FTC/54/2010
[2010] UKUT 372 (TCC)

PROCEDURE – admission of further evidence – discretion to admit – evidence admitted – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

CONNECT GLOBAL LIMITED

Appellant

- and –

-

THE COMMISSIONERS FOR HER MAJESTY' S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: The President, the Hon Mr Justice Warren

Sitting in public in London on 29 September 2010

Michael Patchett-Joyce counsel, instructed by McGrigors LLP, for the Appellant

Michael Holland QC and Jamie Sharma, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondent

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DECISION

1. The hearing of the tax appeal to which the present appeal relates had an estimated length of twelve days. On the ninth day of the hearing, 18 May 2010, the First-tier Tribunal, Judge Avery Jones, Ms Farquharson and Ms Myerscough ("**the Tribunal**"), dealt with an application by the Respondent ("**HMRC**") to admit further evidence. They granted the application on that day, adjourning the hearing to give the Appellant ("**Connect Global**") an opportunity to consider and respond to the new evidence. The Tribunal gave its reasons in a written decision (**"the Decision**") released on 21 May 2010. Connect Global now appeals against the decision to admit the new evidence.

2. As explained by the Tribunal, the tax appeal is an MTIC appeal in which HMRC have to show that there is fraud (by a missing trader at the start of the transaction chain), that Connect Global's transaction (17 deals) in mobile phones are connected to the fraud, and that Connect Global knew or ought to have known of the connection with the fraud. The application to the Tribunal concerned IMEI [International Mobile Equipment Identity] numbers which are identifying numbers of individual mobile phones.

3. In order to understand the basis of the appeal, it is necessary have the history of the underlying tax appeal in mind. The Tribunal set this out in paragraphs 2 to 8 of the Decision. I append those paragraphs to this decision and make some additional observations in the following paragraphs.

4. The decision letter a number of matters were listed as having been taken into account. In relation to the absence of formal written contracts with suppliers or customers and the consequent absence of any redress arrangement it was observed:

> "This is an indicator that the transactions were artificially contrived rather than being genuine commercial transactions, and a reasonable business would have realised this and not proceeded with the deals without making extensive enquiries to establish the reliability of the other parties in the supply chain."

5. The due diligence undertaking by Connect Global was stated to be insufficient – it could not have provided adequate assurances that Connect Global was not involved in an MTIC fraud chain. In that context the letter states that

> "it would be expected that a reasonable business would record IMEI numbers so that it could ensure that goods were not stolen etc, and also as a check against the possibility of dealing in the same goods more than once, which would be a clear indicator of connection with carousel fraud. It would also be expected that such records would be necessary for commercial purposes, to enable the company to validate any returned goods that the company had supplied."

6. It was not surprising that the letter alleged that IMIE numbers had not been kept: this is what HMRC had been told by Mr Ajay Gokani on behalf of Connect Global.

7. However, in its Notice of Appeal, Connect Global states that it did keep IMIE numbers and that these were available if required. These had not been provided prior to HMRC's statement of case.

8. In that statement of case, there appears this paragraph 41.c):

> "The Appellant carried no insurance for the period 04/06. It is difficult to follow its preparedness to accept such a risk in circumstances of potential exposure to liability for another in respect of high value goods. In particular, recording of IMEI numbers for each handset could have demonstrated the goods were neither stolen nor circulating within the transaction chains, and (absent written contracts and insurance) proof of purchase. Unusually, there appears not evidence of unsold goods.

9. At this stage, HMRC had not seen any material to support the assertion in the Notice of Appeal that IMEI numbers had been kept. It is now said by Connect Global that HMRC's case went no further than an allegation that IMEI numbers were not kept but made out no further case, and required no further evidence or information about IMEI numbers, if on the facts that allegation turned out to be incorrect. That struck me, when I had first read the paragraph which I have just quoted, as a rather surprising suggestion. It seemed to me that the subject of IMEI numbers had been thrown into the pot quite generally – they are by no means the only, or most significant, aspect of HMRC's case on any footing. HMRC's point was that the recording of IMIE numbers would have demonstrated an absence of theft or carousel fraud. If Connect Global was then going to rely on the fact that it had (contrary to what HMRC had been told) recorded IMIE numbers, then I would have expected it to provide evidence of what it had done. In particular, it would need to show whether it had recorded IMIE numbers for all phones and to identify the numbers and phones concerned and how the recording was done. In the absence of that evidence, a bald assertion that IMIE numbers were recorded really provides the Tribunal with virtually no assistance.

10. On 3 December 2008. a witness statement was made by Pankaj Mandalia on behalf of HMRC in response to Connect Global's appeal. Following that, the witness statement of Anjay Gokani dated 30 January 2009 was made. The Tribunal considered and summarised the relevant section of the witness statement in paragraph 3 of the Decision identifying the list of IMEI numbers exhibited as "AG8".

11. I need to say something about AG8. It was introduced by a short paragraph which read as follows:

> "A copy of the IMIE numbers scanned in respect of the stock dealt with in the transactions relevant to this case is now shown to me marked "AG8".

12. That is all that is said. Nowhere in the witness statement is any explanation given about the way in which the numbers scanned were transferred, as they must have been, to a computer. Nothing is said about how the numbers were sorted. The reader of the witness statement and AG8 might be forgiven for thinking that AG8 was a contemporaneous record of each transaction which had been recorded and printed out. The reader would have had no reason to think that AG8 was a document compiled for the purposes of the witness statement, taking some, but not all, of the information available and collating it in a way which bore no resemblance to the way in which the information was originally collected and stored.

13. In particular, AG8 provides only IMEI numbers and, against each recorded number, a model of phone. It gives no other information, not even the date of the transactions in which any particular phone was involved. The list is compiled in blocks, each block relating to a single model of phone. It is impossible to link any particular phone or IMIE number with any particular deal.

14. Mr Mandalia made a second witness statement on 6 May 2009. He expressed surprise about what Mr Gokani had said but I do not need to go into any detail about that. But I do need to note what he says about Mr Gokani's stated wish to act in accordance with the standards of a reasonably competent and honest trader:

> "I do not understand the basis of Mr Gokani's unwillingness to provide IMEI numbers to HMRC. If as he says Mr Gokani was concerned to act in accordance with the standards of a reasonably competent and honest trader……I would have thought Mr Gokani would have wanted to know if the results of a comparison of IMEI records from Elite [another company of which Mr Gokani was a director] or CGL [Connect Global] with the contents of HMRC records – assuming that this was done – had indicated that particular handsets were being traded more than once."

15. That, it seems to me, was not simply addressed at the excuse for having lied to HMRC about the recording of IMEI numbers; it was challenging Connect Global saying in effect "If, as you say, everything is in order then provide us with the information to enable us to make a comparison". It does not, one must recognise, say so in terms, but it could hardly come as a surprise to Connect Global that HMRC might subsequently require more detail about the detail or the recording of IMEI numbers

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16. On 9 September 2009, directions were made listing the hearing for 6 May 2010 with witness statements standing as evidence in chief and subject to cross-examination. It was ordered that by 31 March 2010 the parties

"shall confirm that they have adduced all the documents on which they intend to rely or which might be relevant to the issues to be determined in the appeal and there shall be no further evidence without the agreement of the parties or order of the Tribunal."

17. It is to be noted that this direction requires each party to disclose all documents relevant to the issues to be determined in the appeal, not just those relied on by the party concerned. This was a continuing obligation. If Connect Global had adduced all its documents in, say, January 2010, and then discovered new relevant documents, it would be bound to adduce them. Further, each party was entitled to assume, in the absence of any indication to the contrary, that the other party had complied with its obligations by 31 March 2010

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18. On any view, one of the issues in the case was whether Connect Global had recorded IMEI numbers. Connect Global's position before me is that that was a narrow issue: literally whether numbers were recorded or not. Accordingly, once it is established that records were kept, that is an end of the issue concerning IMEI numbers. That seems to me to be altogether too narrow an identification of the issue as at 31 March 2010. One reason why the recording of IMEI numbers is relevant is because, if they had not been kept, it would be some evidence of the failure by Connect Global to take adequate precautions to ensure that it was not involved in a fraud; and that is a reason which must have been obvious to Connect Global. But it must also have been obvious to Connect Global – and if it was not, it should have been – that even if IMEI numbers had been recorded, HMRC would want to know how the recorded numbers related to the purchases and sales made by Connect Global. The issues concerning IMEI numbers can be seen to go further than the mere fact of recording of those numbers

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19. This is not an aspect on which it is necessary to rely. Even taking the narrow approach to the issue which is taken by Connect Global, it is clearly not enough for Connect Global to say, as it does in its Notice of Appeal, that numbers were recorded and were available on request. When it came to the hearing, Connect Global, the Tribunal would require evidence to support the allegation that IMEI numbers were in fact recorded. In order to ensure that each party had available to it all relevant documents relating to an issue, the direction which I have quoted above was made. There can be no doubt that Connect Global was obliged, pursuant to that order, to adduce all documents which would support or refute its case that IMEI numbers were recorded. The production of AG8 went nowhere near complying with the direction. AG8 was not a document prepared contemporaneously with the recording of numbers but was prepared much later for the purposes of this appeal. It is not even a document which mirrors in a spread sheet the information which is recorded electronically in a form which corresponds in any helpful way with the electronic information. It gives only the limited information which I have already indicated and does not enable the reader to match any phone or number with any particular transaction or the date of any transaction. The information, albeit recorded electronically, was recorded in files

on computers or servers which were relevant to the issue whether records were in fact kept. They ought to have been disclosed pursuant to the direction

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20. They were not disclosed. Until 31 March 2010, when the time for compliance with the direction expired, HMRC had no knowledge about what, if any, further documents would be adduced. They did not even know until after the hearing had commenced that AG8 was not a contemporaneous document although they would obviously have realised, if they had thought about it, that AG8 was most probably prepared from information stored electronically. Moreover, as later as 8 April 2010, Connect Global was maintaining that it had disclosed all relevant documents. Its solicitors wrote to HMRC on that date stating that Connect Global "has adduced all the documents on which it intends to rely or which might be relevant to the issues to be determined in the appeal". For the reasons I have given, I consider, as did the Tribunal, that that is simply incorrect even if the only "issue" concerning IMEI numbers was whether they were recorded or not.

21. Had Connect Global complied with its obligations under the direction, HMRC would have had, by 31 March 2010, all the underlying data. It would have been able in good time to carry out further research on its own database, Nemesis (as to which see more below) and to have been a position well before the start of the hearing, to adduce the evidence which they now wish to adduce to demonstrate that Connect Global had traded in the same phones more than once (having failed to carry out the checks necessary to identify these multiple trades) and that a number of phones had been carouselled.

22. Mr Mandalia did not, after his second witness statement of 6 May 2009, address in further evidence the issue of IMEI numbers until a few days before the hearing when he produced a third witness dated 6 May 2010 and turned to consider AG8. He identified some recent correspondence in March and April 2010 concerning the provision of further information about IMIE numbers. The last letter, dated 14 April, from Connect Global's solicitors indicated that Connect Global was carrying out a further check for any further records. At the date of the witness statement, no further information had been provided.

23. Mr Mandalia set out what he then did in the absence of further evidence. He says that he carried out certain checks on some of the IMEI numbers contained in AG8 using HMRC's database, Nemesis. Nemesis, he explained, is a database used to record information gathered for various batches and shipments of mobile phones and other monitored goods, to a given transaction point or movement, and to detect, by a cross-referral process inbuilt within the database, where any specific item has been encountered previously as part of an earlier supply chain transaction or shipment. He explained that, because of the volume of IMIE numbers in AG8, he had been able to check only a small sample – only 20 in all.

24. As a result, he was able to prepare a table which contained the following information:

a. The IMIE numbers sampled together with the AG8 page number.

b. The Nemesis batch report number to which each IMIE number was found to have been scanned in.

c. The date each IMIE number was scanned.

d. The identity of the trader.

25. Then Mr Mandalia produced the individual pages from the batch reports for each of the 20 sampled IMIE numbers. He drew the conclusion from all of this information that Connect Global had traded in the same phones more than once but had failed to carry out the checks necessary to identify this. He also concluded that a number of phones had been carouselled (that is to say, the mobile phones in question had been exported out of the UK and then had returned to the UJ at some point).

26. I am told by Mr Holland QC (who appears for HMRC) that HMRC were very surprised that the exercise carried out in relation to these samples produced the results which they did. HMRC had not previously carried out this process because they had no expectation of it being a worthwhile exercise. Whether that is accurate or not, it is certainly the case that AG8 by itself did not provide the information which would enable HMRC easily to match batches with the data held on Nemesis.

27. Connect Global make great play of the fact that HMRC did nothing after January 2009 to investigate any matters concerning the recording of IMEI numbers. And yet they had known from that time that Connect Global case was that IMEI numbers had been recorded and had the details of the phones and IMEI number concerned. There are at least two answers to that complaint.

a. First, it was not until 31 March 2010 that HMRC would at latest receive all relevant documentation; until then, or at least in the course of the correspondence of March 2010, HMRC had no reason to think that there were relevant documents which would not be adduced.

b. Secondly, because AG8 did not match phones and numbers to batches or deals, it was impossible to tell from AG8 whether all of the phones comprised in all of the 17 deals were listed. There was simply no way of knowing whether AG8 did show that all IMEI numbers were recorded.

28. As to the first of those, it is true that, after January 2009, HMRC could have sought an order of disclosure of the documents and data underlying AG8. They did not do so before September 2009. But that, if it was a matter for criticism at all which I doubt, became water under the bridge in the light of the directions made on 9 September 2009. That provided for relevant disclosure by 31 March 2010. Even if this was not an agreed date (which I believe it was), it was a date

set by the directions and was not challenged either in correspondence or by way of an application for a revised timetable.

29. Then it is said by Mr Patchett-Joyce, in relation to the checks which Mr Mandalia carried out against Nemesis shortly before trial, that he should have done this long before. Mr Holland has given a response to that as I have just explained. Of course, what Mr Holland says is not evidence. But the assertion made by Mr Patchett-Joyce in submissions that these checks should have been carried out earlier is not based on evidence either. I do not propose to determine whether HMRC could reasonably expect such checks to be fruitless, or whether Mr Mandalia and his colleagues were surprised at the results they obtained. What I do decide is that they cannot be criticised for failing to carry out these checks until after 31 March 2010 when, according to the directions, all relevant documents ought to have been disclosed. As I see it, it is the failure of Connect Global to adduce the relevant information which had led to the present dispute about admissibility of evidence. If those documents had been supplied by the end of March, HMRC would have had the opportunity in good time for the hearing to carry out their own checks against Nemesis and to seek to adduce new evidence in time for the hearing. If an application to adduce such evidence had been made in, say, the second half of April, then it would, I venture to suggest, have been admitted even if a delay in the start of the hearing had been necessary to enable Connect Global to reply to it

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30. On 10 May 2010, Mr Holland made a formal application to the Tribunal to adduce Mr Mandalia's third witness statement in evidence. He had flagged early in the hearing that such an application would be made and that there might be argument about it. As the Tribunal records, on the next day, 11 May, Connect Global disclosed to HMRC and the Tribunal further details of its database of IMEI numbers in electronic form so that HMRC could run further checks. A site inspection was also offered. HMRC were able to run further checks against Nemesis and wanted to adduce further evidence of these.

31. The next relevant event was that Ketan Gokani produced a witness statement dated 16 May 2010 explaining how Connect Global's database was used; HMRC wished to adduce yet further evidence to rebut what Mr Gokani had said. The effect of this evidence was summarised by the Tribunal in paragraph 8 of the Decision (set out in the Appendix to this decision).

32. The Tribunal also recorded in paragraph 8 of the Decision that, on 18 May, Mr Patchett-Joyce made an application. His preferred course was not to admit any of the new evidence from either side – from Mr Mandalia's third witness statement onwards. As an alternative, he sought to have Ketan Gokani's evidence allowed in, in the knowledge that this would be followed by an application by Mr Holland to admit Mr Mandalia's third and fourth witness statements, an application which Mr Holland duly made.

33. In the debate between the Tribunal and Mr Patchett-Joyce (the transcript of which I have read) it is clear that Mr Patchett-Joyce's primary position was that none of the evidence should be admitted. His own application to adduce the witness statement of Ketan Gokani was premised on the Tribunal having already admitted Mr Mandalia's third witness statement. It is not open to Mr Holland to say that there was an unqualified (and unopposed) application to admit Mr Gokani's witness statement which would have resulted, almost inevitably, in the admission of Mr Mandalia's fourth witness statement. Mr Patchett-Joyce did not seriously suggest, indeed he could not, that the evidence was not relevant but what he did say was that it was relevant to issues concerning the IMEI numbers which would arise only if Mr Mandalia's third witness statement was admitted and not relevant to the narrow issue whether IMIE numbers were recorded. As to that, he said it was simply too late. There could be only one proper case-management decision at that late stage of the hearing, a decision to refuse to admit the evidence.

34. The Tribunal disagreed and allowed all the evidence to be adduced.

35. The Tribunal dealt, in paragraphs 10ff of the Decision, with the rules governing, and the correct approach to, the admission of evidence. They saw, correctly, that there was clearly a discretion to admit the evidence which they did admit. It was a discretion which had to be exercised in accordance with the overriding objective set out in rule 2 of the Tribunal Procedure (First-tier Tribunal (Tax Chamber) Rules 2009. Having set out the rule, the Tribunal said this at paragraph 11 of the Decision:

> "The purpose of HMRC's statement of case and directions dealing with disclosure of documents is to enable the appeal to be heard with both parties understanding the case they have to meet. We therefore start with the position that late evidence should in general not be permitted."

36. That, no doubt, reflects what was said by Rose J in *GUS Merchandise Corp Ltd v Customs & Excise Commissioners* [1992] STC 776 at 780:

> "The whole purpose of the statements of case and the list of documents, submitted [counsel for the taxpayer] was to enable the company to know the way in which the commissioners put their case. That is undoubtedly right."

37. On the facts of that case, it was an appropriate observation to make. But it is perhaps putting the matter rather high. Lightman J had a different approach in *Mobile Export 365 Ltd* [2007] EWHC 1737 (Ch):

> "The presumption must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary."

38. Perhaps the tension between those different statements of principle is more apparent than real. The question has been considered in more detail by Lewison J in *Brayfal Ltd v HMRC* (CH/2008/APP/0082), a decision referred to an cited from

by the Tribunal. It is worth repeating the paragraphs which they set out in the Decision:

> "38. Modern case management attaches importance to a number of different factors. First, it attaches importance to compliance with orders and directions. Failure to comply with orders and directions increases the costs to the parties, delays the final adjudication on the merits and requires the devolution of proportionately more time of the Tribunal to the case in question. Failure to comply with orders and directions is prejudicial to the administration of justice itself.
>
> 39. Where a party in default of an order or direction wishes to be relieved from the consequences of his default, the burden is undoubtedly on him to persuade the Tribunal to grant relief. The Tribunal will take into account any explanation for the failure, which will always be a relevant circumstance.
>
> 40. Secondly, modern case management attaches importance to a cards-on-the-table approach. It discourages surprises and ambushes.
>
> 41. Thirdly, it attaches importance to adhering to trial dates. Applications that have or may have the result of disrupting a trial date or the progress of a trial are viewed less sympathetically than those which will not have that effect.
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> 42. Fourthly, it adopts a flexible approach to the imposition of sanctions on a party who is in default. When considering what, if any sanction to impose, it will weigh up the consequences of deciding one way rather than another. Sometimes these factors will all point towards the same conclusion. Sometimes they will point in different directions. Where the balance is to be struck in any particular case is a matter of judgment for the tribunal in question."

39. I would only add that the application of these principles must be applied consistently with the ethos of tribunals within the new structure of the Tribunals, Courts and Enforcement Act 2007. Principles which have been developed in the courts in the context of the Civil Procedure Rules must be applied with appropriate sensitivity to the situations of tribunal users. It should be noted that Lewison J was dealing with an appeal in the VAT and Duties Tribunal (now abolished). It should not be taken that Lewison J was intending to carry across mechanically the approach to case management in the courts to case management in that tribunal let alone that that should be done in the new system without recognition of the distinctive characteristics of the new tribunals.

40. The Tribunal distinguished *Brayfal*. It clearly is distinguishable on its facts. Having distinguished it, the Tribunal then applied the principles set out by

Lewison J to the facts of the present case. They summarised the case in this way at paragraph 13:

> "13. Standing back from who is applying to do what, the issue for us will be the weight we should have to the Appellant's evidence of its due diligence in checking IMEI numbers. The extent of the Appellant's due diligence is likely to be an important factor in determining whether the Appellant ought to have known that its transactions were connected with fraud (assuming that the existence of a fraud is proved). The material that the Appellant wishes to introduce will show what use they made of the IMEI numbers, which is part of their case; and the material that HMRC wish to introduce appears to throw doubt on the accuracy of the Appellant's database, and hence whether the due diligence was effectively carried out. If it is not admitted the Appellant cannot demonstrate what checks it made, and we would expect Mr Ajay Gokani to be cross-examined about the IMEI numbers but without HMRC being able to produce evidence to rebut what he says."

41. It is important to note what the Tribunal says about due diligence – that the extent of Connect Global's due diligence is likely to be an important factor in determining whether it ought to have known that the transactions were connected with fraud. That it clearly an important issue in the case and what it did about IMEI numbers is simply one facet of that issue. Connect Global relies on Ajay Gokani's witness statement and on AG8. AG8 makes no sense in isolation; it has to be explained and if it is not explained by the witness statement already made by Ketan Gokani, there will be cross-examination of Ajay Gokani about it. Without any of the additional material, the Tribunal might well be forced to conclude that no reliance can be placed on AG8 and even if Mr Gokani is believed when he says that records were kept, the Tribunal will have no evidence about the extent of those records or the transactions to which they related.

42. It would be absurd if the Tribunal had to shut their eyes to the evidence now available from Connect Global which shows that quite extensive records of IMEI numbers were made; but if they are to receive that evidence, it would be wrong not to allow HMRC to produce its own evidence, based on the data contained in Nemesis, to explain why there remained a lack of due diligence and to meet the explanations given by Ketan Gokani which, it might be anticipated, would be repeated by Ajay Gokani in cross-examination.

43. As to cross-examination, to refuse to admit Mr Mandalia's third witness statement and all subsequent material would have unsatisfactory consequences for the conduct of the hearing. The Tribunal would then be left with the evidence of Ajay Gokani, by way of assertion and unsupported by any document other than AG8, that IMEI numbers were recorded. I can see no reason why HMRC should be precluded from cross-examining Mr Gokani about the recording of IMEI numbers and how this was done. He could be asked how AG8 came to be made and the data from which it was produced. HMRC would surely be entitled to establish

how AG8 relates, if it relates at all, to the 17 deals and the batches of phones relevant to each deal. I can, at the moment, see no reason why they should not be entitled to use in cross-examination material, relevant to the recording of IMEI numbers, which was obtained as a result of very late disclosure, in the course of the hearing, by Connect Global. It would be wrong, in my view, if HMRC were not entitled to challenge Mr Gokani by reference to their own data as recorded in Nemesis. It would have been highly unsatisfactory if HMRC had sought to introduce for the first time in cross-examination, the material in Mr Mandalia's third and fourth witness statement. HMRC have not, of course, sought to do so; instead they seek, responsibly, to adduce the material as their own evidence and accept that Connect Global must be given the opportunity to respond to it

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44. Connect Global's own approach to this aspect was addressed in a letter dated 14 April 2010 from their solicitors to HMRC. Its then approach was, if I may say so, the correct one:

> "The matters you raise about recording IMEI numbers are dealt with in the Witness Statement of Ajay Gokani (see paragraph 75FF). It is, of course, open to HMRC to cross examine on these points during the hearing…. However in the light of your comments our client is undertaking a further check for any records within the categories you describe. Presumably you will have no objection as to the introduction of any documents located as this is a point that you have specifically raised."

45. Further material was disclosed. HMRC have no objection to its introduction. Indeed, they say, correctly, that it is relevant and should be admitted. They wish to cross-examine as Connect Global's solicitors stated they should be entitled to do, and in so doing wish to rely on all the relevant material.

46. Finally, the Tribunal considered the matter of prejudice to each side in admitting the further evidence.

47. Having weighed up its conclusions on the relevance and importance of the new evidence and the prejudice (in particular to Connect Global) of allowing its introduction, the Tribunal decided to admit he evidence.

48. To succeed in its appeal, Connect Global would have to persuade me either that the Tribunal had applied the wrong approach in principle or that, in applying the correct approach, it had reached a conclusion which no tribunal, properly directed, could have reached on the facts. In my judgment, the Decision discloses no error of approach. Further the Tribunal's decision was one which it was open to the Tribunal properly to reach. I would add that it is the decision which I myself

would have reached so that if, contrary to my view, the Tribunal adopted the wrong approach, I would have remade the decision and reached the same conclusion as the Tribunal.

49. Accordingly, this appeal is dismissed.

Mr Justice Warren
President

Release Date: 19 October 2010

APPENDIX

PARAGRAPHS 2 TO 8 OF THE DECISION

1. By way of background, this is an MTIC appeal in which HMRC have to show that there is fraud (by a missing trader at the start of the transaction chains), that the Appellant's transactions (17 deals) in mobile phones are connected to the fraud, and that the Appellant knew or should have known of the connection with the fraud.

2. The application concerns IMEI [International Mobile Equipment Identity] numbers which are identifying numbers of individual mobile phones. During HMRC's extended verification of the Appellant's transactions during April 2006 the Appellant denied that they recorded IMEI numbers. The decision letter of 25 February 2008 refusing the Appellant's input tax claim for April 2006 records as one of the reasons that the Appellant did not keep a record of IMEI numbers which a reasonable business would be expected to do since dealing in the same goods more than once would be a clear indicator of carousel fraud. The Notice of Appeal dated 26 March 2008 records that the Appellant did in fact keep IMEI numbers which could be provided if required. HMRC's statement of case relied on the fact that there was no recording of IMEI numbers. In paragraphs 75 to 86 of his witness statement dated 30 January 2009, Mr Ajay Gokani, the Appellant's only witness of fact, who has not yet given evidence, records his evidence about IMEI numbers, including that they were scanned by the freight forwarders, checked against the Appellant's and Elite Mobile plc's (its associated company, which is the UK's third largest authorised distributor of mobile phones) previous transactions, that if duplicates were found they refused to complete the transaction, they questioned the supplier about the history of the stock and if the supplier was to blame would consider not to continue trading with the supplier. He explains that the reason why he had told HMRC that IMEI numbers were not kept was that he did not want HMRC to compare it with their own database and use the information against the Appellant that the same phones had been bought

and sold by fraudulent traders. A list of the IMEI numbers involved in these deals was provided as exhibit AG8 to the witness statement. This gave the IMEI number and the type of phone but no other details and it now appears to have been sorted by phone model rather than being in the order of the transactions. The Appellant's database contains other information such as the date of the transaction, the seller and the purchase order number, that was not disclosed. It will be apparent that whether IMEI numbers were kept by the Appellant at all, and what checks the Appellant made with them, was an issue in the appeal.

3. The Tribunal's directions in this appeal required the parties to confirm by 31 March 2010 that they had disclosed all the documents on which they intended to rely or which were relevant to the issues in the appeal. Exhibit AG8 does not show how checks of the numbers in the list were carried out, and against what. Nor does it record the date of the transactions, so that HMRC could not use the information to check against their own information, for which a fuller version of the Appellant's database of IMEI numbers, including dates and purchase order numbers would be required. One would also expect that the Appellant's evidence would include documents showing what the IMEI numbers were checked against, details of the duplicates (if any) found in relation to the 17 deals in question, and what was done about it. We consider that the disclosure solely of the IMEI numbers involved in the 17 deals did not fully comply with the directions in this respect, on the basis that the Appellant intended to rely on the checks that had been done with those IMEI numbers for which documents were required to show what they were checked against, and in any case the checks were relevant.

4. HMRC wrote on 3 March 2010 asking for further information about the IMEI numbers and the checks done, and asked to view the database on site. The Appellant's representatives replied that if the purpose was to obtain further information or test the Appellant's case this was not acceptable. HMRC wrote again on 9 April 2010 and the Appellant replied on 14 April 2010 saying that they had complied with the directions. Although HMRC did make this request before the time limit for disclosure under the directions, they had had Mr Ajay Gokani's witness statement and AG8 since 30 January 2009. We agree with Mr Patchett-Joyce's criticism that HMRC started to act extremely late in relation to investigating IMEI numbers, even taking into account that AG8 did not enable them to make the checks they wished.

5. HMRC scan IMEI numbers of some exports but do not scan them all. Their records are contained in a database called Nemesis. Nemesis is internal to the HMRC and is not available to traders. The information in Nemesis includes the date and time, a code number for the exporter, the reference to the airway bill (where relevant) and export declarations. One would expect that if HMRC did scan IMEI numbers relating to the exports in the particular deals done by the Appellant into Nemesis, the IMEI numbers would correspond with the numbers in the Appellant's database relating to the same transaction, which could be identified by the date and airway bill number. Having AG8 in paper form did not enable HMRC to check this because it did not contain dates or airway bill numbers, but they did some checks against AG8 using a sample and wanted to introduce further evidence about the comparison of the

Appellant's database. That application was initially made by Mr Holland on 10 May 2010 after the start of the hearing.

6. On the next day the Appellant disclosed to HMRC and the Tribunal further details of its database of IMEI numbers in electronic form so that HMRC could run further checks. A site inspection was also offered. HMRC were then able to run some checks against Nemesis and wanted to introduce further evidence of these. A witness statement on behalf of the Appellant by Mr Ketan Gokani dated 16 May 2010 was then supplied explaining how the database was used. HMRC want to produce evidence to rebut this evidence.

7. On 18 May 2010, which was day 9 out of 12 reserved for this appeal, we heard an application by Mr Patchett-Joyce whose preferred course was not to allow the introduction of either his or HMRC's witness statements, but as an alternative to allow Mr Ketan Gokani's witness statement to be introduced in the knowledge that these would be followed by an application by Mr Holland for HMRC to admit two witness statements by officer Pankaj Mandalia, which Mr Holland duly made. Mr Mandalia's evidence appears to show that in relation to a sample of a batch of exports (which appears to correlate with one of the deals on 7 April 2006) which was scanned into Nemesis on 8 April 2006 under the airway bill number relating to the same purchase order reference, none of the IMEI numbers in Nemesis appears in the Appellant's database, whereas one would expect them all to correspond. And 33 out of a sample of 37 IMEI numbers in Nemesis for that export do appear in the Appellant's database for an export on 27 March 2006 with a different purchase order number, and the remaining 4 do not appear in the Appellant's database at all.