TC04156

Appeal number: TC/2014/00418

VAT – MTIC fraud allegations – whether statement of case sufficiently particularised – failure to allege dishonesty with clarity – requirement for primary facts only and not full particulars to be contained in statement of case

FIRST-TIER TRIBUNAL
TAX CHAMBER

CITIBANK NA **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 3 November 2014

D Scorey, Counsel, instructed by Hogan Lovells International LLP, for the Appellant

J Kinnear QC and J Puzey, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. On 27 August 2013 HMRC assessed the appellant for just over £10,000,000 on the basis that in HMRC's opinion the appellant had reclaimed VAT on sales of European Union Emissions Allowances ('carbon credits') to which it was not entitled because, HMRC alleged, the appellant knew or ought to have known that its transactions in these carbon credits were connected with fraud.

2. The assessment was related to input tax claimed in VAT period 09/09 for trades which took place in July 2009. So far as timing was concerned, I was told the assessment was made in reliance on s 73(6)(b) Value Added Tax Act 1994 ("VATA") (and not s 77(4)). A review of the decision on timeliness dated 17 December 2013 upheld the assessment.

3. So far as substantive liability was concerned, the assessment relied on the decision of the CJEU in *Kittel* C-430/04. A review of this aspect of the decision dated 27 February 2014 reduced the assessment to £9,893,821.

4. An appeal was lodged with this Tribunal against both review decisions. The appeals are not consolidated: whether they should be consolidated is yet to be considered by the parties and this Tribunal. HMRC lodged their statement of case ('SOC') on 22 April 2014, which, while it only cites appeal reference TC/2014/418, actually deals with both aspects of the assessment (in other words, both the substantive issue and the timing issue).

5. The appellant lodged a request for further and better particulars on 23 May 2014 ('the Request'). That request, like the SOC, dealt with the appeals against both review decisions. HMRC did not respond substantively to any of the requests and so the matter came on for the Tribunal to resolve. It was the subject of today's hearing.

6. The SOC was some 57 pages and nearly 100 paragraphs long and had some fairly substantial annexes to it; the Request ran to 24 pages and 70 individual requests (although a few were dropped at the hearing – in particular §§8-10 and §§58-60).

HMRC's contentions

7. In summary, HMRC's contentions were that the SOC was sufficiently particularised and needed no amendment; the Request either asked for information which the SOC or its annexes already contained; or it was prematurely asking for information which was not required to be in the SOC but would be contained in the witness statements; or it was asking for material which did not form part of HMRC's case.

Appellant's contentions

8. The appellant contended that there were possible inferences of fraud from the SOC but fraud was not clearly pleaded; it considered overall the SOC lacked the

necessary detail and in particular that the appellant was prejudiced by not knowing what was alleged against it and therefore was unable to commence investigations into the matters alleged.

What must the SOC contain?

9. The parties were not agreed as to what the SOC should contain. They did not agree on whether fraud or dishonesty was pleaded nor were they agreed in general on how much information should be in the SOC.

10. HMRC accepted that special rules apply to pleadings of fraud in the courts. They did not accept that the statement of case in the tax tribunal should necessarily have the same strict rules applied to it. They considered it would be enough if the respondent's case was made clear from a combination of the statement of case and witness statements.

11. It goes without saying, although it is enshrined in Rule 2(2) of (Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009), that the object of the Tribunal is to deal with cases fairly and justly. Litigation by ambush is not fair or just: a party must be given time to properly prepare to meet the case against it. For this reason, the Tribunal's rules at Rule 25(2)(b) requires the Statement of Case to:

> "set out the respondent's position in relation to the case"

Again with the object of fairness of justice, a failure by the respondent to fully set out its case in its statement of case is not fatal to the respondent putting that case in the hearing of the appeal if it is nevertheless apparent that the appellant has been given the opportunity to properly prepare for the case. For instance, where an allegation which could have been pleaded had not been but was nevertheless clearly made in a witness statement filed in support of the respondent's case, the respondent may be able to pursue that allegation at the hearing: see for instance *Pars Technology* [2011] UKFTT 9 (TC) at [46].

12. However, there is a difference between considering the position as at the date of the hearing and asking the question whether the appellant knew the case against it in time to prepare for the hearing, and considering an application for further and better particulars before the service of the evidence. The appellant is entitled to have the respondent's case set out in its statement of case and it is no answer for the respondents to say (at this point in time) that they will rely on their (yet to be served) witness statements to remedy any defects in the statement of case.

13. So while the strict rules of pleading which apply in the courts, and which might prevent the respondents relying on an allegation which was only contained in a witness statement, do not apply in Tribunal, nevertheless the rules in court proceedings on what should be pleaded are a guide to what a statement of case in this Tribunal ought to contain.

14. So far as pleadings in the courts are concerned, Mr Justice Andrew Smith in *Gamatronic (UK) Ltd* [2013] EWHC 3287 (QB) said:

> "[26] …I reject any suggestion that a pleading is sufficient if the other parties can discern what lies behind it: parties should not have to dig behind what is pleaded to detect what is alleged (particularly where dishonesty or comparable impropriety is alleged); and perhaps more important, its meaning should be plain to the court as well as other parties."

15. So did HMRC's statement of case make its allegation plain? Without outlining in the decision notice each of the 70 odd requests for more information, I consider this in the context of the types of information the appellant sought.

Allegations of dishonesty?

16. The appellant says, and I did not really understand HMRC to disagree, that a pleading of fraud must be made plain in the statement of case, or else the Tribunal ought to proceed as if dishonesty was not alleged. I agree. One of the leading case on pleadings of fraud in the courts is the House of Lords' decision in *Three Rivers DC v Bank of England (No 3)* where Lord Millett said:

> "[184] It is well established that fraud or dishonesty …must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence…This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.
>
> [185] It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him….
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> [186] The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet….this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference [of dishonesty]. At trial, the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud….There must be *some* fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

17. It follows from this that HMRC must make clear whether it is alleging the appellant had a dishonest state of mind. In this case, the SOC appears to imply dishonesty against the appellant but at the hearing HMRC's position was that dishonesty against the appellant was not alleged.

Was dishonesty/fraud alleged?

18. Mr Kinnear's point is that no where did the SOC use the word 'dishonest' or 'fraudulent' or a word with a similar meaning in connection with the appellant. He pointed out that the Court of Appeal in *Mobilx* [2010] EWCA Civ 517 did not use the word 'dishonest'. From this it was HMRC's contention that where HMRC denied the appellant input tax recovery under the rule established by the CJEU in *Kittel* on the grounds (HMRC alleges) it *knew* its transaction was connected to fraud, HMRC was not making an allegation of dishonesty. Therefore, said Mr Kinnear, the special pleading rules which applied to fraud did not apply to MTIC cases.

19. I find in this case that in §§14-21 of the statement of case HMRC describe an MTIC fraud. An MTIC fraud is where a fraudster organises the purchases and sales of goods so the goods and money are likely to move in a circle of transactions beginning and ending with the fraudster or a person acting on his behalf. For this fraud to be profitable, it relies on a VAT free acquisition by a trader of the goods *within* the UK and a VAT free sale of the goods *out of the UK*. The VAT free sale by the exporter (the 'broker') to another EU country, which entitles the broker to recover VAT paid to his supplier, is the key to this fraud. Perhaps the simplest explanation of this fraud is that its object is to induce HMRC to refund to the broker VAT that was never actually paid to HMRC by the broker's (ultimate) supplier.

20. The fraud does not depend on the broker or a buffer (a trader earlier in the chain) knowing that his role is vital to a fraud. It is possible that, so far as the broker or buffer is aware, he is simply buying and selling goods at a profit. Whether any particular alleged broker or buffer is aware of the fraud (if proved) is a question of fact. Nevertheless, the person making the cross-border sale is the lynchpin of the fraud, whether or not he knows it. As long as the broker, when selling the goods pays his vendor *more* than he receives from his buyer, the fraudster is able to extract the fraudulent profit.

21. In this artificial market, the goods are bought and sold but there is no real market for the goods. The fraudster has to contrive the chain of transactions.

22. HMRC's case is that all they have to prove is actual knowledge by the appellant that its transactions in issue were connected to a fraud. They would not have to prove that the appellant understood the nature of the fraud involved in order to succeed.

23. HMRC's position disintegrates, however, when I consider what facts HMRC seek to prove in order to prove that the appellant knew its transactions were connected to fraud. Most significantly, as is almost inevitable in a case where MTIC fraud is alleged, the SOC here alleges that the appellant knew that its transactions were contrived. As an example of this §49 of the SOC reads:

> "The respondents contend that the appellant's transactions formed part of an overall scheme to defraud the Revenue, that the scheme involved an orchestrated and contrived series of transactions, and that there were features of those transactions which demonstrate that the appellant knew or ought to have known that this was the case…"

24. In my view, if an appellant is shown to know in advance that its purchase and sale were orchestrated by a third party in order to perpetrate a fraud on HMRC (or indeed on anyone), its decision to proceed with the transactions knowing this would be dishonest.

25. In other words, as part of its case that the appellant knew that its transactions were connected to fraud, HMRC seek to prove that the appellant acted in a dishonest fashion: they seek to prove that it went ahead with transactions which it knew were orchestrated for the purpose of fraud.

26. The same point was made by Judge Wallace in *Blue Sphere* VTD 20694 at [29]:

> "There is however an important difference between the person who knowingly participates in fraud and the person who takes part in a fraudulent chain without knowing that he is doing so notwithstanding that he should have known. A person who knowingly participates in a transaction connected with fraudulent evasion is himself committing fraud…."

27. Mr Justice Briggs said in *Megtian Ltd* [2010] EWHC 18 (Ch) at [41]:

> "…A person who knows that a transaction in which he participates is connected with fraudulent tax evasion is a participant in that fraud. That person has a dishonest state of mind…."

28. HMRC do not consider either of these to be good authorities. Mr Kinnear says they are superseded by the Court of Appeal's decision in *Mobilx.* However, Mobilx did not consider either of these passages or any passage similar to them and indeed did not deal with a question of pleadings. It is true, as noted above, that it does not use the word 'dishonest' nor a word similar to it, but then it did not need to consider whether knowledge that a transaction was connected to fraud amounted to dishonesty. Paragraph 41 of *Megtian* was neither expressly nor impliedly overruled in *Mobilx* and is therefore binding on this Tribunal.

29. Moreover, I note that the Court in *Mobilx* certainly appeared to describe dishonest behaviour: see, for instance [84] where Millett LJ refered to a trader who

> "has chosen to ignore the obvious explanation as to why he was presented with the opportunity to reap a large and predictable reward over a short space of time."

Futher, Millett LJ was quite clear in the same paragraph that such behaviour had to be 'put' to the witness in cross examination; in other words, the Court of Appeal did consider such behaviour to be dishonest, as it ruled the witness had to be given a specific opportunity to give an explanation before adverse inferences could be drawn.

30. It is true that, earlier in the decision, Millett LJ twice (at [20] and [41]) drew a distinction between a fraudulent trader and one who knew or ought to have known its transaction was connected to MTIC fraud. Does that mean I should infer from this that the Court of Appeal ruled that a person who 'merely' knew its transactions were connected with fraud was not dishonest? I do not think so.

31. The context of what Millett LJ said was in a reference back to what the CJEU said at [53] and [56] of its decision. In these two paragraphs, the CJEU drew a distinction between 'where tax is evaded by the taxable person himself' ([53]) and a person who knew or should have known its transaction was connected to fraud ([56]). The former transaction described at [53] was not an economic activity, so there would be no right to recover input tax; whereas the transaction described at [56] was an economic activity but one in which the right to deduct input tax was lost. In these two paragraphs, the CJEU was not drawing a distinction between honesty and dishonesty; it was drawing a distinction based on whether the transactions were an economic activity or not. Millett LJ, no more than the CJEU, stated that a person in the second category was honest if, although not actually fraudulently evading payment of VAT by its transaction, that person nevertheless entered into a transaction knowing it facilitated fraud by someone else. On the contrary, it stands to reason that such a person is not acting honestly. And that explains why later at [84] Millett LJ said such allegations had to be specifically put to the witness.

32. So I do not consider that there is anything in *Mobilx* which casts any doubt on what was said by Briggs J in the passage above, and which, for the reasons I have given at 25, must be right in law.

33. I note in passing that I consider HMRC wrong for another reason. In my view, the CJEU in *Kittel*, when referring to 'connected with' fraud used the word 'connected with' in the sense that the appellant's transaction facilitated the fraud. The justification given by the CJEU in *Kittel* for denial of input tax by someone who was not the fraudster, was as follows:

> "[56]…. In the same way, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with the fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.
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> 57. That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.
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> 58. In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions is apt to prevent them."

34. In [57] and [58] the CJEU refers to aiding the perpetrators, and refusing input tax recovery to knowing parties to make it more difficult to commit fraud. The underlying assumption the CJEU here makes is that the participation of the taxable person making the input tax reclaim actually facilitated the fraud: if the appelant's actions did not facilitate the fraud, then the appellant would not need penalising for aiding the perpetrator of the fraud, nor would refusing the input tax recovery make it more difficult for the fraudster to carry out the fraud. Here, therefore, is the guide to interpretation of what the CJEU meant by 'connected'. It meant it in the sense of a connection which facilitated the fraud. This is therefore the natural extent of the decision in *Kittel*. Not every remote connection to fraud is relevant: it is only the connections which facilitate the fraud which matter.

35. Therefore, the test in *Kittel* is whether the appellant knew (or ought to have known) its transaction was connected to (in the sense of facilitating) fraud. In my view a person who entered into a transaction knowing it facilitated fraud necessarily has a dishonest state of mind.

36. Mr Kinnear equated an allegation of dishonesty with an allegation of criminal conspiracy. But they are not one and the same: it is possible to be dishonest without entering into a criminal conspiracy. So far as MTIC fraud is concerned, a person may know that his transaction is connected to fraud and his decision to undertake that deal is thereby dishonest but that does not require him to have been in a conspiracy with anyone else. For instance, he may know of the connection to fraud because he was presented with the opportunity to reap a large and predictable reward over a short space of time (see [84] of *Mobilx)* and *not* because of any conspiracy in which he participated. So HMRC can allege dishonesty without alleging conspiracy. And in this case there is no allegation or even insinuation of conspiracy.

Effect on SOC in this case

37. Because there is an express allegation in the SOC that the appellant knew its transactions were contrived and, separately, because an allegation of knowledge of connection to fraud necessarily connotes an allegation of knowledge that the transaction facilitated fraud, I find that HMRC's SOC does imply that the appellant acted dishonestly. In contrast, at the hearing, as I have said, HMRC's position was that they did not allege dishonesty against the appellant and made no express allegation to that effect in the SOC.

38. The appellant said the SOC left it uncertain whether allegations of dishonesty were made against it or just against third parties. I consider this confusion justified bearing in mind HMRC's statement at the hearing that no dishonesty was alleged, which contradicted the allegation in the SOC that the appellant knowingly entered into transactions contrived for the purpose of fraud.

39. Allegations of fraud must be clearly made, and HMRC's position, bearing in mind what was said at the hearing, was not clear.

40. HMRC ought to apply to amend its statement of case to make it clear whether or not it is alleging a dishonest state of mind against the appellant. And, if it does not amend its SOC to allege a dishonest frame of mind, at the hearing it must not ask the Tribunal to find that the appellant knew its transactions were contrived, nor the appellant knew its transactions facilitated fraud by others, nor, indeed, that the appellant knew its transactions were connected to fraud.

41. If, on the other hand, HMRC amends the SOC to say that a dishonest state of mind is alleged against the appellant, then it may retain the allegations that are currently in the SOC that the appellant knew that its transactions in issue in this appeal were contrived and that it knew its transactions were connected to fraud.

42. I note in passing that a pleading that an appellant 'knew its transactions were connected to fraud' has, so far as I am aware, always been considered by this Tribunal in MTIC cases to be a clear pleading of dishonesty. Nothing in this decision should be taken as suggesting otherwise: nevertheless, in this case, bearing in mind HMRC's position at the hearing, HMRC must clarify if they are pleading a dishonest state of mind.

How should dishonesty be pleaded?

43. On the assumption that HMRC chooses to maintain the allegation that the appellant knew its transactions were contrived, then that is a pleading of dishonesty, and, as the above citation from *Three Rivers* shows, the appellant is not only entitled to know if fraud is alleged, but it is entitled to know the particulars on which the allegation is based. Millett LJ said a party against whom fraud was alleged was entitled to be told in the pleadings the primary facts on which the allegation was based, and the primary facts pleaded to support the allegation must not be consistent with honesty.

44. The appellant's position was that the SOC did not meet the standard referred to in *Three Rivers.* HMRC's position was that the appellant's Request asked for more details than to which it was entitled.

45. I find §65-95 of the SOC pleaded primary facts on which HMRC relied for their allegation that the appellant entered into the transactions in issue in this appeal knowing they were connected to fraud. These allegations include:

- The appellant's general knowledge of MTIC fraud in carbon credit trading;
- The appellant's expanding trade in carbon credit trading;
- That the appellant carried out superficial due diligence;
- The appellant's decision to enter into substantial trades with a new supplier when the Bluenext exchange was shut;
- The appellant's submission of a suspicious activity report to the Financial Services Authority about this new supplier but at the same time continuing to trade with it;
- Re-trading the same carbon credits within a short time-frame

46. The SOC contained greater detail than in my above summaries. The appellant says that there is not enough detail. I do not agree for the reasons given at §90-122 below. The appellant knows the primary factors relied on by HMRC. It knows some details but (I presume) not all of them. It must wait for the witness statements to put all the flesh on the bones.

The (allegedly) re-traded carbon credits

47. One primary fact relied on which the appellant said was inadequately pleaded, was in relation to the allegedly re-traded carbon credits. The appellant wants to know to how many of its impugned deals this allegation related and it wanted to know the serial numbers of the carbon credits concerned.

48. It seems to me that this is a prime example of the distinction between pleading of primary facts and details which can be left for service of evidence. The primary fact relied on is the re-trading of the identical product within a short period; if HMRC is to succeed in making it out they will need to serve evidence showing that the appellant actually did re-trade the identical credits in a short period of time, which will necessarily require them to identify the dates, serial numbers and transactions and so on. But they do not need to plead these details in the statement of case.

49. The appellant's case is that they want to start investigating the matter as quickly as possible and don't want to wait for the evidence to be served in order to discover the details. On the contrary, while the appellant must be given sufficient time to respond properly to the allegation, I find it difficult to understand why the appellant expected to speed up proceedings by serving a Request for details which ought to be contained in the evidence. If no Request had been served, directions for evidence to be served would (normally) have been agreed or issued shortly after the SOC. So far from speeding up the provision of these details, the Request may well have delayed the provision of these details by HMRC but that is no reason for me to now require HMRC to serve out of turn. The details must await service of evidence.

Facts relied on should not be consistent with honesty

50. The requirement to plead fraud with particularity is coupled with a requirement that the particulars pleaded must not be consistent with honesty. In [184] of *Three Rivers* (see §16 above) Millett LJ said that 'facts, matters and circumstances which are consistent with negligence' do not plead dishonesty. How does that fit with the allegations in these sorts of cases that the appellant knew '*or ought to have known*' that its transactions were connected with fraud? The second half of this allegation is one of constructive knowledge but not dishonesty. In MTIC cases the same facts to support the allegation of actual knowledge are relied on to support the allegation of constructive knowledge, and it is difficult to see how else it could be pleaded.

51. On reflection, I do not think that pleading in this manner falls foul of what Lord Millett said in [184]. As he said in [186], there must be '*some* fact which tilts the balance and justifies an inference of dishonesty'. Where a combination of circumstantial matters are relied on to support an inference of actual knowledge, it is the *combination* of (some or all of) these factors which (allegedly) 'tilts the balance' from constructive to actual knowledge. So it does not offend against what Millett LJ said if, at the same time that dishonesty is alleged, it is alleged in the alternative that the same facts support a finding of constructive knowledge.

Fraud allegations against third parties

52. HMRC make allegations of fraud against third parties, such as the defaulting traders. It is of course legitimate for them to make such allegations if there are grounds on which to make them. As with any other pleading, it must be properly particularised, particularly where an allegation of dishonesty against a party may in part depend on the dishonesty of the non-party being proved.

53. HMRC's view was that they would not need to prove that the appellant's suppliers were parties to the fraud in order to make out a case of knowledge against the appellant. And this is true; the dishonesty of the broker's suppliers is not a necessary ingredient to justify a *Kittel* denial of input tax. Nevertheless, a tribunal might consider the proved dishonesty of the appellant's suppliers to be relevant to the question of the appellant's knowledge of fraud, so HMRC might chose to seek to prove it. I consider that if the supplier's (alleged) dishonesty is a fact relied on by HMRC to prove the appellant's (alleged) knowledge, then it is a primary fact and ought to be pleaded (assuming of course there are grounds for such a pleading).

54. The appellant's complaint is that dishonesty against some non-parties seems to be insinuated but is not clearly pleaded. I consider this in detail.

55. Alledged Defaulting Traders: HMRC recites a number of alledged facts about the three alledged defaulting traders (Bilta (UK) Ltd, Nathaneal Eurl Ltd and Westis Limited). With respect to the first two there is a clear allegation of fraud (at §58.4 and 59.10) but no such allegation with respect to the third.

56. This omission does make the SOC defective. Elsewhere in the SOC it is clearly HMRC's case that the default by the acquirers was a part of the MTIC fraud; the two paragraphs which deal specifically with Westis recite facts which, if true, could support an allegation of fraud, yet fraud is not pleaded.

57. HMRC must apply to amend its SOC and clarify its position with regards Westis Ltd or else it must not make an allegation Westis was fraudulent at the hearing. If it does not make that allegation, it is difficult to see how it can maintain an allegation of connection to fraud for those chains in which Westis is the (alleged) defaulter.

58. The appellant also says that the pleading is unclear with regards Bilta. While it is pleaded that Bilta fraudulently defaulted, it is not made clear if Bilta was the alleged acquirer. I agree with HMRC that the defaulter does not have to be proved to be the acquirer and therefore do not consider the pleading to be unclear: the factual position may not be fully known to HMRC. The details of what they intend to prove should be in the evidence.

59. The appellant's Request also asks HMRC to confirm that it does not allege the appellant was aware of any of the facts relied on in respect of the three traders. I consider this falls in the category of asking for 'negative pleading' and to which the appellant is not entitled. I deal with this at §112-122 below.

60. Appellant's suppliers: K O Brokers: in respect of KO Brokers, HMRC give some 4 paragraphs of facts. At §61.2 HMRC allege that its turnover increased exponentially in a short period of time and concludes in the next paragraph

> 'those figures, achieved from a virtual standing start, were wholly implausible as resulting from honest and genuine arm's length trading in emissions allowances.'

61. It is difficult to read this particular allegation as anything other than an allegation that KO Broker's trading was dishonest, but there is no pleading that the facts pleaded in respect of KO Broker in the other three paragraphs (such as the director's conviction for fraud) support an allegation of dishonesty against K O Brokers. Therefore, I find that the pleading in respect of KO Broker lacks clarity. HMRC should apply to amend the SOC to make it clear if dishonesty is alleged against K O Brokers. If they do not, they should not make allegations of dishonesty against K O Brokers at the hearing.

62. Moreover, the relevance of the facts alleged against K O Brokers is not made clear. K O Brokers was one of the appellant's suppliers but not in respect of the deals in issue in the appeal. I deal with this below at §70.

63. Skyinformations: this trader was not a supplier in the deals in issue in the appeal and HMRC do not make clear why 8 paragraphs of the SOC is devoted to this trader; moreover, while what is said seems to indicate that HMRC considered Skyinformations traded fraudulently (sudden increase in turnover, sudden switch from broker to buffer, failure to contact HMRC), there is no statement to that effect.

64. HMRC must clarify if they are alleging dishonesty against Skyinformations. If the SOC is not amended to carry a clear allegation of fraud against this company, then HMRC must not ask the Tribunal to draw any inference of fraud against the Skyinformation at the hearing. I deal with the question of relevance at §70 below.

65. Cantor CO2 Ltd: In respect of Cantor CO2 Limited, HMRC plead that they have refused its input tax deduction on the grounds (inter alia) of knowledge of fraud. For the reasons given at §§18-35 I consider that is an allegation of dishonesty by Cantor CO2 but it is clear from what was said at the hearing that HMRC may not have intended it as such; HMRC has therefore failed to make its position clear with respect to Cantor CO2 Ltd.

HMRC must clarify if they are alleging dishonesty against Skyinformations. If the SOC is not amended to carry a clear allegation of fraud against this company, then HMRC must not ask the Tribunal to draw any inference of fraud against the Skyinformation at the hearing. I deal with the question of relevance at §70 below.

66. SVS: In respect of SVS Securities PLC HMRC plead a number of matters, such as (alleged) minimal due diligence, exponential increase in turnover in a short period, most of its deals tracing back to fraud, and so on. Nevertheless, in the three pages dealing with this trader there is no allegation that this company was dishonest and/or knowingly entered into transactions contrived for the purpose of fraud.

67. It is not clear to me for what purpose these allegations of fact in relation to SVS are relied upon. It seems they cannot be relied on merely to support an allegation that the appellant's due diligence in respect of its supplier was inadequate, because (if that were so) why mention that most of SVS' deals ultimately traced back to fraud, a factor which due diligence should not discover? So HMRC may be implying SVS entered into transactions which it knew were contrived for the purpose of fraud but, if so, the SOC does not state this expressly.

68. I consider that the appellant was justified in asking for this to be clarified. HMRC must apply to amend their SOC if they wish to allege dishonesty against SVS and in particular if they allege it knowingly entered into transactions contrived for the purpose of fraud. If they do not, they should not make any such allegation at the hearing nor ask the Tribunal to make such a finding.

69. It is of course well established that allegations of fraud against anyone should not be made without sufficient grounds to support it. The appellant did not suggest that the matters set out in the SOC (assuming there is evidence to support them) would not be grounds to support such an allegation against any of the four above named traders.

70. In so far as HMRC is alleging fraud against any or all of these suppliers, they have not relied (or at least not expressly relied) upon such allegations as a primary fact which supports their allegation of knowledge against the appellant. HMRC cannot therefore make such an allegation at the hearing unless they now apply to amend their SOC to make such an allegation with clarity. Indeed, unless they did intend to rely on allegations against the appellant's immediate suppliers in order to support the allegation of knowledge against the appellant itself, it is difficult to see why such facts about the suppliers are pleaded. Nevertheless, it is not for the appellant or Tribunal to infer HMRC's case. It must be stated with clarity.

Pre-assessment trading

71. Lack of clarity is evident particularly in respect of the allegations surrounding the appellant's trades which pre-date those on which input tax was denied. HMRC only assessed the appellant in respect of transactions after 8 July 2009. Yet the SOC refers to matters relating to the appellant's trade prior to 9 July and in particular:

- It is alleged that the appellant's trade in carbon credits grew exponentially in 2009;
- It is alleged the some of the appellant's earlier trades (with SVS and Cantor) connect back to fraudulent tax loss;
- As mentioned, reference is made to two suppliers (K O Brokers and Skyinformations) which supplied the appellant in earlier deal chains but not those at issue in this appeal;

- It is pleaded that the appellant commenced trading with SVS on 9 June in circumstances which HMRC say 'is supportive of an inference that trading was contrived and [the appellant] knew as much'.

These various matters are scattered throughout the SOC and there is no clear statement of what inferences should be drawn in respect of them and why.

72. There is no explanation of why K O Brokers and Skyinformations are mentioned; there is no statement even that Citibank's trades with them have been traced back to fraud. HMRC need not only clarify whether allegations of dishonesty are made against these two companies but what the relevance such allegations have to this appeal and why. The details are not required, but clarity is.

73. It is clear that HMRC do allege that the appellant's trading with SVS prior to the 24 deals in issue traced back to fraud and was contrived and that the appellant knew it (at least from 9 June). What is not so clear from that paragraph (§88) is why HMRC say this, and although paragraph §96 may contain an explanation, it is not clear.

74. While HMRC explain (partly in the annexes) its case in outline of why it says the 24 deals in issue traced back to a fraudulent default, no specificity is provided about its allegation that some of the appellant's trades prior to 9 July 2009 traced back to fraudulent tax loss. The number of deals concerned is not stated. The deals concerned are not identified. The deal chains are not annexed. The defaulters are not named nor the default described.

75. Yet if HMRC do rely on as a primary fact to support the allegation of knowledge after 8 July an allegation that certain of the appellant's earlier trades connected to fraud and the appellant knew or ought to have know it, then those earlier alleged fraudulent deal chains should be pleaded to the same degree of specificality as the later ones.

76. So I consider that the SOC is deficient here. HMRC should apply to amend the SOC to make it clear whether it relies on earlier alleged fraudulent trades as a primary fact and why. If it does, it should provide a greater degree of clarity and detail than currently provided. If it does not make that application then it should not ask the Tribunal to make findings in relation to the appellant's pre 9 July trading.

Basis of appellant's alleged liability as a corporate entity

77. Another complaint is that the SOC does not make clear on what basis the appellant, a corporation, is said to have actual or constructive knowledge of connection to fraud. In its SOC, HMRC does not aver that any particular individual employed by, or an agent of, the appellant had the requisite state of knowledge and that that knowledge should be imputed to the appellant.

78. At the hearing I understood that HMRC's position is that at the moment they cannot be sure which individuals at Citibank knew what. Mr Kinnear considered that

there might be (at least) one individual acting as an agent of the appellant whose state of knowledge amounted to 'actual knowledge' of connection to fraud and that therefore that knowledge should be imputed to Citibank; he accepted that it might be the case that, without any one individual having actual knowledge, different things were known by different people within Citibank, which, if such knowledge was considered in its totality, amounted to constructive knowledge by Citibank of connection to fraud, even if actual knowledge was not possessed by any single individual.

79. This explanation is not contained in the SOC, which does not address the issue of how a company, a legal construct, can possess actual or constructive knowledge.

80. Where the corporate entity is owned and controlled by the same person, it may be obvious that an allegation that that entity 'knew' something is an allegation that the controlling director knew that thing. It is not so clear where the corporate entity is not the alter ego of a single person, but on the contrary a subsidiary of an ultimate holding company which is likely to have a great many shareholders; and moreover where the corporate entity has a great many employees, and where the allegation of 'knowledge' appears to be connected with the knowledge and/or activities of a small number of employees who were not directors. HMRC should apply to amend their SOC to state their case on why they think the knowledge of named or unknown individuals employed by the appellant should be vicariously attributed to the corporate appellant.

If HMRC do not apply to amend the SOC, then they should not ask the Tribunal to attribute knowledge (actual or constructive) by named or unknown individuals to the appellant. It seems to me that that would prevent HMRC making out its case, so that it may be appropriate for the appellant to apply for the appeal to be allowed if HMRC does not apply to amend its SOC as indicated.

Allegations against the four named individuals?

81. Four persons employed by the appellant are named in the SOC (§77). No allegations are made in the SOC against any of them and the appellant's Request asks if HMRC is making any allegation that any of them knew or ought to have known of the (alleged) connection to fraud.

82. HMRC's response is that they do not have the information to form an opinion whether any particular individual working at Citibank knew or ought to have known of the connection to fraud. Their position is (as I understand it) that they would not have to prove that to succeed in the appeal.

83. Nevertheless, they do allege that Citibank as an entity had actual knowledge of the fraud. I have ruled that that is in effect an allegation of dishonesty and that HMRC must make this explicit or withdraw the allegation (see §40). Assuming HMRC does make the allegation explicit, it must be an allegation that they have proper grounds to make.

84. Mr Kinnear accepted in the hearing that to prove actual knowledge against Citibank would require them to prove actual knowledge against an individual whose knowledge could be vicariously attributed to the bank. Yet they do not (so far) seek to prove actual knowledge against any *named* individual. Would the individual whose (alleged) knowledge they seek to vicariously attribute to the bank have to be identified by them to make good the allegation of knowledge by the bank? Because if so, HMRC should not make that allegation against the appellant without identifying such an individual.

85. But I do not think identification would be required: otherwise a corporate entity could avoid allegations of actual knowledge by simply refusing to cooperate with HMRC's enquiry or call any witnesses, making it impossible to identify which particular person had actual knowledge. If the circumstantial evidence was sufficient to justify it, I think a Tribunal could draw the inference that at least one person, albeit unidentified, acting on behalf of the bank had actual knowledge.

86. So I consider that HMRC can (if they have proper grounds in the evidence) make an allegation of knowledge against a corporate entity, such as the appellant, even if they are unable to identify any particular individual whose knowledge should be vicariously attributed to the bank.

87. I agree with HMRC that to prove merely constructive knowledge they would only have to prove that various persons individually had separate elements of knowledge, which, when collectively attributed to Citibank, would mean that Citibank as an entity had constructive knowledge of the connection to fraud.

88. Therefore, I agree that it is proper (subject to having the evidence) that HMRC can make allegations of knowledge and means of knowledge against the bank without making any allegations of dishonesty or even constructive knowledge against any of the named individuals. Therefore, HMRC should not be required to answer Request 63 or 2(a)(i): the answer is in the existing SOC. HMRC do not (yet) allege that any particular individual knew or ought to have known of the connection to fraud.

89. It may be that following exchange of evidence that HMRC go on to form an opinion that a particular individual did have actual or constructive knowledge of the connection to fraud. But it is clear that they could not put such an allegation in cross examination to that person, if a witness, or ask the Tribunal to make that finding even if the person is not a witness, unless it has first been made clear to the appellant that such allegations would be put. The normal way of doing so would be to apply to amend the SOC. And what I said in paragraph §40 about making clear whether the allegation is one of dishonesty or not applies.

Application for exhaustive facts to be pleaded

90. So the appellant is entitled to have pleaded the primary facts which support the allegation of connection to fraud and knowledge of it. But nowhere do the authorities require *every* fact relied on in support of the allegation of fraud to be pleaded. And while fraud must be pleaded with greater particularity than other pleadings, the same

general rule applies to all pleadings which is that pleadings must state the primary facts relied on; the details do not need to be pleaded.

91. In *Gamatronic* (in which there were allegations of dishonesty) the Judge said:

> "[26]… statements of case should be concise and avoid excessive details and particulars. That is so, but they must still be sufficient accurately to identify the issues for the court as well as the parties…"

The quotation then continues as at §14 above. It goes on:

> "[27] In this sort of case where the claims are based upon allegations of covert wrongdoing, claimants are often unable to provide full details and solid evidence….[In another case where] the thrust of the complaint was that the defendants worked together secretly to damage the claimants' reputation and business, I said that, 'On a summary judgment application the court is not blind to claimants' difficulties in such cases, of producing solid evidence of the role of each defendant in covert activities, particularly before disclosure.' The same is true of the difficulties in pleading with particularity, but lack of particularity is different from lack of clarity."

92. The appellant clearly did not have this in mind when the Request was framed. At a number of places it asks for 'full particulars of all facts and matters relied on' by HMRC to prove a specified point (see eg §1(f), 2(b)(iv), 12(c), and 13 (d)) and 'provide an exhaustive list of all facts and matters relied upon (see §2(a)(ii)). Elsewhere it made many requests for 'full particulars' (eg §19(a) and 22).

93. The appellant's Request is for more information than a statement of case is meant to contain. But so far as I understood its position, the appellant's point is that it requires this information. It wants it now and does not wish to wait for the witness evidence to be served, which may or may not contain the information it seeks. Without it, it says, it can not investigate the position.

94. If I were to grant an application for 'full' or 'exhaustive' particulars I could create a hostage to fortune; it could lead to an application by the appellant at the hearing that anything put to the appellant's witness that strays beyond the 'exhaustive' particulars is beyond what the respondent is entitled to put to that witness. It might give rise to a suggestion that a respondent could not apply to amend a statement of case if and when further evidence comes to light.

95. If I were to grant an application for 'full' or 'exhaustive' particulars, I would create an unfortunate expectation that appellants are entitled to that level of detail in every statement of case. In the same way that a notice of appeal does not require the appellant to state absolutely every fact on which it relies, no more is a statement of case required to contain this level of detail. The statement of a case is a step in the process of building the case that will come on for hearing. It must contain a reasonably detailed outline of the respondent's case but it is not required to contain all the evidence that will later be contained in the witness statements.

96. Moreover, allowing requests for 'full' or 'exhaustive' particulars would delay proceedings as it would be impossible for HMRC to serve its SOC any earlier than it could serve its witness statements. On the contrary, the rules expect the SOC to be served within 60 days of the receipt of the notice of appeal.

97. Allowing the request for 'full' or 'exhaustive' particulars of allegations would also render the SOC otiose as it would become no more than a duplication of the witness statements. On the contrary, the statement of case is merely a step in building the case to be heard at the hearing; it is not a substitute for witness statements.

98. A Tribunal should not grant, at this stage in proceedings, a request for pleadings to be more detailed than required because such a request only slows down the progress of the proceedings; instead of agreeing Directions shortly after receipt of the SOC for service of witness evidence, the parties here have been involved in a dispute over the Request. Delay in proceedings is in the inevitable consequence, so the Tribunal should not uphold at this stage of proceedings requests for further details unless the statement of case is actually defective.

99. And it is clear that the appellant is not entitled to full particulars. As Lord Woolf MR in *Mcphilemy v Times Newspapers Ltd* [1999] 3 AER 775 said at 792:

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out parameters of the case that is being advance by each party. What is important is that pleadings should make clear the general nature of the case of the pleader…"

100. It was also said by Saville LJ in *British Airways Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 45 Con LR at 4:

> "The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party to properly to prepare to answer it. To my mind it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even where is it not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court poor over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered, when in truth each party knows perfectly well what case is made by the other and is able properly to prepare to deal with it. Pleadings are not a game to be played….."

101. So I will not grant the appellant's request for HMRC to provide 'full' or 'exhaustive' particulars. The respondents are merely required to plead the primary

facts on which they rely, and that is without prejudice to any possible application to amend the pleadings which might be made once witness statements are exchanged.

Applications for further details to be pleaded

102. At a number of places and in respect of a number of issues the appellant's Request demands more details than were pleaded. As I have stated the appellant is entitled to have the primary facts relied upon pleaded. It is not entitled to 'full' or 'exhaustive' particulars. But where should the line be drawn? The statement of case must make clear the general nature of the case; it does not need to include the details.

103. Having stated the principle, I go on to apply it to the particular requests for further details to which I was referred:

104. The timing issue: Part of the dispute between the parties concerns whether the assessment was raised in time. It is accepted that the assessment was made within the four years required by s 77 and the dispute is whether it was made within one year after evidence of facts sufficient to justify it came to HMRC's knowledge within s 73(6)(b). HMRC have not suggested that s 77(4) is relevant.

105. There appears to be an issue between the parties over who has the burden of proof on the matter but that is not something for the SOC. The Request asks for details about HMRC's investigation up to and after the one year before the assessment (§22, 30, 70). (Part of the Request is an application for disclosure of documents such as the 'progress log' and submissions to HMRC policy. I deal with the various applications for disclosure below.)

106. The appellant complains that the SOC does not make clear which facts, sufficient to justify the assessment, came to light before the expiry of the one year time bar in s 73(6)(b). I find HMRC's SOC deals with the time bar issue at §§51-53. Its case is that the receipt of information that showed (allegedly) that some of the appellant's trades in issue were in carbon credits which the appellant had traded only shortly before was the last piece of information necessary to justify the assessment.

107. I consider that the SOC would be inadequate if it did not state what the last piece of information was. But that having stated the piece of information, it does not need to be particularly detailed. In my view, HMRC has here made clear its case. It is succinct and lacks detail but that is sufficient for a statement of case. The details must wait for the service of the evidence.

108. Circularity: the appellant wants HMRC to state for which deals it holds direct evidence of circularity and for which it relies on circumstantial evidence. Circularity is not pleaded although contrivance is (see §88); the only direct evidence of circularity referred to is the re-trading of the same bonds (§94) and there it is relied on as evidence of contrivance. In any event, it is for HMRC to plead the primary facts (such as the matters relied on to prove contrivance); the nature of the evidence to prove it can properly be left for the witness statements.

109. Assessments against defaulters: the appellant complains that HMRC has not listed any assessments raised against the alleged defaulters. In fact, while details are lacking, it is pleaded that assessments were raised against, unqueried and unpaid by, Bilta. It is also pleaded assessments were raised against Nathaniel Eurl. It is not pleaded against Westis.

110. While I agree that the headline facts alleged to show that the default was fraudulent need to be pleaded, the details of them (such as dates) do not need to be pleaded. I do not find the pleading on the assessments inadequate so far as Bilta and Nathaniel Eurl are concerned. The pleading against Westis was on this, as on other matters as already mentioned at §57, inadequate. The same comment made at §57 applies.

111. Nature of fraud: the appellant also complains that the SOC does not make clear the nature of the fraud pleaded and in particular whether acquisition or MTIC fraud is pleaded. I consider that the summary of the fraud at §14-21 is not the most informative description of MTIC fraud. In particular, it lacks an explanation that the deal chains are contrived, but that omission is rectified at §88. Nevertheless, the fraud described is MTIC fraud. I find it clear that MTIC fraud was pleaded.

Negative pleading etc

112. HMRC are not required to exhaustively state what they are *not* pleading and what does *not* form a part of their case. Nevertheless, at various points in the Request HMRC are asked to state that something does not form part of their case.

113. It is certainly the position that HMRC should not seek to prove something at the hearing which should have been but was not pleaded. The remedy for that is that the Tribunal can refuse to hear evidence which goes to prove something that should have been but was not alleged in advance of the hearing.

114. The appellant is not entitled to ask HMRC to confirm what it is not pleading. Requests for such negative pleadings would unnecessarily prolong proceedings and fail to generate anything useful, particularly as any answer would sensibly have to be caveated by saying that the matter forms no part of HMRC's case *as yet*, just in case more evidence comes to light later.

115. The appellant complains that the SOC does not identify the alleged fraudster who allegedly contrived the transactions, nor is it made clear whether all impugned transactions are alleged to be part of the same fraud or are alleged to comprise different frauds, each contrived by a different person.

116. HMRC's point is that they do not have to prove the identity of the fraudster nor the exact nature of the fraud in order to succeed in showing that the transactions were connected to fraud. That is true. But if the identity of the fraudster and/or the nature of the fraud is one of the primary (alleged) facts of their case then it must be pleaded.

117. As HMRC do not plead either the identity of the fraudster nor that the same fraudster contrived all of the appellant's transactions, it seems to me that the appellant must take from the SOC that neither of these are a part of HMRC's case against them. HMRC do not have to state what they are not pleading.

Asking for information which HMRC can not provide

118. I find in places the Request asked for information which HMRC was unable to provide. For instance, at §1(e) and 12(a) & 13(a) it required HMRC to identify the parties to the alleged MTIC fraud. HMRC's position is that it does not know the identity, or at least that they do not seek to prove it. The appellant also asked for all parties to the transaction chains to be identified. The deal sheets provided with the SOC only identified the chain from defaulter to the appellant; they did not even identify the appellant's customer. At the hearing, HMRC explained that this was because they had not (yet) identified the downstream chain.

119. The appellant at the hearing did not suggest that if HMRC could not provide the requested information the appeal should necessarily fail. It said it wanted the information or an explanation as to why it could not be provided.

120. It's the appellant's case that this information should have been in the SOC. I cannot agree. HMRC is not relying on any of this information, which it does not possess, in order to make out its allegations. Nor does HMRC have to explain why it is not providing this information.

Bona Fides direction?

121. The fourth item of the Request was a confirmation from HMRC that it did not allege that the appellant's customers were knowingly involved in the fraud. HMRC has not identified the appellant's customers (so far) and there is no allegation that they knew of the fraud.

122. What the appellant requires here appears to be similar to a 'bona fide' direction, by which I mean a direction that persons not alleged to be involved in the fraud should be assumed by the Tribunal to be honest. This was considered by me in the case of *Trimax* [2014] UKFTT 733 at [19-20]. I consider what I said in that case is right: the Tribunal should not assume the bona fides of a person just because no allegations of dishonesty are made. The lack of such allegations and/or the lack of evidence of dishonesty would prevent adverse inferences being drawn but that is not the same as assuming honesty. The question can and ought be left open, unless the matter is put into issue and evidence adduced.

Applications for disclosure contained in the Request

The appellant applied for disclosure of a number of matters in the Request, such as the documentation relating to the re-traded carbon credits, the internal HMRC documents on the timing issue; copies of the assessments against defaulters, copies of the deal documentation (such as invoices) and a copy of a conviction referred to in the SOC.

123. The Tribunal has power to make orders for disclosure and HMRC do not suggest that anything of which the appellant seeks disclosure in the Request is something which should not be disclosed. It is simply their position that the application is premature.

124. I agree. It does not advance the efficient progress of litigation for a party to make an application for something which would be shortly directed in any event; indeed the requirement to disclose is a part of the Tribunal's rules. On the contrary, an application for disclosure following receipt of the statement of case puts a brake on the issue of directions and the orderly conduct of the appeal. I agree the application is premature and, with a view to discouraging premature applications, I will not grant it, although that in no way determines whether the appellant is entitled to the material requested at the proper time for disclosure.

125. The appellant must therefore wait for disclosure in the ordinary course of proceedings and then apply for further disclosure if it is dissatisfied with what it has received. Had it not made the Request, it might already have received HMRC's list of documents.

126. I note in passing that there is an issue between the parties over the extent of general disclosure. I am not yet called to resolve that.

Summary of conclusions

127. The Request for information was flawed in many respects; in some instances it asked for information which was actually pleaded (eg the deal chains); in others it asked for information to which it is plainly not entitled (such as exhaustive facts to be relied on at the hearing); in many others it asks for details and disclosure to which it is entitled, but not at this stage.

128. The appellant is entitled to have the respondent's case set out in its statement of case and it is no answer for the respondents to say (at this point in time) that they will rely on their (yet to be served) witness statements to remedy any defects in the statement of case. But on the other hand, the appellant is not entitled to require the SOC to contain more than the allegations and the primary facts relied on to establish them. The appellant criticises the preamble to the SOC which stated that 'full particulars' would be contained in the witness evidence, but this records no more than the law. HMRC are not directed to reply to the Request or any part of it.

129. Nevertheless, I do consider that the SOC was seriously flawed and some of the appellant's complaints about it were justified. The SOC was seriously flawed as either HMRC intended to allege behaviour amounting to dishonesty but failed to plead it with clarity or HMRC did not intend to allege behaviour amounting to dishonesty but nevertheless insinuated it. In a few instances, it failed to plead the primary facts relied on. In summary, the defects were:

(1) The SOC failed to make clear whether or not HMRC is alleging a dishonest state of mind against the appellant. If HMRC do not (successfully)

apply to amend the SOC to allege a dishonest frame of mind, they must not make allegations at the hearing that the appellant knew its transactions were contrived, or that the appellant knew its transactions facilitated fraud by others, or indeed that the appellant knew its transactions were connected to fraud.

(2) It made no clear pleading of fraud against Westis Ltd. HMRC must apply to amend its SOC if it wishes to make such a pleading; if it does not, or if the application is unsuccessful, then at the hearing it must not make an allegation that Westis was fraudulent. They must ensure they have pleaded all primary facts to support any such allegation of fraud against Westis they chose to make, and in particular should refer to any assessment if the fact of that assessment is relied upon.

(3) The SOC failed to make clear if dishonesty was alleged against K O Brokers. If HMRC do not apply to make such an allegation, or if such application is unsuccessful, then they should not make allegations of dishonesty against K O Brokers at the hearing. Moreover, the relevance of the facts alleged against K O Brokers in the SOC must be made clear.

(4) The SOC failed to make clear if dishonesty was alleged against Skyinformations. If HMRC do not apply to make such an allegation, or if such application is unsuccessful, then they should not make allegations of dishonesty against Skyinformations at the hearing. Moreover, the relevance of the facts alleged against Skyinformations in the SOC must be made clear.

(5) The SOC failed to make clear if dishonesty was alleged against Cantor CO2. If HMRC do not apply to make such an allegation, or if such application is unsuccessful, then they should not make allegations of dishonesty against Cantor CO2 at the hearing. Moreover, the relevance of the facts alleged against Cantor CO2 in the SOC must be made clear.

(6) The SOC failed to make clear if dishonesty was alleged against SVS. If HMRC do not apply to make such an allegation, or if such application is unsuccessful, then they should not make allegations of dishonesty against SVS at the hearing. Moreover, the relevance of the facts alleged against SVS in the SOC must be made clear.

(7) In so far as HMRC is alleging fraud against any or all of these suppliers, they have not relied (or at least not expressly relied) upon such allegations as a primary fact which supports their allegation of knowledge against the appellant. HMRC cannot therefore make such an allegation at the hearing unless they now (successfully) apply to amend their SOC to make such an allegation with clarity.

(8) HMRC do not clearly plead their case in respect of the appellant's pre-9 July trading and whether it is relied on as a primary fact to support the allegation that the appellant knew its post-8 July trading was connected to fraud; HMRC cannot therefore make such an allegation at the hearing unless they now (successfully) apply to amend their SOC to make such an allegation with clarity and, in so far as they allege the pre-9 July trading was connected to fraud, with the primary facts to support that allegation and any allegation that the appellant knew or ought to have known it.

(9) HMRC should apply to amend the SOC to state HMRC's case on why they think the actual and/or constructive knowledge of named or unknown individuals employed by the appellant should be attributed to the corporate appellant. If they do not apply to amend their statement of case, or if such application is unsuccessful, then it would seem they might be unable to make out their case at all, and it might be appropriate for the appeal to be allowed.

130. HMRC should be on notice that if they intend to apply to amend their SOC they should do so sooner rather than later and any such application made more than a month after the date of release of this decision will be less likely to succeed then one made within a month.

131. There are other case management issues outstanding between the parties. On receipt of this decision the parties should seek to agree them; if they are unable to do so, they should notify the Tribunal and another hearing set down.

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

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 28 November 2014