Neutral Citation: **[2024] UKUT 382 (TCC)**

Case Number: UT/2023/000084

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

VAT – MTIC appeal – whether FTT erred on burden of proof – no – Edwards v Bairstow challenge to findings of fact – errors of law advanced either rejected or found to be immaterial – appeal dismissed

Heard on: 6 November 2024
Judgment date: 26 November 2024

Before

JUDGE SWAMI RAGHAVAN
JUDGE ANNE REDSTON

Between

BEIGEBELL LIMITED (NO. 2)

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Tim Brown, Counsel, instructed by Appleton Richardson & Co.

For the Respondents: James Puzey, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. The appellant ("**Beigebell**") appeals against a decision of the First-tier Tribunal ("**FTT**") published as *Beigebell Ltd (No. 2) v HMRC* [2023] UKFTT 363 (TC) ("**the FTT Decision**" or "**the Decision**"). The FTT held that Beigebell knew that certain purchases Beigebell made of memory cards and Samsung SSDs (solid state drives) from a supplier in August/September 2015 were connected to fraud under the test in *Kittel*[1]. The FTT accordingly dismissed Beigebell's appeal against HMRC's refusal to make repayments of input tax totalling £144,628.40 and upheld a notice of assessment of £3,646.78.

2. With the permission of the FTT, Beigebell raises various grounds of appeal; these focus on the circumstances under which Beigebell had entered into the above transactions. Beigebell's case was that the transactions had been pre-arranged by Ritesh Patel, a friend of Beigebell's directors, and that because the company with which Mr Patel was involved could not fulfil the transaction due to alleged sales channel restrictions, Beigebell had agreed to step in and buy from the seller and sell to the buyer already found by Mr Patel. The FTT had held there was no such pre-arranged deal or deals.

3. For the reasons set out below we reject each of the grounds of appeal. Although we identified two errors of law (see Grounds 2 and 5), neither was material to the FTT Decision such that it should be set aside. We therefore dismiss Beigebell's appeal.

FTT DECISION AND BACKGROUND

4. The FTT Decision followed a six day hearing[2]. It is detailed and runs to 282 paragraphs. In this section we provide a high-level overview of the Decision in order to put the grounds of appeal into context (paragraph references, unless otherwise stated at to those in the FTT Decision). We will refer to more of the detail of the Decision as appropriate when discussing the relevant ground.

5. Beigebell carries on business as a supplier of a range of merchandise. It supplied and continues to supply products such as USB sticks, stickers, bags, phablets, power banks, clothing, notebooks and mouse mats. Beigebell's directors and shareholders are Jack Orton and Marcus Griffiths ([33(2) and (3)]).

6. Between 1 September 2015 and 8 September 2015, Beigebell made six purchases of memory cards from a single supplier, Online Distribution Limited ("**ODL**") and sold these on in five deals to Hi View Trading SL ("**HVT**") (located in Spain). Each of those transactions was connected to a fraudulent defaulting trader or contra trader ([33(4)]).

7. As the FTT said at [28], a Tribunal deciding an appeal against a *Kittel* denial is required to consider the following four steps, see *Blue Sphere Global Ltd v HMRC* [2009] EWHC 1150 (Ch) at [29]:

(1) Was there a VAT loss?

(2) If so, did this loss result from a fraudulent evasion?

(3) If there was a fraudulent evasion, was the appellant's transaction that is the subject of the appeal connected with that evasion?

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[1] *Axel Kittel v Belgium State, Belgium State v Recolta Recyling SPRL* C- 439/04 & C0440/04

[2] It was a remitted hearing, following HMRC's successful appeal before the Upper Tribunal ("**UT**") against an earlier decision of the FTT in May 2019 published as *Beigebell Limited v HMRC* [2019] UKFTT 335 (TC). In its decision of 4 June 2020 (published as *HMRC v Beigebell Limited* [2020] UKUT 176 (TCC)) the UT remitted the appeal for re-hearing before a different FTT panel.

(4) If such a connection was established, did the appellant know or should it have known, that its purchases were connected with a fraudulent evasion of VAT?

8. The sole issue for the FTT in this case was the fourth: whether Beigebell knew the transactions were connected to fraud or ought to have known that they were so connected. It was not disputed that Mr Orton's state of knowledge was attributable to the company for the purposes of the *Kittel* test ([252]).

9. The Decision summarised the evidence of HMRC's two witnesses (the visiting officers responsible for Beigebell and for its supplier) and that of the appellant's four witnesses, Mr Orton, Mr Griffiths, Mr Patel and a Mr Worthington. The FTT went on to make detailed findings of fact regarding the transactions and the surrounding circumstances, including those relating to the invoices, communications and visits with the freight forwarder; subsequent MTIC assurance visits to Beigebell by HMRC, and Mr Orton's telephone enquiries as to whether goods were subject to reverse charges.

10. Beigebell's case was that Mr Patel had set up a deal for his employer to purchase from ODL and sell to HVT. According to Mr Patel, SanDisk (the brand of the memory cards) had called him to say the contract with his employer only allowed it to supply UK customers, and he could not therefore supply HVT in Spain with the SanDisk products. Mr Patel's evidence was that ODL could not sell directly to HVT due to "the channel model that exists and channel ethics" and "…they [had] to follow a Channel Model which [prevented] selling to End Users", see [96] and [115].

11. Drawing inferences from the lack of any deal documentation and noting various anomalies in Mr Patel's evidence, the FTT found as a fact that Mr Patel had not set up any deal in advance ([219] to [229]). The FTT also considered the channel model/ethics explanation to be "a fabrication", as it hinged on SanDisk being in the transaction chain, which it was not ([239]). The FTT's evaluation of the evidence, which is challenged on certain points in the grounds of appeal discussed below, included an assessment that Mr Orton's evidence was neither credible nor reliable ([251]) and that Mr Griffith's evidence while credible, was unreliable in certain respects ([242] to [244]).

12. The FTT noted (at [261]) the various factors which pointed to transactions being contrived. These included variously: their departure from the appellant's normal trade practice and pattern, the lack of contracts, anomalies regards HVT's terms and conditions, the currency of the deals being in Euros (although ODL and Beigebell were UK based), the length of the supply chains, the lack of insurance cover, Beigebell's higher mark-up not being commercial, the fact HVT was prepared to pay upfront before dispatch of goods even though it had not traded with Beigebell before, issues in relation to inspections and deliveries, the fact that the goods were shipped direct to Poland (and not to Spain), and Mr Orton not asking for evidence of delivery. The FTT also noted (at [264]) Beigebell's role as broker and the improbability that such orchestrated transactions would involve an unknowing party.

13. The FTT concluded from its consideration of "the totality of the circumstantial evidence" that there was "sufficient weight from the cumulative effect of the evidence" that Mr Orton and therefore Beigebell had actual knowledge the transactions were connected to fraud ([270]). It went on to conclude that if he did not have actual knowledge, he had "blind-eye" knowledge of the transactions' connection to fraud ([275]).

14. On the alternative "should have known" test, the FTT noted the lack of commercial reality, including that Mr Orton ought to have questioned why ODL was not buying from HVT directly ([278]). The FTT considered "the orchestration of the deal chains was at such a level that Mr Orton should have known that the "only reasonable explanation" was that the transactions were connected with fraud ([280]).

GROUNDS OF APPEAL

15. We address in turn the grounds Beigebell confirmed it was pursing before us.

Ground 1 – burden of proof

16. Under this ground Beigebell argues that the FTT misstated and misapplied the burden of proof. There was no dispute that legal burden of proof to show actual knowledge or means of knowledge rests on HMRC, but that the evidential burden may shift.

17. Mr Brown, who appeared for Beigebell, submitted that [204] and [205] of the FTT Decision show where it went wrong. There the FTT said (emphasis added):

> "204. In relation to the *Blue Sphere* test, what HMRC are required to prove is that there is a prima facie case for the four elements, and if the appellant advances a positive case to the contrary, the burden is then on the appellant to adduce evidence that supports its positive case. Beigebell is making a positive case that the 'channel model' was the credible explanation and the reasonable explanation for the appellant becoming involved in the fraudulent transactions. To that end, the appellant bears the burden to prove its positive case to the requisite standard.
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> 205. The need for the appellant to prove its positive case is made clear by the Upper Tribunal in *Fairford* where it is held that once an issue has been raised by HMRC based on some obtainable facts, an appellant taxpayer is required to defend its position, or risk an adverse finding against it…"

18. Mr Brown submitted the FTT erred in law when it said that the appellant had the burden of proving its positive case that it had a credible explanation (the "channel model"), whereas the burden lay on HMRC to prove the only reasonable explanation for the transaction was that it was connected to fraud.

19. We disagree with Mr Brown that there is anything in the above paragraphs which shows the FTT mis-stated or misunderstood where the legal burden lay. When it said that "the appellant bears the burden to prove its positive case to the requisite standard" it was plainly referring to the *evidential* burden: see the reference at [204] to HMRC being required to prove its prima facie case. This is also clear from the FTT's earlier reference (at [203]) to the burden of proof of all four *Blue Sphere* elements resting on HMRC.

20. Further reinforcement for the FTT not having made the alleged error is found in the subsequent analysis. In its discussion of whether there was actual knowledge, the FTT explained at [253]:

> "As set out above, we reject the positive case of innocence being advanced for the appellant. The issue turns on the evidence of Mr Orton and his explanation for the circumstances of these transactions. To determine the appeal, it remains to be considered whether the respondents have discharged the burden that the appellant had actual or constructive knowledge that the transactions in question were connected with fraud."

21. This highlights that the FTT drew a distinction in its analysis between its conclusion in respect of the appellant's "positive case of innocence" on the one hand and its determination of the appeal on the other. As Mr Puzey, who appeared for HMRC, pointed out, the FTT's explanation that "it remains to be considered" shows that the FTT did not hold that a rejection of Mr Orton's explanation determined the appeal, but that what determined the appeal was whether HMRC had discharged their burden.

22. As regards actual knowledge. the FTT stated the correct position explicitly at [270]:

> "After careful consideration of the total of the circumstantial evidence, we conclude that there is sufficient weight from the cumulative effect of the evidence that HMRC have met the burden of proof that Mr Orton had actual knowledge…"

23. Mr Puzey also rightly drew our attention to the FTT's early discussion of the approach to finding actual knowledge (at [255]) which explained that the tribunal hearing the case "will be entitled to rely on inferences drawn from the primary facts established by HMRC…" (emphasis added). The FTT's conclusion in the alternative on means of knowledge (at [280]) similarly concluded that HMRC had "met the burden" in relation to the "only reasonable explanation" standard.

24. From the above it is clear the FTT's statements about the burden being on Beigebell were simply about the evidential burden; it fully appreciated that the burden to show actual knowledge or means of knowledge rested on HMRC, and there was no misapplication by the FTT of that burden.

25. We therefore reject this ground of appeal.

Ground 2 - the FTT erred in law when making a finding that Mr Orton was "neither credible nor reliable as a witness" by taking account of evidence it had earlier excluded

26. This ground, as argued by Mr Brown, focusses on the FTT's reference in [249] to a witness statement and exhibit (both of which the FTT had previously ruled to be inadmissible) to make a point adverse to the appellant.

27. The background is as follows. The appellant applied on 12 January 2022 (around two months before the hearing) to admit a further witness statement from Mr Orton. The relevant topic concerned Mr Orton's phone call enquiries to HMRC as to whether the memory cards were subject to reverse charge VAT. As the FTT explained at [97], the reverse charge was a legislative measure introduced to counter MTIC fraud; if it applied, it was the customer instead of the seller who accounted for output VAT to HMRC.

28. Mr Orton attached exhibits to this witness statement, the first of which was an email to Beigebell from a company called Servium that included text regarding the reverse charge. The FTT summarised Mr Orton's further evidence (at [18(1)]) as being that:

> "The reverse charge enquiry to HMRC in July 2015 was in relation to a different customer unrelated to the deals in question. Exhibit 1 in support thereof is a copy of email communications on the subject of 'Reverse Charge VAT', on the face of which were from 4 June 2015. The point being made is that 'the Reverse Charge request was made on an order for Phablets supplied to a company called Servium', which has the same office address as Beigebell at Trident Court, Chessington, and unrelated to the deal chains in question as suggested by HMRC."

29. The FTT rejected the appellant's application to admit Mr Orton's further witness statement on the basis of the length of time since 2015, and because the counterparties to the e-mails were not called as witnesses. The FTT went on to say this at [21(3)]:

> "To refuse the application means that Mr Orton would not be able to speak to the additional email exhibits, but there is no embargo against any reference being made in his oral evidence, and the probative value of any statements so made, so far as relevant to the substantive issue, would be assessed in the context of the overall credibility and reliability of Mr Orton as a witness."

30. Beigebell's ground takes particular issue with the criticism the FTT made towards the end of [249]. This paragraph was in the part of the Decision discussing the inconsistencies and

other issues with Mr Orton's evidence; that part concluded with the FTT deciding that Mr Orton was neither credible nor reliable. The paragraph read:

> "The transcript of the second telephone call to HMRC by Orton to enquire whether SD memory cards come under the reverse charge is clear evidence that Orton did make the enquiry at the relevant time specifically in relation to the product that was concerned in the fraudulent transactions. In the application to lodge further documents for the re-hearing, Mr Orton sought to refer to his enquiry phone call on the reverse charge relied upon by HMRC as being in relation to a different customer Servium, and exhibited the emails with dates from June 2015 (§18(1)). The application was made before the transcript of the two phone calls was produced by HMRC, since only Officer Redman's [sic] summary of the first phone call was included in the 2019 Hearing Bundle. It is disturbing to note that in the appellant's application, part of Mr Orton's additional evidence was in fact to assert that the enquiry on reverse charge was for a different supply, and totally unrelated to the transactions on the SD memory cards."

31. In his oral submissions, Mr Brown clarified that this ground of appeal contained two points.

(1) it was wrong in principle to refer in [249] to evidence that had been excluded; and

(2) the FTT was wrong to consider that the purpose of Mr Orton's new evidence was to say that the phone call related to another company, as opposed to being related to the relevant transactions.

The reference to excluded evidence

32. We agree with Mr Brown that it would be wrong as matter of principle for the FTT to rely on evidence which it had earlier ruled should not be admitted: that evidence, by definition, would not be before the tribunal.

33. But, on closer analysis, that is not what the FTT did. It did not rely on the content of the evidence. Rather its criticism of Mr Orton flowed from it attributing *a purpose* to Mr Orton's application to adduce the evidence. However, this too was an error of law. Before concluding this point against the appellant, the FTT should as a matter of fairness have given Mr Orton the opportunity to explain the purpose of his application, and not simply inferred it.

34. It is true, as Mr Puzey said, that the FTT Decision records that Mr Orton could nevertheless give further *oral* evidence regarding the e-mail exhibits (see [21(3)]), and we have assumed that this concession was given orally at the time of the hearing. However, it does not address our concerns, because:

(1) it is unclear how a witness can be allowed to speak to evidence which has been ruled inadmissible; and

(2) we cannot see how the concession would have alerted the appellant to the need to clarify, through asking Mr Orton further questions as to (a) his *purpose* in relying on the e-mail in the exhibit and (b) how that sat with the documentary evidence of the phone-calls on 25 August 2015. Instead, a person whose application to adduce further evidence had been refused would reasonably assume that the failed application was not an issue they needed to address in their further oral evidence.

35. Having decided that the FTT's reliance on the purpose it attributed to Mr Orton without giving the appellant an opportunity to explain was an error of law, we went on to consider whether we should exercise our discretion under s12(2)(a) Tribunal Courts and Enforcement Act 2007 to set aside the FTT Decision. That in turn raises the issue of whether the error is

material to the decision. For the error to be considered material, it is enough if we consider the decision *might* have been different if the error were corrected[3].

36. Beigebell's case is that the error was material. Mr Brown submitted that it clearly had an effect on the FTT's finding that Mr Orton was neither credible nor reliable, and he highlighted the FTT's description of Mr Orton's purpose in making the application as "disturbing". Mr Puzey by contrast depicts that statement as:

> "essentially a passing comment…of minor importance compared to the remainder of the findings on Mr Orton's credibility and it cannot be said to be determinative or even influential in the conclusion."

37. We consider Mr Puzey's characterisation the better one. At [245] the FTT said that there were numerous inconsistencies" in Mr Orton's evidence, and then set out at (1) to (7) "one cohort" of those inconsistencies which "serv[ed] well for illustration". Those illustrative examples included the differences between Mr Orton's evidence and his earlier exchanges with HMRC; his lack of knowledge as to Mr Patel's employer, and his failure to ask for copies of the deal documentation. The FTT also noted Mr Orton's changing accounts as to the insurance position for the goods ([246]); the lack of documentation in relation to Beigebell's contract arrangements with the freight forwarder; contradictions in his evidence on whether a deal or deals had been set up by Mr Patel ([248]), and the fact the e-mail communications with the trading partners and freight forwarder indicated that Mr Orton "was firmly in the driving seat moving the transactions forward; he was not a passenger being carried along in these deals allegedly already set up by [Mr] Patel." The FTT's criticism at [249] came some way after this list of numerous inconsistencies.

38. Mr Brown also referred us to [267], where, in relation to its understanding that Mr Orton was trying to dissociate his reverse charge enquiry from the fraudulent transactions, the FTT said:

> "As Mr Puzey submits, it goes to the heart of Mr Orton's credibility whether such an assertion of complete ignorance of MTIC fraud is credible."

39. However, read together with the earlier section dealing with Mr Orton's evidence ([245] to [251]) where, as we have said, the point about his purpose appeared some way down the catalogue of inconsistencies as an additional reason, we do not think the point was central in the way [267] appears to make out.

40. We are confident that if the FTT's error in making the adverse comment it did at [249] were corrected (by removing it), the outcome would be the same. Thus, although there was an error of law, it was not one that was material to the outcome: we have no doubt the FTT would have reached the same conclusion on Mr Orton's credibility and reliability without taking into account the calls to the helpline. This is therefore not a case where the FTT might have reached another decision on that issue.

Misunderstanding the evidence

41. In his oral submissions, Mr Brown also said that the FTT had misunderstood the evidence, and had been wrong to find that Mr Orton was attempting to give incorrect evidence because he did not know that transcripts of the calls to HMRC's helpline existed. He said (and Mr Puzey confirmed) that:

[3] See Court of Appeal's decision in *Degorce v HMRC* [2017] EWCA Civ 1427 at [95]

(1) transcripts of Mr Orton's calls had been provided to the original FTT panel at the time of the May 2019 hearing, but had been filed and served too late to be included in the Bundle;

(2) the same incomplete Bundle had been made available to the FTT at the time of the rehearing; and

(3) it was not until the second day of that hearing that their absence was noted and they were provided.

42. We accept that it is clear from paragraph [249] that the FTT had not realised the transcripts had previously been provided to both parties; instead, it thought that they were new evidence which Mr Orton was seeing for the first time on the second day of the hearing, after he had filed and served his further witness statement.

43. Although the points set out above were not in dispute before us, Mr Puzey said this was not a ground on which permission to appeal was granted, and Mr Brown accepted this was the case. But in any event that matters not, because in the light of the numerous other reasons justifying the FTT's finding on credibility and reliability, any misunderstanding as to Mr Orton's purpose would not be material.

44. We therefore reject this ground of appeal.

Ground 3 - the FTT Did not explain why Mr Orton had awareness of MTIC fraud just because he enquired to HMRC's enquiry line about reverse charge on SD cards.

45. Under this ground Beigebell argues that the FTT gave insufficient reasons for its finding that Mr Orton had an awareness of MTIC fraud because he had called HMRC's enquiry line to ask about the reverse charge on SD cards.

46. The FTT Decision contained a section entitled "MTIC awareness and the reverse charge enquiry" ([265] to [268]). As explained above, the FTT rejected what it saw as Mr Orton's attempt to dissociate his reverse charge enquiry from the goods in the fraudulent chains. In relation to awareness of MTIC fraud it said:

> "267. We do not find Mr Orton's assertion of ignorance of MTIC fraud credible. The fact that Mr Orton had the foresight to make the reverse charge enquiry phone call on SD cards is indicative of awareness of MTIC fraud, although we do not equate an awareness of MTIC fraud as synonymous with actual knowledge that the transactions being undertaken were connected with MTIC fraud.
>
> 268. What we find from the reverse charge enquiry specifically on SD cards is that Mr Orton had awareness of MTIC fraud. We also find that the enquiry phone call demonstrates Mr Orton's acumen as a businessman, competent and with foresight, able to take timely, pre-emptive, and proactive measures as required by a situation if he so applies his mind to do so."

47. Mr Brown criticised the FTT's lack of reasoning. He submitted that the FTT had not explained why it followed from Mr Orton's reverse charge enquiry that he was aware of MTIC fraud, saying that it was clear from the phone call transcripts that neither Mr Orton nor HMRC had mentioned MTIC fraud during those conversations.

48. The relevant legal principles concerning adequacy of reasoning were not in dispute. Mr Brown referred to the Court of Appeal's decisions in *English v Emery Reimbold & Strick Ltd* [2002] EWCA 605 at [15]-[19] and *Weymont v Place* [2015] EWCA Civ 289 at [4]–[6]. He correctly points out there is a duty to give reasons, and that those reasons must be adequate and of sufficient detail to explain the decision that has been arrived at in the particular circumstances of the case.

49. Mr Puzey disagrees that there was any inadequacy in the circumstances of this case which amounted to an error of law. He pointed out the FTT had referred elsewhere in its Decision to other material regarding Mr Orton's awareness of a public notice on VAT MTIC fraud, and said that this explained the FTT's finding. However he rightly accepted that the FTT did not refer to that other material in the context of paragraphs [265]-[267].

50. Mr Puzey's better point was that the FTT had decided the appeal against the appellant on the basis that Mr Orton had actual knowledge of connection to fraud, whereas the issue of Mr Orton's awareness was primarily relevant to the "should have known" test, and/or whether there was blind-eye knowledge, and those were matters the FTT had addressed only in the alternative.

51. In both *English v Emery* and *Weymont* it is made clear the focus of adequacy is on the critical reasons which determined the parties' substantive rights. In the former, the Court of Appeal explained that the judge was required to "identify and record those matters which were critical" to the judge's decision. In *Weymont*, the Court of Appeal said at [6]:

> "….The process of adjudication involves the identification and determination of relevant issues. But within those bounds **the parties are entitled to have explained to them how the judge has determined their substantive rights** and, for that purpose, the judge is required to produce a fully reasoned judgment which does so: see *English v Emery Reimbold & Strick Ltd.* [2002] EWCA Civ 605." (emphasis added)

52. Viewed in this context, there is no inadequacy of reasoning which amounts to an error of law. The critical question in the case and the reason why Beigebell's input tax was denied was a finding Beigebell had actual knowledge. This finding was adequately explained by the FTT. Beigebell was not left in any doubt why it lost on that fundamental point.

53. We therefore reject this ground of appeal.

Ground 4 – The FTT was wrong to conclude that Mr Patel had not arranged the transactions between the Appellant's supplier and customer

54. The FTT rejected Beigebell's case on the "channel model", finding at [229] that Mr Patel had not arranged the transactions between Beigebell's supplier and customer. Ground 4 is that this finding was one it was not entitled to reach on the evidence, and that in accordance with the principles set out in *Edwards v Bairstow* [1956] AC 14, it was therefore wrong in law.

55. Mr Brown points to the FTT's reliance on e-mails of 19 August 2015, where Mr Patel introduced Mr Orton to Matt Jones at the supplier; he submits that (a) the FTT then failed to take the subsequent e-mails into account, and (b) had it done so, the only conclusion that could be drawn was that Mr Patel had set up the deals.

56. The two e-mails sent on 19 August 2015 were:

(1) from Mr Orton to Mr Jones (with the previous email attached) and copied in Mr Patel. The subject was "Spain", and Mr Orton said:

> "Good to e-meet you, if you want to give me a call on [*mobile number*] we can have a chat about any potential business. Any time is fine"; and

(2) from Javier Saenz at HVT to Mr Orton stating:

> "We are Hi View Trading SL. We are interested in open [sic] an account with you."

57. Further e-mails were:

(1) From Mr Orton on 26 August 2015 to Mr Saenz at HVT stating:

> "Please find the pro-forma invoices attached. After speaking to Matt [Jones] he tells me you are likely to pay for the 256GB ones first then the 512GB later, this is fine. We will ship goods once payment is received."

(2) An email from Mr Orton to Mr Jones on the same day, which stated:

> "Hi Matt, I've sent Javier the pro-forma invoices he requested at about 15:15, please find our purchase order attached."

(3) An email on 27 August 2015 from Mr Orton to Mr Jones stating:

> "Hi Matt, Javier just emailed me, he couldn't get the payment out today as he ran out of time, he is going to make it first thing tomorrow morning."

58. Mr Brown submits that the only logical conclusion to be drawn from those email exchanges was that Mr Jones and Mr Saenz already knew each other and had traded before. In oral submissions, Mr Brown explained that the emails were significant because they showed that this was not the normal sort of commercial transaction, but was instead consistent with the deal having already been set up by Mr Patel. However, he went on to concede that the emails were also consistent with Mr Patel simply introducing the supplier to Beigebell.

59. As explained by the Court of Appeal in *Georgiou (trading as Mario's Chippery) v CCE* [1996] STC 463 at p 476, the question for us as the appellate tribunal is whether there was:

> "…evidence before the tribunal which was sufficient to support the finding made? In other words, was the finding one which the tribunal was entitled to make? Clearly if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled."

60. This was clearly not a case where there was *no* evidence, so the issue is whether, looking at the totality of evidence before the FTT, the evidence was insufficient to support the FTT's finding, or whether it was "to the contrary effect".

61. In our view, the challenged finding was clearly sustainable in view of the totality of the evidence before the FTT, which was discussed in detail at [220] to [251]. For the reasons the FTT explained at [219] onwards, there was a conspicuous absence of documentation on the set up of the deal or deals. There were also a number of anomalies in Mr Patel's evidence (see [228]) including the currency of the deals (Mr Patel's evidence was that it was in US dollars whereas it was Euros), and the FTT's rejection of his evidence that he had been called by the supplier SanDisk to say the contract of the company he was involved had a contract that was to supply only UK customers, when SanDisk did not appear in the supply chains. As Mr Puzey submitted, it did not follow from the fact that Mr Orton was talking to both the supplier and customer that Mr Patel had set the deal up. In summary, Beigebell's challenge, based on the above sequence of e-mails, falls far short of establishing that the FTT was not entitled to reach the finding it did regarding Mr Patel not having set up the deals.

62. We therefore reject this ground of appeal.

Ground 5 – rejection of Mr Griffiths evidence

63. Under this ground it is argued that the FTT was wrong to reject an important piece of evidence given by Mr Griffiths about the phone calls. This was as follows:

> "1. 18th August 2015 I was out on the road meeting two of our customers, I received a phone call from Jack. He talked through a possible sale that our friend Ritesh had called him about earlier that day. Due to the high turnover, I questioned Jack quite vehemently over his take on its legitimacy and overall security. Jack gave me some confidence by detailing his thoughts, and also Ritesh's affirmation and assurances.

> 2. 18th August – 19th August At various times Jack and I went go back and forth over the pros and cons of the potential sale. We eventually came to a mutual agreement to proceed, largely due he faith we had in our friend of 20 years, Ritesh.
>
> 3. At some point over this time, I don't recall the exact date(s), I also called Ritesh to ask him myself about the sale. The specific details of the call(s) I cannot recollect, however I do know that after the call(s) I felt reassured enough to proceed."

64. The FTT said at [244]:

> "Finally, we do not find Mr Griffiths' evidence reliable to the extent that he sought to assert that he had spoken to Patel on a few occasions to reassure himself. He was unable to give any particulars as to what he tried to ascertain with Patel to reassure himself, and his evidence in this respect would seem to be at odds with what HMRC were given to understand during the first two visits as highlighted in Officer Redman's [sic] witness statement (see §174(1)[4]).

65. Mr Brown made two challenges to the findings in this passage. He first noted that the FTT had stated at [242] that it had no issue with Mr Griffiths' credibility, and went on to submit that it was therefore wrong of the FTT to find at [244] that his evidence was unreliable.

66. We agree with Mr Brown that courts and tribunals normally use the term "credibility" in the way described by Lord Pearce in *Onassis v Vergottis* [1968] 2 Lloyds Rep 403 at p 431:

> "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? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others?"

67. As commonly understood, therefore, honesty is one of several elements falling within the overall umbrella term of "credibility", so a finding that a witness is "credible" includes a finding that he is both honest and reliable.

68. However, in *Phipson on Evidence* at 45-17, the learned authors say (our emphasis):

> "It is <u>often hard to distinguish</u> between the credibility and reliability of witnesses. That said where there are conflicting accounts of witnesses, the <u>issue of credibility in the sense of honesty</u> may need to be confronted."

69. An example of this narrower usage can be seen in *Laing O'Rourke v HMRC* [2021] UKFTT 211(TC), where Judge Bowler said at [34]-[35]:

> "In summary, I found Mr Waller to be a credible witness: he did not dissemble, attempt to obfuscate, or otherwise give any indication of dishonesty [but] [s]ome of the statements in his Witness Statement are inaccurate."

70. Reading the FTT's judgment as a whole, it seems to us that when the FTT said at [242] that it "had no issue with Mr Griffiths' credibility as a witness" it was considering "the issue of credibility in the sense of honesty", and taking that approach it found Mr Griffiths to be an honest witness, ie one who was not seeking to mislead or deliberately give partial or incorrect evidence. We came to that conclusion because the FTT say only two paragraphs later that it

[4] This cross-reference should be to [175(1)]

did not find parts of his evidence to be "reliable". It seems to us very unlikely that the FTT would have made that finding had it just used the term "credibility" as encompassing reliability.

71. Plainly, evidence given by an honest witness can be found to be inaccurate and so unreliable, for instance because of the fallibility of the witness's memory and/or its inconsistency with contemporaneous documentary evidence.

72. For the above reason, the FTT made no error of law in finding that Mr Griffiths was both credible (in the sense of honest) and yet not reliable.

73. Mr Brown also challenged the FTT's finding that Mr Griffiths was not *reliable*. He points out that Mr Griffiths was being asked to recall the specifics of a telephone conversation or conversations that had occurred eight years previously.

74. We share some of the appellant's reservations about the FTTs' reasoning here. Mr Griffiths had given honest evidence that (a) the conversations had taken place, and (b) he drew comfort from them. The FTT rejected that evidence as unreliable because Mr Griffiths could not remember the details of the calls. However, it does not necessarily follow from the fact that Mr Griffiths could not remember the detail, that he had given unreliable evidence about the calls having taken place, or about the comfort he drew from them.

75. The FTT did however provide further justification for its conclusion on reliability: it referred to HMRC Officer Rehman's visit report, which had noted that Mr Orton did not mention that Mr Griffiths had looked into the deal. That further justification was not challenged by the appellant.

76. We also rejected Mr Brown's depiction of Mr Griffiths' evidence as "an important piece of corroborative evidence" in support of the appellant's case that Mr Patel had already set up the deals. The fact that conversations took place about a "possible" or "potential" sale, and that Mr Griffiths was reassured by those conversations was equally consistent with Mr Patel having simply introduced ODL and HVT to Beigebell, as the FTT found was the position. Thus, although the FTT's rejection of Mr Griffiths' evidence as being unreliable was an error of law, it was not a material error that warrants setting aside the FTT Decision.

77. We therefore dismiss this ground of appeal.

OTHER SUBMISSIONS

78. For the sake of completeness we also considered whether the combination of any error under Grounds 2 and 4 would, taken together, be material to the Decision, but we do not consider that they were. Even if we were to correct the reverse charge evidence error, and factor back in Mr Griffith's evidence (as far as it went), we are confident the FTT's finding that Mr Orton was neither credible nor reliable was one it would still reach, in view of the other inconsistencies identified and relied on in the judgment.

79. In its notice of appeal Beigebell had also sought to challenge a number of other points of fact in the FTT Decision, but these were not mentioned in Mr Brown's skeleton argument. He confirmed at the hearing that he was not pursuing those points, and we have therefore not addressed them.

80. Mr Brown's skeleton also included a challenge to the FTT's conclusion at [231] that the channel model explanation was irrelevant, but this point too was not pursued at the hearing and have not considered it.

CONCLUSION

81. We reject each of the grounds pursued. Beigebell's appeal is accordingly dismissed.

JUDGE SWAMI RAGHAVAN
JUDGE ANNE REDSTON

Release date: 28 November 2024