Neutral Citation Number: [2019] EWCA Civ 2176

Case No: A2/2019/0411

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
His Honour Judge Jarman QC
E90CF053

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/12/2019

Before:

LORD JUSTICE LEWISON
LORD JUSTICE NEWEY
and
LADY JUSTICE ASPLIN

- -

Between:

The Commissioners for Her Majesty's Revenue and Customs	**Appellants**
- and -	
Ian Charles, trading as Boston Computer Group Europe	**Respondent**

- -
- -

Mr Joshua Carey (instructed by **The Solicitor's Office and Legal Service**) for the **Appellants**
Mr Tim Brown (instructed by **Hugh James Solicitors**) for the **Respondent**

Hearing date: 26 November 2019

- -

Approved Judgment

Lady Justice Asplin:

1. This appeal raises the issue of whether the Commissioners for Her Majesty's Revenue and Customs ("HMRC") can owe a common law duty of care to verify the factual accuracy of evidence relied upon in proceedings in the Tax tribunals. It arises in the context of a claim for damages brought by the Respondent in which it was alleged that HMRC was liable for breach of contract, breach of statutory duty and/or negligence in relation to matters arising from an HMRC investigation into what has become known as VAT "MTIC" fraud, and the conduct of subsequent litigation.

2. It results, in particular, from the omission of the name of a supplier from one of the chains of supply recorded in a report compiled by HMRC officers when investigating VAT fraud (the "Visit Report") which was subsequently relied upon by the Respondent to this appeal in the First-tier Tribunal (Tax Chamber) (the "FTT") in support of his statutory appeal against HMRC's disallowance of input tax for the purposes of VAT in the Respondent's VAT quarter to September 2006 and, subsequently, in his appeal to the Upper Tribunal (Tax and Chancery Chamber) (the "UT") and his application for permission to appeal to the Court of Appeal.

3. By an order dated 27 February 2019, HHJ Jarman QC struck out the claims made by the Respondent, Mr Ian Charles, trading as Boston Computer Group Europe ("Mr Charles") against HMRC in contract and breach of statutory duty. However, he declined to do so in relation to the claim based upon a duty of care in negligence. The judge held that on the unusual facts of this case there was a realistic prospect of establishing a narrow duty of care on the part of HMRC, once Mr Charles' reliance on the omission from the Visit Report became clear, to contact the visiting officers and to verify the Visit Report and, if necessary, to rectify it, particularly when that rectification would assist HMRC in carrying out its general duties and would have supported its case against Mr Charles. It is the dismissal of the application to strike out the claim based in negligence which is the subject of this appeal.

4. The court, having heard oral argument, informed the parties that this appeal would be allowed with written reasons to follow. My reasons for allowing the appeal are set out below.

Background

5. In order to understand the issue in relation to the alleged duty of care, it is necessary to put the appeal in context. In 2006, HMRC began investigating a number of electronic goods businesses in order to tackle widespread VAT fraud, known as "*Kittel"* or MTIC fraud. As part of their investigations, on 17 June 2006 two HMRC officers made an unannounced visit to the premises of a freight forwarder, Tech Freight Limited. They took copies of various documents and were present at the premises for fifteen minutes. Subsequently, they produced the Visit Report which was based upon the documents which they had copied at the premises. They identified six chains of supply in respect of electronic goods or components. Each supply chain was set out in the Visit Report. The name of E-Management Solution Europe Ltd ("EMS") appeared in all but one of the supply chains. The chain in which the name of EMS did not appear was concerned with the sale of 3000 Apple Ipod Nanos 4GB (the "Ipods"). EMS was subsequently identified as a fraudulent trader for the purposes of VAT. It is

now accepted that the omission of EMS from the chain of supply concerning the Ipods was a mistake.

6. As a result of the investigations, HMRC disallowed input tax on seven purchases contained in Mr Charles' VAT return for the VAT quarter ending on 30 September 2006. Mr Charles appealed HMRC's decision to the FTT. HMRC's pleaded case was that Mr Charles' purchases, including the transaction relating to the Ipods, were connected with the fraudulent evasion of VAT, that the tax loss occurred either in a direct chain of transactions or a parallel chain and that Mr Charles knew or ought to have known of it, which he denied. It is accepted that on that appeal the onus was on HMRC to prove the connection between the transactions and the fraud and to prove that Mr Charles knew or ought to have known of it.

7. One of the issues raised by Mr Charles before the FTT was that HMRC had produced no transaction documentation to support a purchase or sale by EMS in the particular chain of supply relating to the Ipods. He relied upon the Visit Report which he produced and exhibited to a witness statement. His case in this regard was that a connection with fraudulent evasion of VAT could not be proved and as a result HMRC could not prove that he had the requisite knowledge in relation to the purchase and sale of the Ipods.

8. The FTT heard evidence and submissions over ten days with closing submissions at a later date. There were twenty-five volumes of witness statements and documents and the FTT heard oral evidence from Mr Charles and a number of HMRC officers concerned with the transactions, including those in which EMS was involved. Further written evidence was filed, relating, amongst other things, to EMS which was identified as a defaulter for the purposes of the appeal, which went unchallenged. The FTT also had the benefit of eight volumes of authorities which included decisions of the FTT in relation to Sceptre Services Ltd and Coracle Ventures Ltd. Sceptre Services Ltd was named in the supply chain relating to the Ipods in the Visit Report.

9. In a decision dated 12 June 2012, the citation of which is [2014] UKFTT 481 (TC), the FTT concluded in summary that: the Ipods had been imported into the UK and sold and bought in a chain of substantially contemporaneous transactions, ending with their purchase by Mr Charles from Sceptre Services Limited and his export of them; that EMS was part of that chain of supply; that EMS had fraudulently evaded the VAT payable by it at its stage of the chain; and that Mr Charles should have known that his purchase was connected with VAT fraud. Accordingly, the FTT dismissed Mr Charles' appeal against HMRC's refusal to allow the deduction of input VAT in respect of the purchase of the Ipods from Sceptre Services Limited.

10. In reaching its findings the FTT stated expressly that it relied upon all of the oral and documentary evidence before it and put only secondary reliance upon the findings of the tribunal in other appeals such as that in the *Sceptre* case, save where there was clear overlap in the evidence presented in those appeals and the one before it: see [64] of the FTT judgment. In finding that EMS was in the supply chain in relation to the Ipods, the FTT relied upon documentation which revealed back to back transactions in quick succession on 8 August 2006 whilst the goods remained in the custody of freight forwarders. The documentation revealed release of the Ipods to and by EMS, Connect Communications Ltd ("Connect") and Sceptre, amongst others. See [67] of

the FTT judgment. In addition to Sceptre, Connect was named in the supply chain in respect of the Ipods in the Visit Report.

11. The FTT's decision in relation to the Ipod transaction was appealed to the UT on limited grounds, which allowed Mr Charles to challenge the FTT's finding that there was a connection between his purchase and fraudulent evasion of VAT elsewhere in the chain of supply; and its further finding, based on its conclusion that such a connection had been established, that Mr Charles should have known of that connection. Mr Charles' case before the UT, based upon the Visit Report, was that the facts found by the FTT were not supported by the evidence and that the application of the "*Kittel*" principles to his purchase of the Ipods was, accordingly, unwarranted. He argued, therefore, that the FTT had made an error of law in reaching a conclusion on the facts to which no person acting judicially, and properly instructed on the relevant law, could have come to on the evidence before it.

12. In its decision dated 24 July 2014, the citation for which is [2014] UKUT 0328 (TCC), the UT re-examined the evidence in relation to the Ipod supply chain in detail and held that the FTT was entitled to find as it did. It did so having criticised the FTT for failing to explain with greater particularity why it preferred the explanation of the supply chain including EMS to the other which excluded it and described its failure to mention the Visit Report as "the most serious failing" in its approach. See [31] and [38] of the UT decision. In any event, the UT held that: it was satisfied that the evidence, leaving the Visit Report aside, was sufficient for the FTT properly to have concluded that the supply chain in relation to the Ipods included EMS; the Visit Report did not undermine that conclusion; and that it was more probable than not that the Visit Report was inaccurate about the participation of EMS. See [44] of the UT judgment.

13. Permission to appeal to the Court of Appeal was refused by Briggs LJ (as he then was) on 15 July 2015, having heard the oral renewal of Mr Charles' application. In his judgment, the citation of which is [2015] EWCA Civ 750, Briggs LJ noted, amongst other things, that: the analysis of the Sceptre transaction had formed part of a trial lasting more than two weeks before the FTT; the evidence relied upon by the FTT "included surviving documents recording the transaction, written reports and oral evidence from Revenue offices and very lengthy cross examination of Mr Charles, and also, but only by way of corroboration, the earlier written decisions of the FTT in appeals by Sceptre and Coracle against VAT disallowance in relation to different transactions"; and that the UT had conducted a very detailed re-examination of the evidence about Sceptre, in order to ascertain whether there had been evidence before the FTT from which it could properly have concluded that Mr Charles' part in it was connected with VAT Fraud and that he should have been aware of the connection. See his judgment at [3] and [5]. As the judge noted at [9] of his judgment, Briggs LJ also stated at [15] of his judgment that:

> ". . . As the UT itself acknowledged, the evidence taken as a whole could be said to have elements which supported both sides' cases, but it could not be said that there was no evidence from which the FtT's conclusion that there was a link with EMS could properly be based."

14. Thereafter, amongst other things, Mr Charles made a complaint to HMRC about the omission of EMS in the Ipod supply chain in the Visit Report. HMRC conducted an

internal investigation and released an internal governance civil investigation report dated 11 October 2016, (the "IG Report"). It focussed on the conduct of the HMRC officers concerned and whether they had perverted the course of justice and lied on oath. It was concluded that they had not.

15. In the IG Report it is recorded that in response to the investigation, one of the HMRC officers who had made the visit in 2006 and produced the Visit Report checked HMRC's electronic folder and noted that it contained release notes showing a consignment of 3000 Ipods, dated 8 August 2006, released from a company named Papoose to EMS and from EMS to Connect. On reviewing her notebook and the Visit Report the officer noted that there appeared to be an error in recording the supply chain in question.

16. It was also concluded that the Visit Report should have been reviewed internally when the discrepancy was highlighted, in other words, whilst the appeal to the FTT was proceeding in 2010. It was also stated that had the visiting officers been approached at that time, it could have been established whether the Visit Report had contained the error and a witness statement to that effect would have been obtained and put before the FTT. It further concluded that: *"*Mr Charles has been led to believe that the report was true for the last 6 years and therefore he had challenged his appeal on that basis against the decision not to entitle him to recover input tax." Under the heading "Learning issues" it was also recorded that: "once it was established that there was a visit report concerning the sale of the 3000 Ipod Nanos then HMRC should have made enquiries with the officers who undertook the visit to Tech Freight, to establish the veracity of the chain as it was recorded. Had this been undertaken earlier then Mr Charles may have been more fully informed. . ."

The Claim

17. On 10 June 2018, Mr Charles commenced a claim for damages arising out of the matters to which I have referred. It was that claim which became the subject of the strike out/summary judgment application (the "Application") which was heard by the judge. The claims, including the claim in negligence, were based upon the omission of EMS from the chain of transactions in relation to the Ipods, recorded in the Visit Report.

18. In summary and where relevant, in the Particulars of Claim it was pleaded that: as a consequence of the omission of EMS from the supply chain in relation to the Ipods recorded in the Visit Report, in the Tribunal proceedings Mr Charles pursued the line of argument that HMRC could not prove that the Ipods were from a supply chain that originated with EMS (para 8); in the run up to the appeal in the FTT and the UT Mr Charles had made it clear to HMRC that he was relying on EMS not being mentioned in the Ipod supply chain in the Visit Report to support his case that HMRC could not prove connectivity (para 9); it had been acknowledged in HMRC's response to Mr Charles' notice of appeal to the UT of 8 February 2013 that the overwhelming likelihood was that the omission of EMS from the supply chain details was a mistake (see paragraph 11); that no one made any effort to verify the Visit Report (paragraph 13); and that the IG Report concluded that the omission of EMS from the Ipod supply chain in the Visit Report had been made in error, that no verification had taken place and that Mr Charles had been led to believe for six years that he was right regarding his "connection" argument (paragraph 16).

19. Under the heading "Duty" it was pleaded that HMRC was vicariously liable for the negligence of its officers where an act is undertaken voluntarily and went beyond a mere mistake, reference being made to *Neil Martin Ltd v Revenue and Customs Commissioners* [2007] STC 180 (paragraph 23); and that the exercise of statutory powers does not preclude the existence of a common law duty of care (paragraph 24). Having referred to section 5 of the *Commissioners for Revenue & Customs Act 2005* which charges HMRC with the collection and management of VAT and the Taxpayers' Charter, which at paragraph 1.2 refers, amongst other things, to putting mistakes right as soon as possible, the alleged duty of care was pleaded at paragraph 27 as follows:

> "The Defendant [HMRC], in exercising its statutory function, had a duty to verify the factual accuracy of its evidence and disclose this matter to the Claimant [Mr Charles]. By not doing so it negligently breached its common law duty of care owed to a taxpayer, particularly one engaged in a Tribunal appeal against the Defendant [HMRC], or there was a breach of statutory duty."

20. Having noted that there is no equivalent to CPR standard disclosure in the UT or FTT (Tax Chamber) rules it is stated that by not disclosing the error in the Visit Report, the three-stage test in *Caparo Industries Ltd v Dickman* [1990] 1 AC 605 is met (paragraphs 28 and 30).

21. In breach of that duty it was pleaded that: HMRC knew that Mr Charles relied upon and was going to rely on the Visit Report as evidence that there was no connection between the Ipods Mr Charles had purchased and a sale by EMS (paragraph 33); and HMRC took no action with the evidence presented to it by Mr Charles, contrary to para 6.2 of VAT Notice 726 (2003 version). Had appropriate action been taken, it is pleaded that Mr Charles would not have appealed against HMRC's decision in relation to the Spectre transactions, nor would there have been onward appeals to the UT and the Court of Appeal, a complaint to HMRC's Complaints Division, a formal complaint to the police, a review by the IPCC and the investigation which led to the IG Report (paragraph 37). As a result, it is alleged that Mr Charles has suffered loss and damage comprising fees incurred or invoiced plus expenses and £273,961 by way of compensation for Mr Charles' time at £19 per hour as a litigant in person (paragraph 40).

The Judge's decision in more detail

22. The Application made by HMRC to strike out the Claim was made on the basis that it (i) disclosed no reasonable grounds for bringing the claim; or (ii) was an abuse of the Court's process; and/or they asked for the Court to enter summary judgment. Reliance was placed, therefore, upon CPR rrs 3.4 and 24.2. The judge directed himself as to the principles which apply in relation to strike out and summary judgment and, in particular, to the approach set out by Lewison J (as he then was) in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 799 (Ch) at [13], at [14].

23. Having set out the duty of care as pleaded, the judge referred to the three tests which are used in deciding whether a defendant sued for causing pure economic loss owes a duty of care at common law to the claimant, as summarised by Lord Bingham in

Customs and Excise Commissioners v Barclays Bank Plc [2007] 1 AC 181 (the "*Barclays Bank* case") which he set out at [29] as follows:

> "I next turn to a common law duty of care. It is now settled that there are three tests which are used in deciding whether a defendant sued as causing pure economic loss owes a duty of care at common law to the claimant. These were summarised by Lord Bingham in *Customs and Excise Commissioners v Barclays Bank Plc* [2007] 1 AC 181 at 189, thus:
>
> > "The first is whether the defendant assumed responsibility for what he said and did vis-à-vis the claimant, or is to be treated by the law as having done so. The second is commonly known as the threefold test: whether the loss to the claimant was a reasonably foreseeable consequence of what the defendant did or failed to do; whether the relationship between the parties was one of sufficient proximity; and whether in all the circumstances it is fair, just and reasonable to impose a duty of care on the defendant towards the claimant… Third is the incremental test.""

He then went on to remind himself of the incremental test approved by Lord Bridge in *Caparo Industries Plc v Dickman* [1990] 1 AC 605, 618 to the effect that it is preferable that the law should develop novel categories of negligence incrementally and by analogy with established categories.

24. The judge went on to record that Mr Carey, who appeared for HMRC, as he did before us, had submitted that there can be no duty of care by one party to its opponent in litigation and quoted a passage from the speech of Lord Bingham in the *Barclays Bank* case to that effect. The judge then recorded Mr Carey's acceptance that HMRC's predecessor was found to owe a duty of care to a sub-contractor in processing its application for a certificate to be paid gross for its work, rather than subject to deduction of tax, in *Neil Martin Ltd v Revenue and Customs Commissioners* [2007] EWCA Civ 1041 (see [32] and [33]).

25. The judge concluded as follows:

> "34. In my judgment there is much force in Mr Carey's submissions in relation to the investigation in 2006. However, when Mr Charles appealed to the FTT, his reliance upon the omission of EMS in the report in respect of this chain became clear. The officers who made the visit and compiled the report were not called to give evidence during the appeal and statements were not taken from them. Their supervising officers were called to give evidence before the FTT, and it is clear that those officers became aware of the omission because it was referred to in the statement which Mr Charles filed in the FTT proceedings. It is important to remember in this context that HMRC was putting its case in the alternative that he knew or should have known of the fraud. On the issue of constructive knowledge, it seems to me that such an omission may well be important, notwithstanding that in the event that it did not avail Mr Charles because other factors prevailed.

> 35. It is also important to bear in mind that although this arose in the context of adversarial litigation, that was in the context of Mr Charles exercising his statutory right to appeal a decision of a public authority charged with the collection of tax. The omission tended to impede rather than to promote the general duties of HMRC in relation to the collection and management of taxes in the public interest. If, as is now clear, the name of EMS should have appeared in the report in respect of this chain, that would further those duties on the part of HMRC.
>
> 36. In [those] circumstances, in my view, there is a realistic prospect of establishing a narrow duty on the part of HMRC in the unusual facts of this case, once the reliance of Mr Charles on the omission became clear, to contact the visiting officers and to verify and if appropriate (as it turned out to be) to rectify the omission, particularly when that rectification would assist HMRC to carry out its general duties and would have supported its case against Mr Charles."

26. Having concluded that the issue of foreseeability was not suitable to be decided on a summary basis, he declined to strike out the claim in negligence: see [37] and [38].

Grounds of Appeal

27. There are three grounds of appeal. First, it is said that the judge misapplied the test for strike out and/or summary judgment in that he did not properly consider and apply what was said by the Court of Appeal in the *Neil Martin Ltd* case. The error in relation to the Ipod supply chain was a mere omission and, therefore, had the judge applied the *Martin* case correctly, he would have found no such duty could arise.

28. The second ground is that the judge did not properly consider and apply the factors from the *Barclays Bank* case which were relevant to the issues of: (i) whether HMRC had assumed a responsibility to Mr Charles; (ii) whether the loss to Mr Charles was a reasonably foreseeable consequence of HMRC's action; (iii) whether the parties relationship was sufficiently proximate; and (iv) whether it was fair, just and reasonable to impose a duty of care on HMRC (particularly where the Court of Appeal in the *Neil Martin Ltd* case had refused to do so in circumstances where the error was only an administrative mistake).

29. The third ground is that the decision was otherwise unreasonable in all the circumstances because no other Court acting reasonably could have found a duty of care to exist requiring HMRC to continue to verify the accuracy of evidence that was relied upon, particularly where HMRC exercises a function analogous to law enforcement officers which have been found not to owe a general duty of care: *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238 and *Brooks v Metropolitan Police Commissioners and others* [2005] 2 All ER 489).

Applicable Tests

30. The part of CPR r3.4 which was relevant to the Application was r3.4(2)(a), namely that the court may strike out a statement of case if it appears to the court that it discloses no reasonable grounds of bringing the claim. In relation to the alternative

claim for summary judgment CPR r24.2 provides, where relevant, that the court may grant summary judgment where the claim has no real prospect of succeeding on the claim or issue and there is no other compelling reason why the case or issue should be disposed of at a trial.

The alleged duty of care and its breach

31. In oral submissions before us, Mr Brown, who appeared on behalf of Mr Charles, accepted that on the facts of this case, it was not clear that the common law duty as pleaded was breached in the manner set out in the Particulars of Claim. HMRC did not seek to rely upon the Visit Report nor was it disclosed by HMRC in the litigation. Although HMRC had generated the Visit Report, it was not its evidence for the purposes of the litigation. It was Mr Charles who not only relied upon it but introduced the Visit Report into evidence by exhibiting it to his witness statement for the purposes of the hearing before the FTT and then went on to rely upon it in his appeal to the UT.

32. Mr Brown sought, therefore, to reformulate the alleged duty of care and its breach. He conceded that the alleged duty did not arise when the Visit Report was compiled. At that stage, it was merely a document produced in the course of HMRC's investigations into VAT fraud and Mr Charles was not in HMRC's contemplation.

33. Mr Brown submitted, however, that the alleged duty of care arose in the context of the litigation. More particularly, he submitted that in the light of the fact that HMRC is a public body and the issue arose in the context of a statutory appeal and that HMRC was aware that the Visit Report was probably inaccurate in relation to the Ipod supply chain, as soon as HMRC became aware that Mr Charles was relying on the Visit Report for the purposes of his appeal to the UT it came under a duty to check its accuracy and to inform him that it was incorrect. In breach of that duty HMRC failed to inform Mr Charles of the error in the Visit Report and the losses claimed were caused as a result.

Discussion and conclusions

(i) The Neil Martin case

34. In the *Neil Martin* case, Chadwick LJ, with whom Smith and Wilson LJJ agreed, held that although a duty of care was not owed by unidentified employees of the Revenue and Customs Commissioners in relation to administrative mistakes, a duty could be owed, for which the Revenue would be vicariously liable, in relation to the act of making an application on behalf of a company which the company had chosen not to make, and which it had not made. The employee had assumed an authority to make the application on behalf of the company and in doing so had assumed a responsibility to the company. In such circumstances it was considered fair, just and reasonable that the common law should recognise the existence of a duty of care.

35. The claim in the proceedings was for damages for breach of duty in failing to process within a reasonable time the claimant's application for a certificate under the scheme established in respect of sub-contractors in the construction industry by provisions which were (at the relevant time) enacted in Chapter IV of Part XIII of the Income and Corporation Taxes Act 1988 ("ICTA"). Numerous errors were made which led to

the delay. The distinction between the administrative mistakes in the processing of the application and the positive assumption of a responsibility to the company was considered by Chadwick LJ in the following manner:

> "72. In my view the judge would have been correct to hold that no common law duty of care was owed to the claimant company by either (i) the unidentified employee at the Furness office who inserted the incorrect UTR on the August CIS3 form on or about 11 August 1999 or (ii) the unidentified employee at the Netherton processing centre who posted the CIS6 certificate to the wrong address. As it seems to me, those were plainly administrative mistakes made in the ordinary course of processing the application under section 561(2) ICTA. In the circumstances that, as I have held, the legislature did not intend to impose a statutory duty, enforceable by an individual in a private law suit, to process such applications within a reasonable time, it would be wrong for the courts to recognise a common law duty owed by the Revenue's employees to take care to avoid delay. I respectfully share the concern, expressed by Lord Justice Mummery in *Carty v Croydon London Borough Council* [2005] EWCA Civ 19, [83]; [2005] 1 WLR 2312, 2337*H*, that to impose liability on the employee in such circumstances – a liability for which the employer would be vicariously liable - would be "to introduce by the back door an action for breach of statutory duty in a case where . . . no cause of action for breach of statutory duty was created by the relevant legislation".
>
> 73. Nevertheless, I take the view that the judge would have been wrong to hold that no common law duty of care was owed to the claimant company by the unidentified employee in the Furness office who chose to complete the declaration in support of an application for a registration card on the July CIS3 form without the authority of Mr Martin or the claimant company. That, as it seems to me, goes beyond an administrative mistake made in the ordinary course of processing the application under section 561(2) ICTA. In completing the declaration in support of an application for a registration card the employee took it upon himself (or herself) to make an application on behalf of the claimant company: an application which the claimant company had chosen not to make, and which it had not made. The employee was not processing an application which had been made: he was assuming an authority to make an application which had not been made. I can see no reason why, in assuming that authority, the employee should not be taken to have assumed a responsibility to the applicant. In those circumstances it does seem to me fair just and reasonable that the common law should recognise that a duty of care exists."

36. Quite clearly, the judge was right to accept Mr Carey's submissions in relation to the investigation into MTIC fraud in 2006, as he did at [34] of his judgment. At that stage, HMRC's officers were collecting information and carrying out investigations in the public interest. They did not and could not have had Mr Charles' interests in mind. The failure to record EMS as part of the supply chain for the Ipods was an

administrative error which occurred whilst the officers were carrying out their public function.

37. Mr Brown relies upon the *Neil Martin* case merely for the proposition that it is possible for HMRC to become vicariously liable for an act by its employee which amounts to more than merely an administrative mistake. That is a very broad proposition. Although that must be the case, the existence of a duty of care must be determined on the facts of each case and will depend upon the application of the tests which were described succinctly by Lord Bingham in the *Barclays Bank* case. The real question in this case is whether any of those tests can be met where the conduct complained of is the failure to verify and correct a report produced by HMRC for an administrative purpose which is subsequently relied upon by an opposing party in litigation.

(ii) The application of the test in the Barclays Bank case

38. In my judgment, there is no real prospect of establishing that a duty of care arose to verify the Visit Report and to rectify it if necessary, once Mr Charles' reliance upon it for the purposes of his appeal to the UT became clear and the judge was wrong to come to that conclusion at [36] of his judgment. It seems to me that the same would be true in relation to Mr Charles' reliance upon the Visit Report in the FTT. The point was made succinctly by Lord Bingham in the *Barclays Bank* case at [18]. As the judge quoted at [32] of his judgment: " . . . no duty is owed by a litigation party to its opponent: *Digital Equipment Corpn v Darkcrest Ltd* [1984] Ch 512; *Business Computers International v Registrar of Companies* [1988] Ch 229; *Al-Kandari v J R Brown & Co* [1988] QB 655." The same point was made by Lord Rodger at [47] and [60]. It seems to me that this must be the case even where the opponent relies upon a document which has been created by the other party to the litigation. It is all the more so where the document was produced for a different purpose in the course of fulfilling HMRC's public duties.

39. Accordingly, it seems to me that there can be no question of an assumption of responsibility by HMRC in relation to Mr Charles' conduct of his litigation, nor is the incremental test referred to in the *Barclays Bank* case satisfied. It has already been determined that a party to litigation does not owe a duty of care to the opposing party in that litigation. It also follows that the threefold test cannot be satisfied.

40. In this case, HMRC having succeeded in the FTT, it was Mr Charles' choice, nevertheless, to seek to rely upon the Visit Report in the UT. Furthermore, he did so, despite the fact that in its response to his Appellant's Notice dated 8 February 2013, HMRC had stated in writing that it was likely that there was an error in the record of the Ipod supply chain contained in the Visit Report. It was open to Mr Charles at that stage to have asked HMRC to produce the underlying documentation, but he did not do so. It is unrealistic to suggest that having served and filed the response to the Notice of Appeal in 2013, HMRC were under a duty to conduct an internal investigation and to seek permission to adduce further evidence before the UT in order to clarify the Visit Report.

41. It is for parties to litigation to determine what evidence they will deploy and in what way and to decide how best to conduct litigation. Mr Charles chose to continue to rely upon the Visit Report despite the admission that it probably contained an error and

despite the fact that HMRC had succeeded before the FTT and the FTT had taken into consideration a large amount of evidence in addition to the Visit Report.

42. The position can be no different because Mr Charles was exercising a statutory right to appeal against the disallowance of input tax for the purposes of his VAT return against a public body. Although the onus was on HMRC to defend the disallowance on that appeal before the FTT, it is difficult to see that, as a result, HMRC assumed a duty to verify all evidence relied upon whether by it or by Mr Charles and to prevent its opponent from taking points about the adequacy of the evidence relied upon. Of course, HMRC, like any other litigant, must not wilfully or recklessly mislead the court. They are not required, however, to ensure that only the best evidence is relied upon. Like any other litigant, HMRC takes the risk that the tribunal or court will consider a matter not to have been proved to the appropriate standard and will be subject to points which will be taken against it in relation to weaknesses in its evidence.

43. If the judge were correct, all litigants would owe a duty to the opposing party in litigation to put forward their very best evidence in relation to every case and to check the evidence relied upon by their opponents, at least if it is based on a document which originated with them. Not only would that create an intolerable and costly burden upon all litigants, it would also have profound effects for the court system. It would have the opposite effect to the overriding objective: CPR r 1.1. If each party were required to file and serve its best evidence on each and every issue, it would prevent the court from dealing with cases at proportionate cost, allotting an appropriate share of court resources and saving expense, amongst other things. To the contrary, all litigation would become unnecessarily lengthy and additionally expensive.

44. Furthermore, it seems to me that the judge's approach was contrary to that adopted by Chadwick LJ in the *Neil Martin* case at [72]. The judge had already decided that there was no statutory duty of care and struck out that part of Mr Charles' claim. He went on, nevertheless, to conclude that the circumstances, including the position of HMRC as a public body and the nature of the statutory appeal, were factors in determining that the narrow duty of care was arguable. In effect, having discounted it, he allowed the alleged statutory duty back in to his thinking.

45. It seems to me, therefore, that the judge failed to apply Lord Bingham's test in the *Barclays Bank* case properly. It has been decided that parties do not owe each other a duty of care in litigation. There was no need therefore to go any further. However, in the circumstances: there could not have been nor was there any assumption of responsibility for the way in which Mr Charles chose to conduct the litigation; there was no realistic prospect of showing that the alleged losses were a reasonably foreseeable consequence of what it was alleged that HMRC failed to do; nor would it be fair, just and reasonable to impose a common law duty of care.

46. In the circumstances, it is unnecessary to consider the third ground of appeal separately. For all of the reasons set out above, I would allow the appeal.

Lord Justice Newey:

47. I agree.

Lord Justice Lewison:

48. I also agree.

Order

Tuesday 26th November 2019

UPON hearing the Commissioners for Revenue and Customs' appeal against the decision of His Honour Judge Jarman QC

AND UPON hearing Mr Carey on behalf of the Commissioners for HM Revenue and Customs and Mr Brown on behalf of Ian Charles t/a Boston Computer Group Europe

IT IS ORDERED THAT:

1. The Commissioners for HM Revenue and Customs appeal is allowed; and

2. Ian Charles t/a Boston Computer Group Europe pay the costs of and incidental to the appeal and the hearing below.