Court case on the contention that Sunico and the remaining defendants were engaged on an acquisition rather than carousel fraud. If that was correct it was entirely possible and plausible that Tricor would have no reason to suspect that the goods in which it was dealing were connected with fraud.

24. Mr Bridge's argument about HMRC's failure to cross-examine Mr Andrews adequately was based on observations of Lord Herschell in *Browne v Dunn* (1893) 6 R 67 to the effect that it should be made clear to a witness, while he was giving it, that his evidence was not accepted, so as to afford him the opportunity of dealing with the point. It was not permissible to make the challenge to the evidence only after the witness had been released. In *Revenue and Customs Commissioners v Dempster* [2008] EWHC 63 (Ch), [2008] STC 2079, a case in which the adequacy of cross-examination was a critical issue, Briggs J dismissed HMRC's appeal from the F-tT because, as he said at [26],

> '… the Tribunal's summary of what was not put in cross examination is stated with clarity on no less than three occasions in the Decision and I was provided neither with a transcript, nor notes (whether by the Tribunal itself or by the parties) of the cross examination with which to be in any position to conclude that the Tribunal's summary of the cross examination was other than fair and accurate. Secondly, it is a cardinal principle of litigation that if serious allegations, in particular allegations of dishonesty, are to be made against a party who is called as a witness they must be both fairly and squarely pleaded, and fairly and squarely put to that witness in cross examination. In my judgment the Tribunal's conclusion that it was constrained, notwithstanding suspicion, from making the necessary findings of knowledge against Mr Dempster (necessary that is to permit the consequences of the alleged sham to be visited upon him) was nothing more nor less than a correct and conventional application of that cardinal principle.'

25. In this case, Mr Bridge said, HMRC had failed to cross-examine Mr Andrews adequately on his additional statements, which dealt in detail with the negotiations leading to each of the relevant transactions. He was not challenged on any of those details, and it was not put to him that his additional statements were untruthful, a point which the F-tT had themselves made in the course of closing submissions. Yet despite that comment the F-tT said, at [382] and [383], that they were satisfied that the cross-examination was adequate. That reversal of view, without any explanation, was unreasonable and represented an error of law.

26. Mr Bridge based his challenge on the fourth ground, that some of the findings of fact were irrational, on three such findings: those relating to the profit margins, at [218] and [220] (see paras 11 and 12 above); the conclusion at [377] (see para 13 above) that the daybooks represented 'no more than a collection of random notes'; and their conclusions about the cancelled deal at [396]*ff* (see para 14 above).

27. The findings about the profit margins were irrational, Mr Bridge said, because Tricor had agreed that the transactions which preceded its own were shams, and so the basis of comparison adopted by the F-tT was a false one, from which no conclusion such as that drawn by the F-tT could properly be drawn. There was moreover no other evidence before the F-tT from which they could have concluded that the margins achieved were or were not consistent with those which would be achieved by a trader in Tricor's position in a genuine market, or that there was any significance to the relative consistency of the margins generally achieved. Since this finding contributed to the F-tT's overall conclusion it put the reliability of that conclusion in significant doubt.

28. Contrary to the F-tT's findings, Mr Bridge said, the daybooks were strong evidence that the transactions had been negotiated and were not pre-ordained and contrived. It was true that not all of Tricor's transactions featured in them, but 12 of them did and there were other entries which related to negotiations about possible

transactions which did not proceed. The description of them as 'a collection of random notes' was correspondingly unfair and unreasonable. At the very least the daybooks were consistent with Tricor's case that it had been innocently swept into the frauds of others, yet the F-tT had disregarded that explanation.

29. The fact that one transaction had been cancelled was, Mr Bridge added, quite inconsistent with the proposition that Tricor was engaged in a contrived market in which every deal was pre-arranged and could not fail. That was particularly the case when Tricor had not merely cancelled the deal but had paid compensation in addition. These features should have led the F-tT to the conclusion that Tricor, and in particular Mr Case and Mr Andrews, genuinely thought they were trading in a legitimate market, and they did not lend any support to HMRC's contrary case.

HMRC's submissions

30. Mr Benson argued that the criticism of HMRC's amended statement of case was unfounded because, as the F-tT had rightly said at [57], it confused pleading and proof. Lord Millett was in the minority in *Three Rivers* and, Mr Benson suggested, better guidance on the requirements which pleadings must meet is to be found in the judgment of Lord Hope of Craighead, who said at [55]:

> '…where it is intended that there be an allegation that a fraud has been committed, you must allege it and you must prove it. We are concerned at this stage with what must be alleged. A party is not entitled to a finding of fraud if the pleader does not allege fraud directly and the facts on which he relies are equivocal. So too with dishonesty. If there is no specific allegation of dishonesty, it is not open to the court to make a finding to that effect if the facts pleaded are consistent with conduct which is not dishonest such as negligence. As Millett LJ said in *Armitage v Nurse* [1998] Ch 241, 256 g, it is not necessary to use the word "fraud" or "dishonesty" if the facts which make the conduct fraudulent are pleaded. But this will not do if language used is equivocal: *Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250, 268 per Buckley LJ. In that case it was unclear from the pleadings whether dishonesty was being alleged. As the facts referred to might have inferred dishonesty but were consistent with innocence, it was not to be presumed that the defendant had been dishonest. Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out. But it is not a proper ground for striking out the allegation that the particulars may be found, after trial, to amount not to fraud, dishonesty or bad faith but to negligence.'

31. It is quite clear from that passage, Mr Benson said, that the only requirement is that the pleaded facts must be consistent with the allegation made; it is not a requirement that they are consistent only with what is alleged. It is, rather, sufficient that, collectively, they make out the pleaded case. The question then is simply whether the pleaded facts are established by the evidence. Here, moreover, there was an explicit allegation that Tricor, or Mr Case and Mr Andrews, knew of the connection with fraud and the facts on which HMRC relied on to support that allegation were equally clearly set out. At para 32 of the statement of case it was said that 'The Appellant knew perfectly well that its suppliers and customers would not fail in their obligations because the transactions had all been pre-arranged', and at para 38 that Tricor's transactions were connected with the fraudulent evasion of VAT and 'the Appellant taxpayer either "knew" or in the alternative "should have known" of that fact'. The pleading was

amplified by the witness statements served by HMRC setting out in detail all of the facts relied on, and there could be no real doubt, Mr Benson said, that Tricor knew the case it had to meet. In addition, Tricor's argument amounted to a contention that an innocent explanation of each alleged fact had, individually, to be eliminated, but all the authorities make it clear that what has to be considered is all the surrounding circumstances in which the transactions took place: see *Mobilx* at [82], *Megtian Ltd v Revenue and Customs Commissioners* [2010] STC 840 at [24] and the criticism by the Court of Appeal in *Revenue and Customs Commissioners v Davis & Dann Ltd* [2016] EWCA Civ 142, [2016] STC 1236 at [60] of the approach of considering factors in isolation.

32. The supposed inadequacy of Mr Andrews' cross-examination was not encompassed by the grounds on which Tricor had permission and, said Mr Benson, we should disregard it. But in any event the criticism was misplaced because it focused only on what was put to Mr Andrews at the resumed hearing. One could not, however, disregard the 2½ days of cross-examination to which he was subjected at the first hearing, when the inadequacy of his evidence about the negotiation of the deals was put to him; the further five statements he made between the two hearings were intended to address that inadequacy, but it did not follow that he must be cross-examined at length at the resumed hearing on the same topic. The additional statements introduced some further material, but all of it was material relating to matters on which Mr Andrews had already been cross-examined. Further cross-examination would have been mere repetition.

33. Mr Benson took us to various passages in the transcript of the resumed hearing relating to the cross-examination of Mr Andrews. We do not think it necessary to set any of it out verbatim, but will instead provide our own brief summary of what took place. Mr Benson explained to the F-tT that he relied on the cross-examination to which Mr Andrews had been subject at the first hearing and did not intend to repeat it. He expressly put it to Mr Andrews that he knew or 'certainly should have known' that all the deals traced back to a fraudulent default (a proposition Mr Andrews denied), before asking a number of questions directed to the reliability and completeness of Mr Andrews' memory, and to some of the details of several, but not all, of the transactions, as well as to a number of matters common to several transactions. It is quite correct, as Mr Bridge said, that Mr Andrews was not asked about all of the detail of his additional statements, but the cross-examination was nevertheless quite lengthy: according to the transcript, it occupied the greater part of the afternoon of one day and the entire morning of the next. We will describe our conclusions about the cross-examination, so far as it is relevant to this appeal, later.

34. The reason why HMRC had made no mention of Tricor in their pleadings in the Sunico case, Mr Benson said, was that it was unnecessary to do so: it would have added nothing to the case against Sunico and would have been a distraction. The argument that it might be possible, on the facts pleaded in this appeal, that Tricor had been a dupe in Sunico's fraud and that, by failing to eliminate that possibility, the F-tT had erred was unsustainable. Nothing in *Three Rivers* supported the proposition that every conceivable innocent explanation of the facts alleged must be eliminated; the question for the F-tT was whether they were satisfied, on the evidence, and on the balance of probability, that there was no plausible innocent explanation. It was quite clear from the F-tT's overall conclusions (see para 15 above) that they were satisfied that there was, as a matter of fact, no innocent explanation of Tricor's involvement.

35. There was, said Mr Benson, no merit in any of the attacks on the F-tT's findings of fact. HMRC had argued that the consistency of the mark-ups achieved on purchases from Tricor's usual supplier suggested contrivance, while accepting that overall contrivance was not of itself conclusive evidence that all the participants were aware of it; the fact of overall contrivance might be taken as indicative of knowledge, but it was merely one of the factors to be taken into account and that was how the F-tT had treated it. The F-tT's observations about the daybooks (see para 13 above) showed that they had considered them carefully, and it was impossible to say that their conclusions about them were irrational. In any event, it was difficult to understand how the mere fact that some entries had been made in a daybook was inconsistent with knowing participation in contrived transactions. It was particularly conspicuous, with regard to the cancelled deal, that at the first hearing Mr Andrews's evidence was that he could not recall the detail of the transaction. It was dealt with in his eighth statement, made between the two hearings, but he then gave, as the F-tT themselves recorded, oral evidence which differed from that he had given at the first hearing. The F-tT expressly rejected his explanation of that difference, and gave clear reasons for doing so, namely that they could not accept that Mr Andrews had simply forgotten that the cancellation of the deal had led to Tricor's payment of compensation to its supplier. That was a perfectly reasonable basis on which Mr Andrews's evidence might be rejected, and it could not be challenged in this tribunal.

Discussion

36. In our view there is nothing in Mr Bridge's criticism of HMRC's amended statement of case. We do not consider that either Lord Millett or Lord Hope was suggesting, in *Three Rivers*, that an allegation of fraud could succeed only if it was both expressly made and supported by facts which might admit of no alternative explanation. Rather, Lord Hope was of the view that a finding of fraud cannot be made where it has not been clearly alleged in the pleading *and* the facts relied on are equivocal. But once the allegation has been plainly made, the question for the court or tribunal is whether the evidence proves the pleaded allegation; on that point we agree with what the F-tT said at [57]. Although Lord Millett was in the minority we do not read the extract from his speech on which Mr Bridge relied, and which we have set out above, as support for any different test or requirement. It is also plain from both speeches that the requirement of clarity of pleading is not a device for putting formal obstacles in the path of a litigant alleging fraud in his opponent, but is intended merely to ensure that the opponent or, as in this case, a witness, knows what is said against him and has an adequate opportunity of dealing with it. Indeed, as both Lord Hope in *Three Rivers* and Millett LJ, as he then was, in *Armitage v Nurse* said, it is not necessary to use the words 'fraud' or 'dishonest' as long as what is meant is clear. We are of the view that the passages from the statement of case which we have set out above make it quite clear what was alleged against Tricor, and Mr Bridge was unable to point us to any allegation, whether in relation to a particular fact or in relation to the conclusion to be drawn, which could have undermined that clarity. Accordingly we reject this ground of appeal.

37. We agree too with Mr Benson that there is nothing in *Three Rivers* which supports the proposition that every possible innocent explanation must be eliminated. But even if there were, we do not think the argument takes Mr Bridge very far. The F-tT had well in mind the need to make findings as to whether Tricor knew, or ought to have known, that their transactions were connected with fraud. In particular, in connection with HMRC's alternative case that Tricor ought to have known of the connection with fraud, the F-tT

were fully conscious that Moses LJ had said in *Mobilx* that it was necessary to decide whether 'the only reasonable explanation for the transaction in which [the trader] was concerned was that it was connected with fraud'. It is in our view clear from the F-tT's decision, and in particular the passage we have set out above, that the F-tT had the relevant questions well in mind, and examined the evidence in detail and with care by reference to them. We should add that we are not persuaded that there is any substance in Mr Bridge's argument based on HMRC's action against Sunico. We agree with Mr Benson that nothing of significance can be read into the fact that Tricor was not referred to in HMRC's pleading, and it does not seem to us, from the manner in which Proudman J described the conspiracy, that what was alleged in that case was an acquisition fraud.

38. We have provided, at para 33 above, a brief description of Mr Benson's cross-examination of Mr Andrews at the resumed hearing. Perusal of the entire transcript shows, in our view, that it must have been abundantly clear to Mr Andrews that his credibility was being challenged, both generally and in respect of various details. It is also apparent from the transcript that he was given the opportunity of answering the propositions which were put to him, of either knowing or 'blind eye' participation in transactions connected to fraud, and that he attempted to answer them. We do not accept Mr Bridge's argument that every disputed point of detail must be put to a witness and that if it is not his evidence on it must be taken to be unchallenged, and correspondingly accepted by the tribunal. If that were so the length of the hearing of a case of this kind would be extended unnecessarily and tediously by questions putting essentially the same point repeatedly. It is enough that the witness should understand which parts of his evidence are challenged, and why, and that he has a proper opportunity of answering the challenge.

39. We see nothing in the transcript which supports Mr Bridge's argument that the cross-examination was inadequate in that it failed to meet the standard we have described. There is no evident reason to think that Mr Andrews did not fully understand what was being put to him, was taken by surprise or for any other reason was not given a fair opportunity of dealing with the allegations made against him. It is, rather, clear that he did not answer some of the questions put to him because he had no answer to offer. It is also, we think, pertinent to this argument that part of the purpose of the second hearing was to enable Mr Andrews to deal with matters which had been put to him at the first hearing but with which he could not deal because (as Tricor itself maintains) its case had not been adequately prepared: even Mr Bridge does not argue that the matters put to Mr Andrews at the resumed hearing had not been explored at the first. Accordingly, even if it is assumed in Tricor's favour that this line of attack falls within the grounds on which it has permission (and we incline to Mr Benson's position that it does not) we reject it.

40. The remainder of Tricor's challenge amounts to an attack on the F-tT's findings of fact. Mr Bridge acknowledged that to be the case, and he accepted that the hurdle he must surmount is high; indeed, he took us himself to the well-known line of authority beginning with *Edwards v Bairstow* [1956] AC 14. A recent and succinct explanation of the earlier authorities was provided by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114]:

> 'Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This

applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them.'

41. Against the background of that reminder it seems to us that Mr Bridge's challenge is bound to fail. It amounts, when properly analysed, to an argument that the F-tT drew incorrect inferences from the evidence, or from their own findings based upon that evidence, but it borrows heavily from the further argument, which we have already rejected, that every innocent explanation must be excluded. In essence, Mr Bridge's argument amounts to the proposition that because there could be an innocent explanation for Tricor's actions, it was not open to the F-tT to find either actual or imputed knowledge: in other words, unless innocent explanation was positively excluded, it must be assumed in Tricor's favour.

42. We cannot accept that proposition. The task before the F-tT, as before any fact-finding tribunal, was to determine where, on the balance of probabilities, the truth lay. As the extracts from their decision which we have set out show, the F-tT explained, and in some detail, why they had come to their conclusions, and in particular why they had rejected the explanations Tricor, or Mr Andrews, had offered of their entering into the relevant transactions. Mr Bridge has been able to demonstrate, putting it at its absolute highest, that another panel might have taken a different view—for example that the margins were unimportant, that the daybooks were consistent with genuine trading or that the details of the cancelled deal had truly escaped Mr Andrews's recollection—but that is not the test. The question for us, as for any appellate tribunal, is whether the findings were supported by the evidence before the fact-finding tribunal. We can see no proper basis on which we could conclude that the F-tT in this case came to a conclusion of fact which is susceptible of challenge. On the contrary, it seems to us quite clear from what we have seen that their finding of actual knowledge was right.

43. It follows that we do not need to address the alternative finding of imputed knowledge, but (agreeing with Mr Benson that alternative findings are not mutually incompatible, as Mr Bridge contended) it seems to us that it, too, would have been supported by the evidence had there been no finding of actual knowledge.

Disposition

44. The appeal is dismissed.

Hon Mr Justice Morgan

Judge Colin Bishopp

Upper Tribunal Judges

Date of release: 3 August 2016