



Neutral Citation Number: [2019] EWCA Crim 1812

Case No 201804844 C2

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM THE CROWN COURT AT CHESTER**  
**HIS HONOUR JUDGE NORMAN WRIGHT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 25/10/19

**Before :**

**LORD JUSTICE HICKINBOTTOM**

**MRS JUSTICE SWEENEY**

and

**SIR RODERICK EVANS**

**(sitting as a Judge of the Court of Appeal (Criminal Division))**

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**Between :**

**R**

**Respondent**

**- and -**

**ROBERT FREDERICK BINFIELD**

**Appellant**

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**N R Johnson QC** (instructed by **Lloyds PR Solicitors**) for the **Appellant**  
**Ben Lawrence** (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 25 October 2019

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**Approved Judgment**



**Lord Justice Hickinbottom :**

**Introduction**

1. On 14 November 2018 in the Crown Court at Chester before His Honour Judge Norman Wright and a jury, the Appellant Robert Binfield was convicted of taking steps with a view to the fraudulent evasion of tax contrary to section 72(1) of the Value Added Tax Act 1994, for which, on 10 December 2018, he was sentenced by Judge Wright to 16 months’ imprisonment suspended for 18 months. With the leave of Sir Alastair McDuff sitting as a judge of this court, the Appellant through Nicholas Johnson QC now appeals against that conviction. In support of the appeal, he applies for leave to rely on fresh evidence under section 23 of the Criminal Appeal Act 1968; and it is upon that evidence that the appeal effectively depends.
2. The evidence comprises a Certificate of Registration for Value Added (“a VAT 4 certificate”) issued on 30 October 2018, to the provenance of which we will return shortly, as exhibited to a statement of the Appellant dated 19 November 2018; and further statements from the Appellant’s accountant Paul McAllen dated 16 November 2018 and from his solicitor Rachel Fletcher dated 21 November 2018. The statements go to when the Appellant received the certificate, which is not is issue. None of these witnesses were called to give evidence before us.
3. On the basis of that VAT certificate, the Appellant relies upon a single ground of appeal with two limbs, namely that his conviction was unsafe because:
  - i) the certificate, which the Crown failed to disclose to the defence, completely undermined the prosecution case on an issue which may have been crucial to the jury’s finding of guilt; and
  - ii) the manner in which this document was not disclosed calls into question the accuracy and completeness of all the digital records produced and relied upon by the Crown at trial.
4. At the trial, one of the Crown’s witnesses with regard to the issues raised in this appeal was John Clive Leech who prepared statements dated 19, 24 and 25 October 2019 and who gave evidence at the trial for the best part of a day on 26 October 2018. Mr Leech has worked for HM Revenue and Customs (“HMRC”) for 30 years, and within the VAT regime since 1994. He is currently an investigator for HMRC Proceeds of Crime – Operations, part of HMRC’s Fraud Investigation Service, who was involved in the investigation of the Appellant and was responsible for the generation of the relevant VAT 4 certificate. Unfortunately, due to ill health, Mr Leech was unable to give any evidence before us, but the evidence with which he dealt was effectively covered by other witnesses who made statements and gave oral evidence or were offered for cross-examination. The evidence of Mr Leech to which we refer in this judgment was either adopted and supported by another witness or was uncontentious.
5. In response to the section 23 application, the Crown relied on evidence from a number of witnesses who work for HMRC, including the following who made statements and were called to give oral evidence:

- i) Dawn Alison Chipperton: an HMRC officer since 1983, now working as a senior criminal investigation officer: statements dated 4 and 19 December 2018.
  - ii) Julian Gordon Fowles: a Lead Developer in the Chief Digital Information Office of HMRC, for which he has worked since 1991: statement dated 23 January 2019.
  - iii) Peter Kenneth Shersby: Mr Shersby has worked in VAT for nearly 30 years, now in HMRC Higher Office in Operational Excellence: statement dated 8 February and 21 October 2019.
  - iv) Martyn William Brinton: HMRC SO Analyst and Developer: statement dated 24 January 2019.
  - v) Paul Burden: Java Developer for Capgemini, a company which provides computer support for HMRC: statements dated 15 April and 22 October 2019.
6. A further witness employed by Capgemini, Alison Cheshire (a Senior Manager in the team which supports the Operational Data Store, the repository which supplies data to and supports processing by internet-facing HMRC services including VAT return display and submission) made a statement dated 23 October 2019 and was tendered for cross-examination, but in the event not called.
7. In addition, the Crown served evidence in respect of the following witnesses, whose evidence was agreed, and who therefore did not give oral evidence.
- i) Adam Allix: a Senior Mainframe Systems Manager in the Chief Digital Information of Office of HMRC, responsible for managing mainframe access, system monitoring and live incidence resolution: statement dated 3 December 2018.
  - ii) Robert Gage: an HMRC HO Analyst and Developer, who has worked on the HMRC VAT Mainframe Team for over 20 years: statement dated 5 December 2012.
  - iii) David Gareth Jones: a Client Delivery Manager with Communisis which has a contract with HMRC to provide all outbound customer communications: statement dated 21 December 2018.
  - iv) Amish Patel: an HMRC Officer who simply produces the most recent VAT return for LP Investment Properties Limited (“LPIP”) (see paragraph 10 below) received by HMRC on 4 December 2018: statement dated 24 April 2019.
8. It was common ground between the parties that this appeal could not be properly or justly determined without consideration of the Appellant’s fresh evidence and that of the Crown in response. We agree; and we accede to the section 23 application and formally allow in all of the evidence to which we have referred.

### **The Factual Background**

9. The background to the prosecution is lengthy and not entirely straightforward, concerning, as it does, the detail of the VAT scheme including HMRC’s internal

mechanics of the scheme. The trial lasted many days. However, the grounds of appeal are narrow, and for the purposes of the appeal we can deal with the background facts relatively shortly.

10. The Appellant is an accountant with his own practice which had as a client a Malcolm Cooper. Mr Cooper owned various units at Arklow Trading Estate, Deptford which he let out to other enterprises (“the Arklow units”). In 2006, the Appellant and an employee of Mr Cooper’s, Lee Reeves, set up LPIP which, with the assistance of a mortgage from Nationwide, bought the Arklow units from Mr Cooper for £3.8m. As landlord, LPIP thereafter collected rental income from the tenants of the units which was used to pay the mortgage payments. For some reason which is not apparent, Nationwide failed properly to register its charge on properties.
11. LPIP was registered for VAT with registration number 886253096 (“the 886 number”). VAT is generally not payable on land transactions; but it is open to the purchaser of land to enter into an “option to tax”, such that VAT liability attaches to its transactions with that land. LPIP entered into an option to tax in respect of the Arklow units. That option was irrevocable so that, even if (e.g.) LPIP’s VAT number was deregistered, that would not invalidate it and the sale of the units would still be treated as a taxable supply.
12. The business affairs of LPIP have been described as “chaotic”. In August 2008, the 886 VAT number was deregistered for failures to lodge VAT returns, but in May 2010 it was reinstated on application by the Appellant. However, due to a failure to submit returns to Companies House, the company received a number of warnings before in fact being dissolved and struck off the register on 28 June 2011. As a result, the 886 VAT number was deregistered again from 1 July 2012.
13. LPIP was by this time in financial trouble because of falling commercial property values and rental income which was insufficient to pay the mortgage instalments. Nationwide decided to take steps to enforce its security; and then realised not only that that its charge on the Arklow units had not been properly registered but that LPIP had been dissolved. Consequently, Nationwide made an application to the High Court for LPIP to be re-registered as a company, which it was on 20 September 2013. The Nationwide charge was registered shortly thereafter.
14. By this time, the property market was improving. Nationwide wanted the properties sold and the mortgage repaid from the proceeds of sale, and they had the right under the mortgage to take charge of the sale; but LPIP wished to sell the Arklow units privately to maximise its own return. The property was advertised and interest in it was shown by, amongst others, Anthology Deptford Limited (“Anthology”). Following negotiations, a purchase price of £8.5m was agreed which, because of the option to tax to which we have referred, attracted a 20% VAT charge of £1.7m. LPIP duly provided Anthology with a VAT invoice for £10.2m, using the 886 number; and Anthology paid that sum which included £1.7m VAT which was accountable to HMRC in the hands of LPIP. The addition of tax was of little if any real concern to Anthology, because, having paid over the VAT to LPIP, as a trading company it expected to be able to recover it from HMRC. It applied to “opt to tax” the properties, and, in its first VAT return, claimed repayment of the £1.7m from HMRC. However, that tax was not immediately repaid.

15. By this time, HMRC in the form of one its inspectors (Trevor Garrett) had become interested in the VAT position of LPIP. He had begun an inspection in respect of the tenant of one of the Arklow units, which was unable to provide VAT invoices from LPIP for the rental payments it had made. Mr Garrett's further investigations showed that LPIP was not registered for VAT, because it had been deregistered from 1 July 2012 as we have described. LPIP accepted that it was not then registered for VAT, and asked for the 886 VAT number to be reinstated as it had been after deregistration in 2010. However, due to the length of time the company had been deregistered, HMRC informed it that the old number could not be reinstated: LPIP would have to make an application for a fresh registration, backdated to the deregistration of the 886 VAT number.
16. From 31 October 2012, HMRC deployed a new online registration service and VAT registration transformation ("VRT") system. Customers could thereafter register for VAT, and make changes to their registration particulars, online; and most applications could be evaluated and dealt with automatically by the VRT system.
17. In their evidence, Mr Leech and Mr Shersby explained that, from the introduction of VAT in 1973 until October 2012, HMRC produced a hardcopy certificate that showed a trader's trading partners that it was VAT registered, i.e. a VAT 4 certificate. Such a certificate was sent as standard to a customer on registration, and further copies could be requested by or through HMRC in one of two ways. First, HMRC could request a print out from its own departmental trader register ("DTR"). That would then be printed on the HMRC officer's own printer. Second, it could be requested through HMRC's VISION mainframe system – a system by which data could be viewed but not input or altered – in which case a copy would automatically be sent directly to the customer's principal place of business.
18. However, Mr Shersby explained that, from October 2012, VAT 4 certificates were not routinely sent out, because, as we have indicated, from that date a customer could both register, and change and access, its registration details – and print off a VAT certificate – online through its own online account. A hard copy VAT 4 certificate would only be sent out if (e.g.) a paper registration application were made. He also explained that a VAT 4 certificate, no matter how produced, is now a computer-template document populated by the data current at the date it is produced. Such a certificate merely shows the position as at that moment in time, and HMRC does not retain a copy of any certificates issued, even in electronic form; although it does retain a record of the dates VAT 4 certificates have been requested.
19. The 886 VAT number having been deregistered in July 2012, the Appellant submitted a new online VAT registration application for LPIP on 15 January 2015. The registration was completed on 18 March 2015, when the company was registered with a new VAT number (20788685, "the 207 number") backdated to 7 June 2014.
20. Mr Leech explained that VAT is declared by registered traders each quarter. When VAT was first introduced, each trader was required to declare VAT on the calendar quarters, i.e. in March, June, September and December. However, given that there are about 2m such traders, this caused administrative difficulties for HMRC. Consequently, it staggered the declaration dates, splitting the traders into three groups assigned to "stagger" 1, 2 or 3; and, dependent upon which "stagger" a trader was assigned to, it was instructed to declare its VAT in the first, second or third month of

each quarter. Mr Shersby explained that a trader can express a preference for which stagger it wishes to be assigned to; but, where it does not express a preference, it is assigned to one of two staggers depending on the date of registration, the third stagger having quarterly declarations of tax in the original months. No one is now allocated to that stagger except upon request, with the intention of equalising numbers of traders in each group.

21. The first VAT return period ends on the last day of the month following HMRC completion of registration, and the due date for an online filer is that end date plus one month plus 7 days. As we have indicated, LPIP's registration with the 207 VAT number was completed on 18 March 2015. So, on this basis, the end date for the first VAT return period would have been 30 April 2015, and the due date for filing 7 June 2015. LPIP's online account showed that the VAT return periods ended on the last day of April, July, October and January; and Martyn Brinton said that, from the audit data he has looked at, he "can state for certain" that LPIP's stagger (i.e. the months of the year in which VAT returns are due) has never been changed. Mr Shersby confirmed that to be the case, and that there is no record of any request for any change in stagger.
22. In his statement of 23 January 2019, Mr Fowles said that the information held on the VAT database indicates that LPIP was informed that it should render a return for the period from the date of registration to 30 April 2015 (the end of the first VAT period) by 7 June 2015, and it would be expected to render returns for periods ending every three months after this; but HMRC do not have a copy of what was sent to LPIP giving it that information. However, it was clear from the evidence that, although the information was readily available to LPIP as a result of its access to the HMRC online system, no express notification or reminder was ever sent to LPIP. In his evidence, Mr Shersby explained that the notification of registration for VAT (Form VAT 9) referred the trader (i.e. LPIP) to that system; and, Mr Burden said, although through that system, LPIP could have requested reminders giving six weeks' notice that a VAT return was imminently due, LPIP did not do so, opting for no reminders. Mr Burden explained that a trader can receive email reminders that a VAT return is due by opting to receive reminder and inserting its email address on a particular page of the online application form, the alternative and default being an option not to receive reminders. However, he said that the database shows that LPIP did not set up an email address or opt to receive reminders.
23. Returning to the chronology, on 18 March 2015, LPIP now having the new 207 VAT number, a fresh VAT invoice with the 207 number was issued by LPIP to Anthology in respect of the property transaction; and, on 9 April 2015, HMRC approved the repayment of £1.7m VAT to Anthology.
24. LPIP was of course liable to account to HMRC for that sum of VAT which it had received from Anthology. However, it did not do so.

### **The Criminal Proceedings**

25. On 25 June 2015, the Appellant and his wife were arrested and interviewed by HMRC officers. A few days later, on 1 July 2015, LPIP paid £535,000 to HMRC using the 207 VAT number. However, it was not accompanied by a VAT return, and no further payments were made.

26. The Appellant and his wife were charged with a number of offences, but in due course the charges against his wife were dropped or dismissed, as were some of the charges against the Appellant.
27. By the end of the trial in late 2018 before Judge Wright, the Appellant faced a single charge of taking steps with a view to the fraudulent evasion of VAT, namely that between 29 April 2014 and 27 June 2015 he took steps with a view to the fraudulent evasion of VAT in respect of the tax due from the sale by LPIP of the Arklow units in the sum of £1.7m. The particulars of the charge continued:
- “The ‘steps taken’ are one or more of the following acts or omissions:
- (1) Failed to apply to reinstate [LPIP’s VAT] number or to re-register [LPIP] for [VAT] prior to the 19<sup>th</sup> day of June 2014.
- (2) Failed to register [LPIP] for [VAT] between the 15 day of July 2014 and the 15<sup>th</sup> day of January 2015.
- (3) Failed to submit a [VAT] return by the 7<sup>th</sup> day of June 2015.”
28. The jury could therefore convict the Appellant if they were satisfied that he failed to take one (or, of course, more than one) of those steps. Therefore, it was open to the jury to find him guilty if they were satisfied to the requisite criminal standard that he had failed to submit a VAT return by 7 June 2015 with a view to the fraudulent evasion of VAT, i.e. step (3).
29. In respect of step (3), there was a dispute at trial as to when the first VAT period for the 207 number ended, and thus when the first VAT return was due. That issue was of course crucial to the alleged failure to submit a VAT return on time. As we have indicated, the Appellant was arrested on 25 June 2015. It was the prosecution case that, on the basis of the analysis which we have already set out, the first return was due by 7 June 2015. It was the Appellant’s case that he thought the first return was not due until 7 July 2015, although he said he had intended to have completed the return earlier than that.
30. The Crown relied upon various pieces of evidence to show that the first VAT return under VAT number 207 was for the period ending 30 April 2015, and therefore the return was due no later than 7 June 2015. Mr Leech produced both the VISION print out for the 207 number, and the “current ledger” which recorded the period to 30 April 2015 as the first declaration period. Another witness (Richard Lang) also gave evidence to the same effect having consulted the Electronic Folder for that number.
31. At the trial, a number of HMRC officers were asked to help with further documentary evidence as to this issue which the Appellant considered would, if available, potentially assist his cause. In particular, they were asked to assist with (i) the location of the VAT 4 certificate for the VAT 207 number, which it was thought would have shown the date of registration and the date on which the first VAT return was due; (ii) the location of the email that it was thought would have been sent to LPIP asking for the first return (which should have been sent in mid-April if the prosecution was correct as to the stagger date); and (iii) the location of the digital return itself. The general response was



not positive; and the judge therefore suggested that the prosecution obtain some definitive evidence on these issues. That prompted evidence in the form of statements being obtained from Mr Leech, to which we have already referred.

32. Mr Lawrence for the Crown submitted that the accounts given by the Appellant at trial on the issue of when the first VAT period ended – and when the Appellant believed it to end – were inconsistent and unconvincing. In any event, the jury found the Appellant guilty of the charge. As we have described, because of the way the particulars were put, it is not known whether they found step 1, 2 and/or 3 specifically made good – only that they found at least one proved. The jury may have found only step 3 proved. However, insofar as the jury did find step 3 to have been made out, they must have rejected the Appellant’s account that the first period ended later than 30 April 2015 and the VAT was therefore not due by 7 June 2015.

### **The Appellant’s New Evidence and the Grounds of Appeal**

33. On the day he was convicted, the Appellant received some post that had been forwarded to his home address from the correspondence address for LPIP. One letter was addressed to LPIP, which must have been received after 2 November and before 12 November 2018. It was opened by the Appellant on 14 November 2018. It contained what Mr Johnson describes in his advice on appeal (which includes the grounds of appeal and, essentially, the skeleton argument in support) as “the missing VAT 4 certificate”, which is dated 30 October 2018. This is the new evidence upon which the Appellant now seeks to rely.
34. The document is headed “Certificate of Registration for Value Added Tax”, and has the 207 number and 7 June 2014 as the effective date for registration. It says, “Copy of certificate issued on 30 October 2014”. The standard form part of the document says that the certificate confirms that LPIP is registered for VAT “from the date shown above”; and it goes on to say:

“The details above include the end date of the next accounting period, the frequency of your VAT returns and the bank account details [HMRC] will use to make any repayments of VAT to your business. These details only apply from the date on which the certificate is issued.”
35. Mr Johnson submits through his advice that this new document vindicates the position taken by the Appellant at trial in that it proves that HMRC witnesses including Mr Leech were wrong to say that the VAT 4 certificate was only a “digital document”, and that HMRC did not have access to it. Furthermore, although the document says that “the details above include the end date of the next accounting period”, no such date is shown. Therefore, if it is correct, there was no legal requirement to complete a VAT return by 7 June 2015.
36. Had this VAT 4 been available at trial – which in his advice Mr Johnson submits it could have been, if disclosed by the prosecution as it ought to have been – it would have undermined Mr Leech’s evidence on these crucial points; and undermined the digital records upon which the prosecution relied with which it is inconsistent. The fairness of the trial was therefore subverted by material non-disclosure, if not deliberate suppression; and, in any event, the conviction must be unsafe.

### **The Crown's Response and Our Conclusion**

37. However, the Crown has now submitted evidence as to how the VAT 4 certificate came to be sent to LPIP, and why it is in the form that it is.
38. As we have already indicated, Mr Leech is unfortunately unwell and was unable to produce a statement; but there is a statement dated 19 December 2018 from Alison Chipperton – another senior investigation officer with HMRC – who refers to emails from Mr Leech to her explaining that he had requested a VAT 4 certificate for the 207 VAT number to see whether that function worked at all. In short, he did not expect the form, if produced, to be sent to LPIP, especially because he did not receive a confirmation message from the system to say that it had; but the function did still work and, as he requested it through the VISION mainframe system, it was both produced and sent direct to LPIP. As we have already explained, when such a certificate is requested, the computer populates the template with then-current data. Mr Johnson, properly and realistically, accept that, on the basis of all the evidence, he could not gainsay that explanation of the provenance of the certificate and how it came to be sent to LPIP. We are satisfied that it is true.
39. In respect of the terms of the document, Mr Johnson relied upon the fact that, although its states “The details above include the end date of the next accountancy period [and] the frequency of your VAT returns...”, no such information is given in the document. He initially submitted that there was no date for any VAT period and consequently no legal requirement to complete a VAT return by 7 June 2018, which requirement was fundamental to the Crown's case on step (3). The case in respect of that step is therefore fatally undermined, and with it the Crown's case as a whole.
40. However, the evidence (notably of Mr Shersby) confirmed that a VAT 4 certificate is produced by the population of a template with data from the DRS system. It is the template which states “The details above include the end date of the next accountancy period [and] the frequency of your VAT returns...”, which therefore appears in a certificate irrespective of the data which might be inserted into it. Mr Shersby explained that, once a trader has been deregistered from VAT, no return period would be included in any VAT 4 certificate produced – because the data populating the form would have no next return date. However, Mr Shersby confirmed that, if a VAT 4 had been produced (or the online system viewed) prior to 30 April 2015, then details of the first return period would have been shown. Mr Brinton referred us to a print out from that part of the system which records changes to important data, which confirms that LPIP was deregistered on ceasing trading on 29 July 2015. There is no doubt that it was deregistered well before October 2018 when the VAT 4 certificate was produced.
41. Again, having heard the oral evidence, Mr Johnson properly accepted that, on the basis of all the evidence, he could not gainsay that explanation. We are again satisfied that it is correct.
42. Once it is understood that, by October 2018:
  - i) a VAT 4 certificate was a computer-generated report using a template populated by the HMRC computer data as at the time of the request/generation;

- ii) there were no data for the next VAT period because LPIP had been deregistered for VAT; and
- iii) the VAT 4 certificate was sent to LPIP accidentally as a result of Mr Leech's interrogation of the computer system;

then the certificate ceases to have any possible relevance to the issues at trial – including the issue as to when the first period for VAT declaration under VAT number 207 ended and, as a consequence, when the first declaration was due. All of the evidence, including the several computer print outs generated in response to this application, are at least consistent with the proposition – accepted by the jury – that the first period ended on 30 June 2015 and therefore the first VAT return was due on 7 June 2015. Indeed, this fresh evidence strongly positively supports that proposition.

- 43. Through his advice, Mr Johnson submitted that the VAT 4 certificate which we have now admitted under section 23 is remarkable for a number of reasons. For example, it does not disclose when the original was issued. But that misunderstands the nature of this document and its provenance: as Mr Shersby explained, any VAT 4 certificate issued in April 2015 would have reflected different data. Mr Johnson emphasised that the details of the end date of the next accounting period were not included, and “this was the issue at trial”. But that submission lacks force for the same reason. Finally, he submitted that the certificate is a paper document, and the evidence at trial was that “these are never issued”. But this certificate was issued as a result of Mr Leech's interrogation of HMRC mainframe computer system, at a time when he thought that that function no longer worked; and, in any event, the document produced was of no relevance to the issue at trial, because it reflected the post-deregistration VAT position of LPIP. In the context of the charge faced by the Appellant, the document is neither remarkable nor indeed relevant to the issues at trial.
- 44. Nor do we accept Mr Johnson's submission that Mr Leech was wrong when he said a VAT 4 certificate “is only a digital document”. That was perhaps a shorthand; but it reflected the fact that, by October 2018, a VAT 4 certificate was a computer-template document populated by HMRC computer data as it stood at the moment of the request. What was relevant was not what a VAT 4 certificate, if generated in October 2018, would say; but what such a certificate would have said in (say) April 2015. That was a document which was not available to HMRC, and Mr Leech was not wrong to say that HMRC did not have access to it.
- 45. In his advice, Mr Johnson suggests that the VAT 4 certificate which the Appellant received in November 2018 was, or may have been, wilfully not disclosed, possibly as the result of suppression or other wrongdoing on the part of Mr Leech and/or other members of HMRC. The explanations given make clear beyond any doubt that there was no such wrongdoing.
- 46. Having heard the oral evidence of the HMRC witnesses to which we have referred, Mr Johnson, again realistically, said that he could not properly advance the case set out in the grounds that the VAT 4 certificate undermined the prosecution case, or that at trial the Crown wrongly failed to disclose the certificate to the defence.

47. For the reasons we have given, we agree. The material which we have agreed to admit does not assist the Appellant; and we cannot say that, as a result of it or otherwise, the jury's verdict is unsafe. As a result, this appeal fails.