Neutral Citation Number: [2022] EWHC 723 (Ch)

Claim No: FL-2016-000008

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST (ChD)

Heard at:
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 31 March 2022

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

BILTA (UK) LIMITED (in liquidation) AND OTHERS

Claimants

- and -

(1) SVS SECURITIES plc
~~**(2) KULVIR SINGH VIRK**~~
~~**(3) SIMON FOX**~~
~~**(4) DEUTSCHE BANK AG**~~
(5) TRADITION FINANCIAL SERVICES LIMITED

Defendants

Mr Christopher Parker, QC and **Andrew Westwood, QC** (instructed by **Enyo Law LLP**) for the **Claimants**

Mr David Scorey, QC and **Mr Laurence Emmett, QC** (instructed by **Greenberg Traurig LLP**) for the **Fifth Defendant**

The **First Defendant** did not appear and was not represented

Hearing dates: 7 to 10 and 16 March 2022

Approved Judgment

I direct that no official note or transcription shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Marcus Smith:

A. INTRODUCTION

(1) The proceedings against SVS, Mr Virk, Mr Fox and Deutsche Bank

1. By a Claim Form issued on 6 July 2015, five claimants (by their liquidators) issued proceedings against various defendants. The claimants included:

(1) Bilta (UK) Limited (**Bilta**).

(2) Weston Trading UK Limited (**Weston**).

(3) Nathanael Eurl Limited (**Nathanael**).

(4) Inline Trading Limited (**Inline**).

(5) Vehement Solutions Limited (**Vehement**).

The liquidators of these companies – Mr Kevin Hellard and Mr David Ingram – were also named as claimants. I shall refer to the five companies described above as the **Claimants** and (where necessary to refer to them) to their liquidators as the **Liquidators**.

2. The defendants, at this stage, comprised *(i)* SVS Securities plc (**SVS**), *(ii)* a former director of SVS (a Mr Kulvir Virk); *(iii)* a former employee of SVS (a Mr Simon Fox); and *(iv)* Deutsche Bank AG (**Deutsche Bank**).

3. The claims against SVS, Mr Virk, Mr Fox and Deutsche Bank all concerned missing trader intra-community fraud (**MTIC Fraud**) which took place in the summer of 2009. The nature of MTIC Fraud is further considered below.

4. The Claimants had been left with enormous VAT liabilities owing to what I shall refer to as Her Majesty's Customs and Revenue (**HMRC**), although that is a name that has changed over time. In the case of all of the Claimants, HMRC was and is the primary creditor.

5. The ordinary limitation period in respect of these claims will have ended by the summer of 2015. It is clear, therefore, that the claims against SVS, Mr Virk, Mr Fox and Deutsche Bank were all – just about – issued within this ordinary limitation period.

(2) The proceedings against TFS and the nature of MTIC Fraud

6. On 25 August 2017, the Claimants wrote a letter before action to Tradition Financial Services Limited (**TFS**) in respect of the claims that are the subject of these proceedings. Those claims, like those against SVS, Mr Virk, Mr Fox and Deutsche Bank, involved MTIC Fraud.

7. MTIC Fraud exploits the fact that imports from one EU country into another are VAT-free. The most basic form of MTIC Fraud involves traders importing goods VAT-free from elsewhere in the EU, selling them within an EU country with VAT added to the sale price and so running up large liabilities to account for the VAT to national revenue authorities (here: HMRC). These importers then default on their liabilities to account for VAT, instead paying their VAT receipts away to third parties and going into insolvent liquidation.

8. MTIC Fraud thus concerns a failure, on the part of the responsible company, to account for its **Output VAT**, which is the VAT that company must calculate and collect when it sells goods or services. Output VAT is calculated both on sales to other businesses and sales to ordinary consumers. By contrast, **Input VAT** is the VAT added to the price when goods or services that are liable to VAT are purchased. If the person or business that is buying the goods or services in question is registered for VAT, then the Input VAT may be claimed back from HMRC. Generally speaking, businesses registered for VAT will incur both Input and Output VAT, and the net amount will be paid to HMRC (in the case of the United Kingdom).

9. Those involved in MTIC Fraud will usually seek to transact in high-value, easily transportable, products. Mobile phones, SIM cards and computer chips were popular product vehicles for MTIC Fraud in the early- to mid-2000s. The fraudsters involved tend to transact in high volume and at high speed and frequency, using back-to-back transactions between linked companies set up or acquired for the purpose. The transaction chains may also include companies that are not controlled by the fraudsters. The use of a chain of companies obscures the fraud and complicates the task of investigation.

10. In these proceedings, the MTIC Fraud involved spot trading in carbon credits under the EU Emissions Trading Scheme (**EUA**s). One EUA represents the right to emit one metric tonne of carbon dioxide or other specified gas. EUAs are required by so-called "installations" in energy intensive industries that emit carbon dioxide and are subject to obligations to comply with EU emissions rules. EUAs exist only in electronic form, are fungible, and can be traded almost instantly. Spot trading in EUAs within EU Member States attracted VAT in 2009. Those rules changed when the authorities realised that EUAs were being used as the products in MTIC Fraud.

11. In August 2017, the Claimants proposed that TFS be joined as a party to the existing proceedings against SVS, Mr Virk, Mr Fox and Deutsche Bank, since the claims against all of the parties were – to some extent at least – related. Given the timing, TFS contended that it had a limitation defence that would be prejudiced if it was joined in this way. Although the Claimants confirmed that they would undertake not to rely on relation back beyond the date of the TFS claim form, when issued, TFS's position was that it was not open to the parties to agree not to apply certain provisions of the Limitation Act 1980. It is unnecessary to go into the correctness or otherwise of these points. It is sufficient to note that in light of TFS's position, a separate Claim Form, against TFS alone, was issued on 8 November 2017.

12. The claim against TFS is based on: *(i)* dishonest assistance in breach of fiduciary duty by the directors of the Claimants; and *(ii)* participation in the fraudulent trading of the businesses of the Claimants pursuant to section 213 of the Insolvency Act 1986. The section 213 claims give rise to rather different issues than the issues which arise in relation to the dishonest assistance claims, and (as I will describe) these claims are considered separately in this Judgment.

13. The dishonest assistance claims allege that through spot EUA trading carried out between May and July 2009, TFS participated in chains of transactions by which a large MTIC Fraud was perpetrated. That participation amounted to dishonest assistance by TFS in the breaches of fiduciary duty of the directors of the Claimants, which those directors owed to those companies. It will be necessary to consider the nature of the case against TFS in greater detail below.

(3) The prior and subsequent history of the proceedings

14. It is unnecessary to describe in great detail the procedural history. There were a number of claims brought by the Claimants (and others) in respect of MTIC Fraud where EUAs were the relevant product in addition to those already described. These claims included claims against Citigroup Global Markets Limited (**Citi**), commenced by a Claim Form dated 23 November 2015. The claims against Citi were ordered to be jointly case managed and tried together with the present proceedings by order of Newey J dated 10 April 2017.

15. Following a consensual resolution, the claim against Deutsche Bank was dismissed by consent by order of Rose J dated 31 October 2017.

16. As I have described, the Claim Form against TFS was issued on 8 November 2017, and by his order dated 2 May 2018, Snowden J ordered that the TFS proceedings be consolidated with the original proceedings.

17. On 5 August 2019, special administrators in respect of SVS were appointed by order of the Court dated 5 August 2019. The proceedings against SVS were, accordingly, stayed, and SVS has (since that date) taken no further part in the proceedings.

18. Following consensual settlements being reached with Mr Fox and Mr Virk (without any admission of liability on their part), I made orders staying the claims against them on 19 February 2020 and 3 March 2020 respectively.

19. The proceedings against Citi were also compromised (without any admission of liability) and I made a consent order dismissing those claims on 20 February 2020.

20. TFS is thus the last defendant standing. The trial of the claims was originally due to take place before me in April 2020 but was adjourned on 3 April 2020. The trial was re-listed for January 2021, but was adjourned by order of the Court of Appeal dated 19 January 2021, my having refused an adjournment. It is this re-re-listed trial that is before me now.

(4) Narrowing of the issues

21. A settlement has been reached between the Claimants and TFS. Those terms are confidential, and it is unnecessary to recite them, save to note the settlement has resulted in a substantial narrowing of the issues, in that only two live issues remain for determination by me.

22. Those "live" issues are as follows:

> **(1)** A limitation defence pleaded by TFS in paragraphs 114 to 116 of its Amended Defence (the **Limitation Defence**).
>
> **(2)** A contention by TFS that the claims under section 213 of the Insolvency Act 1986 fail as a matter of law because they are outwith the terms of that section.
>
> **(3)** Costs. The costs of the whole proceedings are to be determined by me at the conclusion of these proceedings.

(5) Structure of this Judgment

23. In light of the foregoing, this Judgment deals first with the Limitation Defence (in Section B below) and thereafter with the claims under section 213 of the Insolvency Act 1986 (in Section C below).

B. THE LIMITATION DEFENCE

(1) The defence as pleaded

24. Paragraph 114 of TFS's Amended Defence provides:

> "As to the purported claims in dishonest assistance:
>
> 114.1 Any cause of action in dishonest assistance accrued at the time of the alleged dishonest assistance, i.e. on dates during the Relevant Period, which ended on 30 July 2009.
>
> 114.2 The claim form was not issued until 8 November 2017, i.e. over 6 years later.
>
> 114.3 In the premises, the Companies' purported claims are time-barred."

25. Given that the claim was issued about two years after the ordinary limitation period had expired, the Limitation Defence was anticipated by paragraphs 61 and 62 of the Re-Amended Unified Particulars of Claim (the **Unified PoC**), which provide:

> "61. In so far as may be necessary, the Claimants rely on section 32 of the Limitation Act 1980 to postpone the running of any period of limitation which would otherwise be applicable to the claims against TFS.

62. The claims against TFS are based on the fraud of TFS as set out in paragraphs 34 to 54 above and the Claimants did not discover and could not with reasonable diligence have discovered them prior to receipt of the transcript of the telephone call between Eva Karra and Mr Bullen received on or around 10 June 2016 and they had had a reasonable opportunity to review and consider the same."

I shall refer to this transcript as the **Karra/Bullen Transcript**. The important dates to note are that whilst the conversation took place on 6 July 2009, the liquidators did not receive the material until around 10 June 2016.

26. Ms Karra was a trader with Deutsche Bank and Mr Bullen was a trader with TFS. The conversation that was recorded and transcribed took place, as I say, on 6 July 2009. In it, Ms Karra – of Deutsche Bank – asks Mr Bullen – of TFS – about "a broker called SVS". The relevant parts of the conversation are as follow:

Ms Karra	Do you know a broker called SVS?
	…
Mr Bullen	SVS – no, never heard of them.
Ms Karra	Don't you guys trade with them on the spot?
Mr Bullen	No. Never heard of them. The only thing I know that's SVS sells settees and sofas, it's not them.
Ms Karra	That won't do.
Mr Bullen[1] (laughing)	No, interest free for a year *[laughs]*
Ms Karra	Nobody on the desk?
Mr Bullen consults other workers in the office[2]	
Mr Bullen (to Ms Karra)	Oh, it's more on our primary side, they deal with them…deal with it.
Ms Karra	Really?
Mr Bullen	Yeah, I think so.
Ms Karra	No, no, I am enquiring with regards to some EUAs for the trade and they mentioned your name…not your name, I mean your first name…
Mr Bullen	Yeah?
Ms Karra	Yeah, no…

[1] The transcript erroneously refers to "KN", but that is a typo for "JB", which letters are adjacent to "JB" letters on an ordinary keyboard.

[2] Mr Bullen's communications with the team are (at least in part) also recorded. But they do not assist the flow of the conversation, and I have omitted them for sake of clarity (but take them into account).

Mr Bullen	Oh, I know, sorry, I've just…the penny has dropped, the penny has dropped. Yes, they are, we use them as a spot, yeah. They're basically…what would you say, they are…
Ms Karra	Who are they?
Mr Bullen	Well, they are like a…they will take the risk, basically, for all these dodgy little companies. You know, all these little weird names out there…
Ms Karra	Like, for example?
Mr Bullen consults other workers in the office	
Mr Bullen	MassTech…I mean, other guys use them, like Citi use them as well, you know, like Essent, big guys are going for them as well. But basically, if you have got some small dodgy name that we don't really want to take any exposure to, you know, that they take all the exposure, they take all the risk.
Ms Karra	What do you mean, exposure?
Mr Bullen	Well, because, you know, you know what I mean – if you have got a company that has got no credit, impossible to trade with, you know, and it will take us weeks and months to set up contracts and…They will basically stand for them and say they are a good company, so that if anything went wrong with that trade, they'd be able to deliver the EUAs or the CRs then…
Ms Karra	They are like a…they would be a broker of other corporations?
Mr Bullen after consulting others in the office, particularly "Luke"	So, Luke is saying as well if these guys could be pretty dodgy on the brokerage as well, and they might not pay us, so SVS they pay us instantly and SVS take the risk that they don't pay the brokerage, so they have obviously charged them a lot more than we would, you know. I would expect, there has got to be a reason for them to do it, they are not doing it for love are they so…
Ms Karra	Have you been doing a lot?
Mr Bullen	Well, they have, yeah, my guys behind me have been doing a lot of spot trades with them, yeah, quite a lot in the last few weeks, I suppose.
	…

27. In terms of timing, this conversation took place at around the time Deutsche Bank suspended trading with SVS, recommencing trading on 6 July 2009.[3] The Claimants contend that it was not possible to commence a claim <u>against TFS</u> until the Liquidators had had the opportunity to consider the Karra/Buller Transcript. Paragraphs 67(e) and (f) of the Claimants' revised written opening for trial say this:

> "(e) As a result of TFS being mentioned by former employees of [Deutsche Bank] in interviews with the liquidators, arrangements were made to speak to relevant personnel from TFS in mid-2015, namely Mr Bertali and Ms Mortimer. During the course of these interviews, Mr Bertali and Ms Mortimer were specifically asked about TFS's role; however, they provided misleading information concerning their own suspicions and/or knowledge of the fraud and their role in it, as set out in detail in paragraphs 89-118 of Mr Hellard's witness statement.
>
> (f) The Karra-Bullen call was the first time that the liquidators were aware of an appreciation within TFS of the true nature of its involvement in the trading."

28. The point is that the Liquidators were misled by TFS, and put off the trail. The Karra/Bullen Transcript "gave the lie" to the story TFS were telling the Liquidators in 2015.

(2) The relevant limitation rules

(a) Section 32 of the Limitation Act 1980

29. As is clear from the pleadings described above, the question is <u>not</u> whether the claims fall within the ordinary six year period of limitation. It was common ground before me that, on this basis, the dishonest assistance claims against TFS were time-barred.

30. The question is whether the claims are saved by the operation of section 32 of the Limitation Act 1980. So far as material, this provides as follows:

> "(1) Subject to subsections (3) and (4) below, where in the case of any action for which a period of limitation is prescribed by this Act, either –
>
> (a) the action is based upon the fraud of the defendant; or
>
> …
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
>
> References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent."

[3] See paragraph 39 of the original Particulars of Claim against TFS (the **TFS PoC**). The Unified PoC sets out in definitive terms the present pleaded position. Given, however, the centrality of what was known to the Claimants at given points in time, it is appropriate to refer to the predecessors to the Unified PoC, like the TFS PoC.

(b) The law regarding section 32

31. There is a great deal of case-law – in particular, some recent case-law – regarding section 32. The principles that may be derived from that case law are as follow:

(1) Section 32 constitutes a limited exception to the fundamental purpose of limitation, which is to set a time limit for the bringing of claims, not merely to prevent delay, dilatoriness and the belated resurrection of old claims, but to bring about a certain end to litigation: *FII Group Test Claimants v. HMRC*, [2020] UKSC 47 at [155]; *OT Computers v. Infineon Technologies AG*, [2021] EWCA Civ 501 at [23].

(2) The purpose of section 32 is to create a postponement to when time begins to run which is later than when the cause of action accrues. The purpose of that postponement is to ensure that a claimant is not disadvantaged, so far as limitation is concerned, by reason of being unaware of the circumstances giving rise to his or her cause of action as a result of fraud, concealment or mistake: *FII Group Test Claimants v. HMRC*, [2020] UKSC 47 at [193]; *OT Computers v. Infineon Technologies AG*, [2021] EWCA Civ 501 at [24], [25].

(3) The ordinary limitation period in regard to the dishonest assistance claims of the Claimants commenced when TFS's alleged wrongdoing took place, which was prior to 30 July 2009. The limitation period is six years. Thus, the general policy of the Limitation Act 1980 is that six years from accrual is sufficient to enable a potential claimant to consider whether to claim, to put together such a claim and to issue proceedings.

(4) Section 32 provides, exceptionally, that in cases of fraud, concealment or mistake, time does not begin to run until either:

(a) The claimant has discovered the fraud, concealment or mistake (as the case may be); or

(b) Could with reasonable diligence have discovered it.

As is clear, the first limb of this test turns on the actual knowledge of the claimant, however diligent or alert that claimant may or may not have been. In practice, this first limb acts to accelerate the point at which time begins to run. The alert and diligent claimant, who discovered the fraud, concealment or mistake before a claimant, with reasonable diligence could have discovered it, will not be permitted to contend that time began to run later than the date of the claimant's actual knowledge. The "reasonable diligence" test thus acts as something of a long-stop.

(5) It is worth noting that this regime is (rightly) claimant-friendly. Time begins to run on discovery or discoverability (as the case may be), and the claimant will then have six years in which to bring a claim.

(6) Since section 32 constitutes an exception to the ordinary regime, the burden of proof is on the claimant wishing to avail him or herself of section 32: *Paragon Finance v. Thakerar*, [1999] 1 All ER 400 at 418.

(7) As to the meaning of "reasonable diligence":

(a) In *Gresport Finance v. Battalagia*, [2018] EWCA Civ 540 at [41], Henderson LJ approved Millett LJ's statement in *Paragon Finance v. Thakerar*, [1999] 1 All ER 400 at 418:

"The question is not whether the plaintiffs should have discovered the fraud sooner, but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable limitation period is irrelevant. In the course of argument, May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree."

(b) It is inherent in the section 32 *schema* that there is an assumption that the claimant desires to discover whether or not a fraud has been committed, and that there must therefore be an anterior "something" to put a claimant on notice of the need to investigate if there has been a fraud, concealment or mistake: *Law Society v. Sephton*, [2004] EWCA Civ 1627 at [116]; *Gresport Finance v. Battalagia*, [2018] EWCA Civ 540 at [41].

(c) This distinction between *(i)* whether there is anything to put the claimant on notice of the need to investigate and *(ii)* what a reasonably diligent investigation would then reveal is a helpful analytical structure (which I will adopt), but it is important to note that this is <u>not</u> the statutory test. In *OT Computers v. Infineon Technologies AG*, [2021] EWCA Civ 501 at [47], Males LJ said this:

"…although the question what reasonable diligence requires may have to be asked at two distinct stages, (1) whether there is anything to put the claimant on notice of a need to investigate and (2) what a reasonably diligent investigation would then reveal, there is a single statutory issue, which is whether the claimant could with reasonable diligence have discovered (in this case) the concealment. Although some of the cases have spoken in terms of reasonable diligence only being required once the claimant is on notice that there is something to investigate (the "trigger"), it is more accurate to say that the requirement of reasonable diligence applies throughout. At the first stage the claimant must be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. At the second stage, he is taken to know those things which a reasonably diligent investigation would then reveal. Both questions are questions of fact and will depend on the evidence. To that extent, an element of uncertainty is inherent in the section."

(d) The words "could with reasonable diligence" obviously refer to an objective standard (i.e., what the claimant could have learned/done, not merely what he or she in fact did learn/do). The objective standard is informed by the position of the actual claimant, and not by reference to some hypothetical

claimant: *OT Computers v. Infineon Technologies AG*, [2021] EWCA Civ 501 at [48].

(e) Reasonable diligence can require a claimant to undertake investigatory measures, including instituting legal proceedings to obtain disclosure. In *Chodiev v. Stein*, [2015] EWHC 1428 (Comm), Burton J held that reasonable measures would have included seeking a disclosure order out of the jurisdiction (at [49]); and in *Libyan Investment Authority v. JP Morgan Markets*, [2019] EWHC 1452 (Comm), Bryan J held that reasonable measures would have included applying for *Norwich Pharmacal* relief (at [53] and [57]). In the present case, the Liquidators had the power to seek material under section 236 of the Insolvency Act 1986.

(f) It is trite that a statement of case in no way proves or establishes the claim asserted: it merely articulates, to a relatively low standard, the claim that the claimant wishes to vindicate before the courts. It follows that the test as to when the claimant has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered the same must be referable to what is needed properly to plead out the claim. That is the test that appears to be prevalent, particularly where fraud is involved: see *Peconic Industrial Development Ltd v. Lau Kwok Fai*, [2009] WTLR 999 at [56]; *FII Group Test Claimants v. HMRC*, [2020] UKSC 47 at [184] to [192]. What is required is an ability in the claimant to plead a complete cause of action: *Arcadia Group Brands v. Visa*, [2015] EWCA Civ 883 at [48] to [49]. By this is meant an ability to plead a <u>viable</u> claim, that is, one that will not be struck out because a necessary element of the cause of action cannot be asserted or because the necessary particularity cannot be pleaded. A <u>viable</u> claim does <u>not</u> require the claimant to need to know or have been able to discover all of the evidence which it later decides to plead. But it does require the putative claimant to be able to plead the precise case that is ultimately alleged: *Barnstaple Boat Co v. Jones*, [2007] EWCA Civ 727. In a case of fraud – as here – discovery of the alleged fraud means knowledge of the "essential facts constituting the alleged fraud": *Cunningham v. Ellis*, [2018] EWHC 3188 Comm at [87].

(g) I pause to observe that this test is a favourable one to the putative claimant. Ordinarily, when a cause of action accrues, the claimant will (<u>whilst time is running against him or her</u>) have to gain the necessary confidence to justify embarking on the preliminaries to the issue of a claim form, such as submitting a claim to the proposed defendant, taking advice and collecting evidence.[4] If the test is the ability to plead a viable statement of case, then the putative claimant is actually in a better position under section 32 than he or she would be under the "ordinary" rules.

(h) There is scope for an argument that time ought to begin to run rather sooner than this, e.g. when the putative claimant is in a position to recognise that he or she "has a worthwhile case…to pursue a claim".[5] It seems to me, particularly in cases of fraud or dishonesty, that such a lower standard is

[4] To (loosely) quote Lord Nicholls in *Howard v. Fawcetts*, [2006] 1 WLR 682 at [9].

[5] See, e.g., *FII Group Test Claimants v. HMRC*, [2020] UKSC 47 at [185].

redolent with difficulty, because what is "worthwhile" to pursue is a somewhat uncertain and rather subjective standard, whereas what is or is not a pleadable statement of case is clearly understood, even where that case involves allegations of fraud or dishonesty. Accordingly, I make clear that it is the latter test that I am applying, and Mr Scorey, QC did not seek to persuade me from doing otherwise. I also recognise that where the claim involves allegations of fraud or dishonesty, a pleader has professional obligations which must be satisfied before it can sensibly be said that a statement of case is "viable" to plead.

(i) I lay some stress on this, because (in closing) Mr Parker, QC, suggested that a "worthwhile" case involved something more than the putative claimant being able to plead a "viable" statement of case, as I have described it. He contended that – at least in cases of fraud or dishonesty – a putative claimant was entitled to consider the extent to which the claim would succeed. Thus, at Transcript Day 5/pp.45-46, Mr Parker, QC said:

"We say that if one focusses on the fact it is a worthwhile case that is to be pursued, and that therefore brings in the notion at what point…does a claimant decide to pursue a case.

Your Lordship has seen, getting ahead of myself, but we say no claimant decides to pursue a claim unless they think it is going to win.

Now, if you are not alleging dishonesty then I think it is fair to say that the law is not quite as clear as to whether or not you can decide, you can properly decide, to bring a claim that you don't think will succeed with a view to extracting some sort of settlement. But that is not the position where one is alleging dishonesty. One can't bring an allegation of dishonesty thinking that the person was probably honest, but he will pay for me to go away. That is too much of a shake-down. One only alleges dishonesty because on the material that one has one believes that the person is dishonest."

I do not consider that this proposition accords with the law as it stands. In *FII*, the "worthwhile" test represented a less generous standard to the putative claimant than the "viable statement of case" test, whereas Mr Parker, QC, was contending for a test even more favourable to the putative claimant. The problems with the sort of test propounded by Mr Parker, QC are threefold: *(i)* it is a test that is unsupported by authority; *(ii)* it is a test that is extremely uncertain, even subjective, in nature; and *(iii)* it is unnecessarily generous, given that the putative claimant who is able to plead a viable statement of case will then have six years to improve it and decide whether or not in fact to bring a claim.

I will apply what I have described as the "viable statement of case" test.

(3) The evidence

32. By my order given at an earlier case management conference, the entire documentary record contained in the trial bundles constituted the documentary evidence in the case. The parties very helpfully produced an extract from this (voluminous) record comprising a chronological run of the essential documents that they each relied upon.

33. Additionally, I heard evidence from Mr Kevin Hellard, one of the Liquidators. Mr Hellard provided two witness statements directed specifically to the Limitation Defence:

(1) A first statement, dated 29 November 2019, running to some 148 paragraphs (**Hellard 1**).

(2) A second statement, dated 4 March 2022, the purpose of which was simply to "correct some drafting errors and clarify certain matters in my first witness statement which have come to light during the trial preparation process"[6] (**Hellard 2**).

34. Mr Hellard gave evidence over three days – Days 2, 3 and 4 of the trial (8, 9 and 10 March 2022). As a witness, his credibility was difficult to evaluate. That is because, during the course of Mr Hellard's cross-examination by Mr Scorey, QC, on behalf of TFS, it became clear that:

(1) A great deal of what Mr Hellard said was description at second hand. Large tracts of Hellard 1 recounted documents and events to which Mr Hellard had not been party, and could give no particularly helpful evidence. Mr Hellard was the leader of a fairly large team of practitioners within Grant Thornton, and he was in no position to speak to the work of others.

(2) In many cases, Mr Hellard's recollection – even in relation to events where he was a party – was poor. I make no criticism of this: many, if not most, of the events in question had occurred some time ago. Although he attempted to do so, Mr Hellard had, in my judgment, considerable difficulty in separating actual recollection from speculation as to what might have occurred. Again, I make no criticism of this: Mr Hellard was doing his best to assist the court.

(3) Mr Hellard's witness statements only told part of the story. All kinds of other considerations – the relevance of which I will have to come to evaluate – were "airbrushed" out of the story. I will come to these aspects in due course, but I should say at the outset that I am in no doubt that these were matters that I needed to hear about in order to determine the Limitation Defence. It is significant that Mr Parker, QC, for the Claimants, raised no objection to Mr Scorey, QC exploring these matters, at some length, with Mr Hellard.[7]

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[6] Hellard 2/§3.

[7] The time spent was appropriate, but it must not be thought that this was a quick foray into territory that could not sensibly be objected to. Mr Scorey, QC spent a lot of time on these aspects, and Mr Parker, QC had every opportunity to object. Rightly, he did not do so, because these matters were clearly relevant for me to hear, and I would have overruled any objection.

35. The omissions from his witness evidence served to put Mr Hellard in something of a difficult situation. He was obliged – because the questions being put to him were obviously relevant – to answer "on the hoof" in relation to matters which could (and I think should) have been explored in detail in his statements. Inevitably, Mr Hellard's answers were plagued by difficulties of knowledge and recollection. In a very real sense, the deficiencies that I have described in paragraph 34(3) above informed or were the cause of the difficulties described in paragraphs 34(1) and 34(2) above.

36. I am very confident that the matters omitted from Mr Hellard's statement are matters in relation to which a detailed documentary record will exist. As Mr Scorey, QC made good in closing, disclosure by the Liquidators in relation to their own investigations was extremely limited. That may be the genesis for the issues that I have in relation to what was, and what was not, covered in Hellard 1. Be that as it may, it was a matter of some concern to me that the history of the Liquidators' involvement in these proceedings was neither set out in Hellard 1 nor appeared elsewhere in the record.

37. It would not be fair for me to criticise Mr Hellard for these omissions, and I do not do so. But the consequence is that I am now obliged to make findings of fact in relation to matters: *(i)* where I strongly suspect the documentary record is incomplete; and *(ii)* where Mr Hellard's oral evidence was frail, such that he understandably struggled in the witness box.

38. In addition to the evidence of Mr Hellard, the Claimants also served a witness statement from a Mr Ian Richardson, joint liquidator (with Mr Hellard) of Vehement, dated 2 December 2019 (**Richardson 1**). Mr Richardson was not required to attend trial for cross-examination. His evidence essentially went to matters that were resolved by the settlement I have described, and I have not had need to have resort to his evidence.

(4) The pleaded case on limitation and TFS's position

39. The case involving section 32 that the Claimants have pleaded is brief. Referring to the analytical structure described in paragraph 31(7)(c) above (i.e., the distinction between *(i)* whether there is anything to put the claimant on notice of the need to investigate and *(ii)* what a reasonably diligent investigation would then reveal), it is not clear whether it is the Claimants' case that the Karra/Bullen Transcript:

(1) Acted as a "trigger", so as to put the Claimants/Liquidators on notice of the need to investigate; or

(2) Served as the "final, necessary piece of the pleading jigsaw", arising out of a reasonably diligent investigation, which enabled a viable statement of case to be pleaded for the first time.

40. In closing, Mr Parker, QC said that his case was the former, and not the latter. However – particularly because Males LJ rightly warned that the section 32 process concerned a "single statutory issue"[8] – it seems to me appropriate to consider the Claimants' case under both heads.

[8] See paragraph 31(7)(c) above.

41. Throughout the hearing, Mr Scorey, QC was clear that it was his client's case that the Claimants had failed to discharge the burden of proof – which was on them[9] – in relation to section 32. It is appropriate that I set out the opening paragraphs of TFS's written closing submissions, which set out the battlelines very clearly:

"1. The claim cannot succeed unless the Claimants prove that they did not discover and could not with reasonable diligence have discovered TFS's alleged dishonest assistance before 8 November 2011.

2. The short answer to the claim is that the Claimants have not discharged the burden of proof. Mr Hellard was the only witness called by the Claimants to prove their pleaded case. During the course of his evidence, it transpired that Mr Hellard had no day-to-day responsibility for any of the liquidations; and that, in the case of Vehement and Weston, the liquidation was "not a matter he was leading" (Transcript Day 3/p.120). As he frankly and repeatedly admitted, he was unable to say what the Claimants did or did not discover, nor what facts were learnt, nor when: see the observations of the Court at Transcript Day 4/pp.95 to 96. The Claimants should have adduced evidence describing their investigation, identifying what was discovered and when, and indicating why certain avenues were not explored. This cannot be rectified by reference to the documentary record: the Claimants have not disclosed in these proceedings their working papers or materials evidencing their underlying investigation. Thus, the Claimants have adduced the wrong witness and cannot now remedy that defect by reference to materials which have not been disclosed. In that regard, the Claimants have chosen not to disclose, let alone rely upon, the working papers and correspondence created and/or exchanged by the team working on the liquidations.

3. In fact, the evidence which is available points the other way. It is now clear that the Claimants could with reasonable diligence have discovered the fraud (i.e., discovered the objective facts they relied on as a basis for alleging dishonesty against TFS) and pursuing that cause of action by the summer of 2010 at the very latest, and well before 8 November 2011. In short:

(1) The "trigger" had been pulled by the date the Bilta Liquidators were first appointed (i.e., 29 September 2009): it was obvious that "something had gone wrong" and that an investigation was called for as to who may be liable for it. Indeed, the Claimants' conviction that the likes of AH Marketing and GW Deals were embroiled in fraud based upon the objective characteristics of the transactions applied equally to TFS's role as the broker who facilitated those deals.

(2) If the Bilta Liquidators had asked the questions they could have asked, they would have "discovered the fraud" shortly thereafter, probably by around the end of 2009 and at any rate by the summer of 2010.

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[9] See paragraph 31(6) above.

(3) In addition, HMRC's correspondence shows that it had "discovered the fraud" by, *inter alios*, TFS by the summer of 2010. It makes a good touchstone against which to assess what the Liquidators could have discovered. HMRC took no steps which the Liquidators could not have taken.

(4) Even more straightforwardly, if the Liquidators had asked HMRC what it had discovered, they would have discovered the fraud in around the summer 2010. The Claimants have identified no good reason for not asking HMRC what it had discovered. Instead, the Claimants just assumed that <u>if</u> HMRC discovered anything relevant to their work, it would be provided."

(5) Conclusions and analysis

(a) Conclusions

42. It is best if I begin with my conclusions, before setting out my reasons for them:

(1) I am satisfied that the "trigger" had been pulled at the latest by the Liquidators' provisional appointment at the end of September 2009. At that point, the Liquidators had <u>actual</u> knowledge of the need to investigate brokers in the position of TFS, including TFS itself (if that specificity of knowledge was in fact necessary for the "trigger" to be pulled). I consider the contention that the "trigger" was <u>not</u> pulled until the receipt, by the Liquidators, of the Karra/Bullen Transcript to be unfounded in fact and, indeed, to be inconsistent with the facts as I find them to me.

(2) I am further satisfied that the Liquidators have failed to show that the Karra/Bullen Transcript served as the "final, necessary piece of the pleading jigsaw", arising out of a reasonably diligent investigation, which enabled a viable statement of case to be pleaded for the first time. Although this contention was disavowed (or, at least, not advanced) by Mr Parker, QC in closing, I consider it to be a point that is open to the Claimants on the pleadings, and that it is therefore a point that I need to consider. More specifically as to this:

(a) My primary conclusion is that this point fails on the burden of proof: the Claimants have failed to make out the case that (I consider) they have pleaded.

(b) However, despite my misgivings in relation to the evidence, I consider that I can go further, and that I can find that the Claimants, acting by the Liquidators, could, with reasonable diligence, have placed themselves in a position to plead out a viable case against TFS <u>before</u> receipt of the Karra/Bullen Transcript.

(c) I do not, however, consider that I can – on the material before me – go very much further than this and reach a finding as to the precise point in time when the Claimants (or, more specifically, the Liquidators) would have been in the position to articulate a viable statement of case for the first time. As I have noted, what could, with reasonable diligence, have been done or

learned is an objective standard informed by the position of the actual claimant, not some hypothetical claimant.[10] In other words, I need to have regard to what the Liquidators might, with reasonable diligence, have achieved. This is precisely where the evidence of Mr Hellard falls short, as I have described in outline above and as I explain in detail below. In short, the answer to this question turns on information that has not been brought before the court by the Liquidators. Whilst I consider that I have a good feel for what a hypothetical person might have done, I am more or less completely in the dark as to how the Liquidators actually pursued their investigations. I will expand upon this below, but the consequence is that:

(i) I am entirely satisfied that the Liquidators have failed to make good the case that they have pleaded.

(ii) Further, I am satisfied that the case as pleaded is factually wrong and can be dismissed on the facts. Even treating the case as being that the Karra/Bullen Transcript was the "final, necessary piece of the pleading jigsaw", I reject that case. I consider that the Liquidators could – with reasonable diligence – have pleaded their case against TFS far sooner.

(iii) However, I am reluctant to say more about precisely when this could have been achieved by the Liquidators, using reasonable diligence. Although TFS's suggestion that I treat HMRC's knowledge as a proxy for what the Liquidators might have discovered has its attractions, since (as presently advised) I do not actually need to find the facts in this regard, it seems to me better that I do not do so.

43. Accordingly, for reasons that I will now expand on, the Limitation Defence advanced by TFS succeeds against all of the Claimants, save for Nathanael and Inline. The position of Nathanael and Inline differs from that of the other Claimants. I therefore consider and determine their case separately in Section B(6) below.

(b) Analysis regarding the "trigger"

(i) The applications on 29 September 2009

44. On 29 September 2009, HMRC presented a winding up petition against Bilta in respect of unpaid VAT totalling £26.4 million. It also made an application for the appointment of Mr Hellard and Mr Ingram as provisional liquidators until the winding up petition was heard. The applications were supported by affidavits from two officers of HMRC, Mr James Smallbone (**Smallbone 1**) and Mr Peter Sawyer (**Sawyer 1**).[11]

45. The application for the appointment of Mr Hellard and Mr Ingram as provisional liquidators was successful. On appointment, Mr Hellard and Mr Ingram made an immediate application for a worldwide freezing injunction against various proposed defendants against whom it was intended to commence proceedings.[12] I shall refer to

[10] See paragraph 31(7)(d) above.
[11] Hellard 1/§§16 and 19.
[12] Hellard 1/§20.

these intended proceedings as the **Bilta 1 Proceedings**. The Particulars of Claim in the Bilta 1 Proceedings are dated 29 October 2009. They are substantial, running to 18 pages. It is to be anticipated that a great deal of the work that underlay the Bilta 1 Proceedings had already been done by 29 September 2009, on the basis of the efforts of HMRC as described in Smallbone 1 and Sawyer 1. Indeed, it would not have been possible to produce the Bilta 1 Particulars of Claim from a standing start in the relatively short period between 29 September 2009 (the date of the appointment) and 29 October 2009 (the date of the Bilta 1 Particulars of Claim).

46. The application for a freezing injunction by Mr Hellard and Mr Ingram on their appointment as provisional liquidators was also supported by Smallbone 1 and Sawyer 1.[13] These affidavits therefore served a dual purpose.

47. I do not consider that Mr Hellard (or Mr Ingram) would have permitted an application for freezing relief to be made on behalf of Bilta – over which they had been appointed provisional liquidators – without having specific actual knowledge of the contents of both the affidavits and their exhibits. In cross-examination, Mr Hellard stated that neither he, nor his team, had any input into the drafting of Smallbone 1 and Sawyer 1. The affidavits were simply reviewed, and no comments were made.[14] I find this a little surprising, but this probably reflects the extent to which HMRC was taking the lead. Mr Hellard also drew a distinction between his engagement with the affidavits and his engagement with their accompanying exhibits. He recalled that whilst he would have read and reviewed the affidavits in 2009, he could not remember whether that review would have included the exhibits, and that (at best), he would have met with his lawyers and his team to discuss the matter. Whilst certain exhibits would have been drawn to his attention, he could not recall which ones.[15]

48. Any application for an *ex parte* freezing order is a serious matter, and the court expects any applicant for such relief, including a provisional liquidator, to be fully familiar with the basis upon which the application is made, including the detail. Whilst, of course, I cannot expect Mr Hellard to remember the process in any detail (over a decade later) I find that Mr Hellard, as the "lead" provisional liquidator, would have behaved as a liquidator properly should, and appropriately informed himself of the content of the evidence on which he was relying, before permitting the application for a freezing order to be made. That familiarisation would have included the exhibits to Smallbone 1 and Sawyer 1.

49. In these circumstances, I conclude that the Liquidators, on 29 September 2009, had actual knowledge of the content of Smallbone 1 and Sawyer 1. It is, therefore, appropriate to consider in some detail what these affidavits say.

(ii) Smallbone 1

50. Smallbone 1 contains a number of passages of interest, which I propose to set out verbatim. First, in relation to MTIC Fraud, the affidavit says this:

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[13] Hellard 1/§20 describes the making of the application, but not the evidence on which it was based. Mr Hellard confirmed (Transcript Day 3/p.28) that the Liquidators relied upon Smallbone 1 and Sawyer 1.

[14] Transcript Day 2/pp.100-101.

[15] Transcript Day 2/pp.133-134.

"3. MTIC fraud in its simplest form involves a VAT registered trader which imports goods into the UK from another Member State. The trader is liable to account for tax on the acquisition, but can immediately reclaim this as imput tax so the net effect of the importation is that it is VAT free.

4. An MTIC fraudster will sell the goods on in the UK and then deliberately disappear whilst dishonestly failing to account for the output tax on the onward sale. The acquirer who perpetrates this kind of fraud is generally referred to as a "missing trader" or "defaulter". A fraud on the revenue is complete at that point. This simple form of MTIC fraud is known as acquisition fraud. There are, however, many complex and sophisticated permutations of this type of fraud, all based on that simple model.

5. The fraud may involve an acquisition and a dispatch. In this scenario, a trader acquires goods from another Member State. No VAT is payable on the acquisition. He then sells on those goods to a domestic buyer and charges VAT. He dishonestly fails to account for the VAT to HMRC and disappears. Typically, in the past, the goods have been high value low volume goods, such as computer chips or mobile phones.

6. The domestic buyer sellers the goods on to a broker at a price which includes VAT. The broker dispatches the goods to another Member State or to a State outside the EU. The broker is entitled to deduct the VAT that he has paid on purchasing the goods from any output tax he is due to pay on sales of goods made in that taxable period. An export is zero-rated so the broker is not liable to pay VAT on a sale made to another country. If the broker has made no domestic sales he has no output tax to pay and will simply reclaim all the VAT on his dispatch sales. Thus, HMRC directly parts with money. There may be many intermediaries between the original acquirer and the ultimate broker. These intermediaries are known as "buffers".

Pausing there, it is worth noting that whilst "buffer" is terminologically clear (the **Buffer**), the term "broker" is in the circumstances of this case dangerously ambiguous.[16] Mr Smallbone was using the term to refer to an exporter selling the goods out of the UK to another EU Member State or another State outside the EU. He was not using the term in its conventional sense of an agent employed by a principal for the purpose of arranging a contract between the principal and third party. I propose to avoid using the term "broker" in its MTIC sense altogether (unless it appears in documents that I am quoting). When I use the term "broker" in this Judgment, I am referring to an agent arranging a contract. To continue with Smallbone 1:

"7. Historically, MTIC fraud usually involves low-volume high-value goods such as mobile phones and computer parts. The high value of the goods maximises the profit from the fraud and their low volume means that they can – where in existence, which is not always the case – be moved easily when necessary, their presence in a shipping warehouse being easier to accommodate and their lack of movement not being as obvious as bulkier items might be.

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[16] Mr Scorey, QC adverted to this on Transcript Day 1/pp.81 to 82.

8. In June 2007, to counteract MTIC fraud, new rules were imposed in respect of VAT accounting for business to business supplies of mobile phones and computer parts. Where the value of such goods exceeds a certain amount the purchaser of the goods, rather than the seller, has to account to HMRC for the output tax due on the transaction. This has caused fraudsters to look for other suitable commodities to facilitate MTIC fraud. One type of commodity that has recently become the subject of MTIC fraud is carbon credits.

9. Supplies of carbon credits are treated under the Value Added Tax Act as supplies of services. They are treated as supplied in the country where the recipient belongs and are subject to a reverse charge. The net result of this VAT treatment is the same as for goods acquired from another Member State, i.e. the recipient is liable to pay VAT on the supply and can then reclaim that VAT as input tax so that overall the supply is VAT neutral as far as the recipient is concerned. Thereafter, onward sales in the UK will be taxable. On 31 July 2009 supplies became zero-rated."

51. Turning to carbon credits or EUAs, Smallbone 1 says this:[17]

"10. I have appended to this affidavit marked "Appendix A", by way of background to this matter, a detailed summary of the international framework within which the formal system of carbon credits operates. It explains the way in which credits are validated and what gives them their value.

11. The carbon credits with which this matter is concerned are European Emission Trading Scheme ("EU ETS") allowances ("EUAs"). The EU, by Directive, has introduced a "cap and trade" scheme. Put simply, the heaviest polluting industries such as petrochemicals and power stations are subject to the scheme. Each Member State issues a number of EUAs for a given period. A certain number of EUAs are allocated to each installation that is subject to the cap. Member States also auction a number of EUAs on first issue. Each EUA is effectively a "permit to emit" on metric ton of CO_2.

12. EUAs are an intangible commodity. They are recorded on an electronic registry and each is given an individual registration number. Each Member State has its own Emissions Registry which is responsible for the EUAs issued by that State. In the UK, the Environment Agency is responsible for administering the UK ETS Registry ("UKER").

13. At the end of the designated period, a capped installation must have enough EUAs in its possession to cover the tons of carbon it has emitted over that period. Those EUAs must be surrendered and will then be taken out of circulation. If the installation does not surrender sufficient allowances, it will be fined.

14. EUAs can be bought and sold. The idea underpinning the scheme is that those installations whose emissions exceed its holding of EUAs will need to buy in more. This provides an incentive to efficient operators to reduce their emissions and sell their spare EUAs as a way of generating capital. It is intended or at least

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[17] Emphasis supplied.

anticipated that the number of issued EUAs for each successive period will be reduced, providing industries with an additional incentive to reduce emissions.

15. In addition to EUAs, the EU ETS scheme permits capped operators to surrender certain other forms of carbon credits which are validated under international protocols. These credits also have unique reference numbers and are recorded in official registries.

16. The capped industries must surrender EUAs (or other acceptable credits) at the end of the designated period and that is what gives the allowances their basic commercial value, but the EUAs themselves may be bought and sold by anyone, including companies or individuals based outside of the EU. **Many companies are set up purely to broker**[18] **and trade in carbon credits as intermediary businesses and are not operators or users of the credits themselves.**

17. **Carbon credits, including EUAs, can be traded as futures or as spot trades. Futures involves a legally binding agreement, made on the trading floor of a futures exchange, to buy or sell a commodity or financial instrument in the future. Futures contracts are standardised according to the quality, quantity, and delivery time and location for each commodity. Payments for futures contracts are not due until the set delivery date. Spot trading refers to a cash market price for the commodity that is available for immediate delivery.**

18. **There are a number of Exchanges in the EU that deal in carbon credits, including ECX, Bluenext, EEX and Nordpool. Between them, Bluenext and ECX account for about 98% of all the trade through the exchanges. Bluenext, which is based in France, deals, almost exclusively, in the spot market, whereas ECX, which is based in London, deals almost exclusively in the Futures market.**

19. Companies and individuals are not, however, restricted to trading through the exchanges and instead may conduct "Over the Counter" or OTC sales. OTC trade involves a carbon credit transaction arranged between two companies (or an individual and a company) **although they can involve intermediary or broker companies**. It is currently estimated that about 60-65% of all carbon credit trade is "over the counter".

20. **The exchange may provide the forum for trading but the EUAs themselves have to be recorded and held in an EU registry account. In order to hold, buy and sell EUAs a company or individual must be registered for an on line person holding account on one of the Member States' registries. UKER, like other Member States registries, in addition to being responsible for operator accounts i.e. accounts of the capped installations that are subject to the EU ETS scheme, also operates person holding accounts.**

[18] Here, the affidavit uses the term "broker" in its more traditional sense.

21. All transactions of EUAs have to be carried out via these electronic accounts. A company which holds EUAs in an account will notify the registry of a sale and ask the registry to transfer the EUAs to the customer's account. A Registry account also enables a seller to evidence his holdings to prospective buyers."

52. Smallbone 1 noted that "carbon credit trading has now become a fertile area for MTIC carousel and acquisition fraud",[19] and described HMRC's investigations in this area. In particular, Smallbone 1 noted:

(1) That HMRC had "identified MTIC fraud chains in the UK involving the trade of carbon credits, specifically EUAs".[20] This had involved various investigations – including of the Danish Emissions Trading Registry – identifying a number of companies holding accounts with that registry where "[v]erification of the onward supplies of EUAs from these companies is still ongoing".[21]

(2) The manner in which the MTIC Fraud was conducted. HMRC's inquiries had resulted in the belief that a "missing trader is likely to have acquired EUAs from a company based outside of the UK and therefore would have acquired the EUAs free of VAT".[22]

(3) The EUAs so acquired would be traded down a chain – with increasing mark up at each stage – resulting in a sale to "a large multinational UK company".[23] More specifically:

"37. By using a large multinational UK company in the transaction chain as the "broker trader"[24] as defined in a normal MTIC transaction, there is a clear departure from the historical pattern of MTIC carousel trading where the broker trader is a central party to the fraud. It is unlikely that its VAT Returns would fall to be verified, thereby ensuring that the fraud goes undetected.

…

38. Further enquiries into the identified business have established the following:

a. The type of information shown on the accounts on the Danish Registry is generally the same as that shown on other accounts with other Member State Registries. Where traders have accounts on more than one registry they tend to use the same names for all accounts.

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[19] Smallbone 1/§22.
[20] Smallbone 1/§27.
[21] Smallbone 1/§30.
[22] Smallbone 1/§31.
[23] Smallbone 1/§35.
[24] Using the term "broker" in the "MTIC sense" described above.

b. The majority of the companies identified in the transaction chains and certainly those closest to the VAT acquisition fraud, apart from the large multinational UK company and those which traded directly with it, held an account with the Danish Registry."

(4) That it was likely that only a single registry – here the Danish Registry – would be used by the fraudsters.[25]

(iii) Sawyer 1

53. Sawyer 1 contains a far more detailed description of HMRC's investigations, and the information that HMRC had unearthed. The affidavit contains greater detail of MTIC Fraud – including of some of the "footprints" or "hallmarks" of the fraud.[26] It also says more about EUAs and the Danish Registry,[27] before describing the detail of HMRC's investigations.[28] It is unnecessary to set out this detail, but (as I have said) I find that both joint provisional liquidators would have had actual knowledge of this material at the end of September 2009.

54. Sawyer 1 made very clear that his evidence represented what HMRC knew at this point in time, and that further investigations were on-going. Thus, Sawyer 1/§367 states:

"As investigations by HMRC are on-going, I believe that, if anything, HMRC is likely to uncover further matters of concern as matters progress. In these circumstances, I believe it imperative that HMRC takes steps at this stage to preserve the position pending further investigations."

(iv) Synthesis

55. I have concluded that the "trigger" had been pulled as at 29 September 2009 – in that the Claimants by the Liquidators (including specifically Mr Hellard) were by then on notice to investigate the involvement of brokers in the MTIC Fraud that was perpetrated in the market for EUAs in the summer of 2009 – for the following reasons:

(1) The operation of MTIC Fraud in general terms would have been known to the Liquidators well before the appointment of Mr Hellard and Mr Ingram on 29 September 2009. I very much doubt whether HMRC would have appointed provisional liquidators who needed educating in this regard, and Mr Hellard did not seek to deny such general knowledge.

(2) Mr Hellard did seek to make the point that the use of EUAs in MTIC Fraud was novel. I accept this, but find this point to be fundamentally irrelevant to the questions here at issue:

(a) MTIC fraudsters are entirely indifferent to the products they trade in, provided the incidence of VAT is consistent with the operation of the fraud, and the products are suitable vehicles for the fraud (ideally, easily tradable,

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[25] Smallbone 1/§43 (which appears to be misnumbered).

[26] Sawyer 1/§§7 to 12.

[27] Sawyer 1/§§13 to 33.

[28] Sawyer 1/§§34*ff*.

"inconspicuous",[29] and of sufficiently high value). Investigation of MTIC Fraud involves certain "generic" hallmarks that are consistent no matter what product is being used to drive the fraud.

(b) To this extent, once Mr Hellard had been informed – as he was by Smallbone 1 and Sawyer 1, if he was not previously aware – that EUAs had been used in MTIC Fraud, I consider that his general knowledge of MTIC Fraud would have been readily translatable to this new version of an old fraud.

(c) True it is that the existence of brokers in the trading of EUAs is a feature that is not necessarily shared where the product in question is a mobile phone or computer chip, which tend to be sold principal-to-principal. That is an aspect to which I will return, but I stress that Mr Hellard would have been aware of this feature by 29 September 2009 at the latest. The passages in Smallbone 1 that I have set out and **bolded** in paragraph 51 above make the involvement of brokers in EUA trading clear.

(3) There are at least three types of claim in relation to these particular MTIC Frauds that HMRC – and, since their appointment, the provisional liquidators – would likely be looking into, with a view to making some form of legal recovery from third parties in respect of HMRC's losses. Briefly, these types of claim may be described as follows:

(a) *"Bilta 1"-type claims.* These are claims seeking recovery from persons associated with Bilta (or other Claimants), such as directors or former directors, who dishonestly assisted in Bilta's failure to account for VAT to HMRC, and/or persons who knowingly received monies diverted from Bilta which should have been paid to HMRC. Such claims were articulated in the Bilta 1 Particulars of Claim, which the Liquidators caused to commence. There can be no question but that the Liquidators knew how such claims could be articulated, and that there was sufficient material (even at this time) to make allegations of dishonesty in the particulars of claim against the defendants there named. For the avoidance of any doubt, the Bilta 1 Particulars of Claim involved no allegation against any broker.

(b) *Kittel-type claims.* In *Kittel*,[30] the Court of Justice of the European Union held that a taxable person who knew or should have known that, in purchasing goods, he or she was taking part in a transaction connected with the fraudulent evasion of VAT (as MTIC Fraud is), lost the right to deduct Input VAT on those goods. Claims of this type would involve – as a minimum – tracing the "chains" of transactions whereby the MTIC Fraud was conducted – in order to identify those participants who *(i)* had the requisite knowledge and *(ii)* were sufficiently solvent to warrant the articulation of a *Kittel* claim. It is for HMRC to deny Input VAT on the basis of *Kittel*, and it is HMRC that bears the burden of proof. Although Mr Hellard was somewhat unclear in his evidence as to what sort of claims the

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[29] Generally speaking that means sufficiently small not be noticed in warehouses. EUAs have the great advantage of being intangible.

[30] Case C-439/04, *Axel Kittel v. Belgium* and Case C-440/04, *Belgium v. Recolta Recycling SPRL.*

Liquidators would be pursuing,[31] my view is that whilst Mr Hellard would have known about the potentiality for such claims, and hence the importance of "chains" of transactions, it would have been HMRC that would have been the prime mover in denying Input VAT recovery in any given case.

(c) *Claims against brokers.* This, of course, is the type of claim that was, ultimately, made against TFS, and it is in relation to this type of claim that I must find that the "trigger" was pulled. For reasons that appear below, I do not consider that it is possible that Mr Hellard could, as at the end of September 2009, have been unaware of the potentiality of a claim against a broker, such that the Claimants acting by their Liquidators were not on notice of the need to investigate.

(4) I turn then to consider specifically the knowledge that the Liquidators had in relation to potential claims against brokers at around the end of September 2009:

(a) I have described the Liquidators' understanding of MTIC Fraud generally and their understanding of the specific MTIC Fraud that occurred in the EUA market in the summer of 2009 in paragraphs 55(1) and (2) above.

(b) In particular, I have described that the Liquidators knew that this was a brokered market, in that EUAs were in material part traded through the use of broker agents, who put together principals who wanted to buy and to sell. Inevitably, anyone considering the role of a broker would appreciate that a broker would see both sides of a transaction and not merely one side.[32] Equally, brokers – as the Liquidators either knew or ought to have known – are subject to "know your client" requirements before taking on board a new client. (Given the emphasis that Mr Hellard placed on the fact that TFS was regulated, I anticipate that he had actual knowledge of these requirements.)

(c) Even in a brokered market where MTIC Fraud is taking place, it is a stretch to say that the brokers involved in that market were (simply by virtue of that involvement) in fact dishonestly assisting in the MTIC Fraud. But the point of the "trigger" is not to determine whether such a claim can be made, but whether it should be investigated. In my judgment – on the basis of the information set out so far in this Judgment – it would have been unreasonable for a liquidator to conclude that there was no need for an investigation.

(d) In fact, the Liquidators knew rather more than this. In the first place, they knew – or could easily have found out - that there had been unusual movements in the market. Thus, the TFS PoC plead as follows in paragraph 30:

"(1) On 8 June 2009, Reuters News Agency reported that the BlueNext Exchange had been closed and that France was to apply a zero rate

[31] Hellard 1/§§21 and 22 are extremely vague in identifying the <u>purpose</u> of the Liquidators' investigations post their appointment, and Mr Hellard's oral testimony was little better.

[32] In other words, the agent might very well know more than either principal involved in the transaction.

to EUAs because of a risk of VAT fraud in the market. The report further stated that:

> "Emissions traders said rumours were circulating that a recent surge in volumes in European Union emissions permits traded over BlueNext, Europe's main exchange for spot permit trading, were suspicious.

The BlueNext Exchange was closed on 8 and 9 June 2009.

(2) On 9 June 2009, Bloomburg News Agency reported, under the heading "France Finds "Carousel" Tax Fraud in Carbon Emissions Market", that:

> "…the French government found evidence of carousel fraud relating to valued added tax on trades of European Union carbon dioxide allowances, according to an official in the nation's budget ministry.
>
> The official, who declined to be named citing government policy, didn't disclose the size of the fraud. Sellers committing carousel fraud, or missing traders, collect tax and then disappear before submitting the money to the authorities."

(3) On 11 June 2009, Bloomberg News Agency reported that the Paris prosecutor's office had confirmed that a probe was under way into suspected multi-million euros VAT fraud in the French carbon market…

…

(6) On 3 July 2009, Reuters reported that trading volumes on the Dutch Climex exchange grew by 49% in June 2009, despite an overall drop in trading volumes across all European exchanges, saying that there were concerns that fraudsters might be targeting the Climex exchange following the zero rating on EUAs in France.

(7) On 15 July 2009, Reuters reported that the Dutch Ministry of Finance had said that there were clear indications of fraudulent activity in the Dutch carbon emissions market, specifically carousel fraud. Further, on the same date, Environmental Finance published a news article under the heading "VAT fraud fears roil carbon market".

(8) On 19 July 2009, the Daily Telegraph newspaper published an on-line article under the heading, "Fraudsters target tax on carbon credits", in which it was reported that HMRC had recently uncovered an attempted UK tax fraud in the carbon emissions trading market."

Although the TFS PoC, from which I am quoting, are dated 7 March 2018, the materials pleaded were in the public domain well before the end of September 2009. I of course accept the submission from Mr Parker, QC that the mere fact that unusual market operations were being reported does not mean that these unusual features were caused by MTIC Fraud. There could have been other, quite innocent, explanations. But that is the very point and purpose of investigation – to find out whether a reasonably arguable claim can be advanced or not.

(e) In the second place, the Liquidators knew of TFS's involvement in the market and in some of the transactions which they and HMRC were investigating. As Hellard 1/§22 makes clear:

"It was apparent from the documents included in the exhibit to Mr Sawyer's affidavit provided to us by HMRC that TFS has some involvement in Bilta's trading in carbon credits. We were aware from the master schedule of Bilta deals which was exhibited to Mr Sawyer's affidavit that TFS was involved in a few early linear Bilta deals involving CarbonDesk…However, the extent of our knowledge of TFS's role with Bilta was linked to the documents in Mr Sawyer's affidavit provided by HMRC. Although we were aware of certain SVS volumes in Bilta chains, we did not associate those volumes with TFS because there was nothing to connect them."

This, of course, is exactly the point: the Liquidators knew of TFS's involvement, but not its nature or extent. That is why matters need to be investigated.

(f) Thirdly, the Liquidators did actually seek information from TFS by way of a letter dated 2 October 2009. This was a formal request for information pursuant to section 236 of the Insolvency Act 1986. The letter sought information about certain specific trades. But there is no reason why the requests could not have been more widely framed, focussing (for example) on the volumes of EUAs that TFS traded, and the basis upon which they were traded (e.g. as agent, and if so, for whom, or as principal), and the nature and identities of the principals involved (including in particular an "offshore" element).

56. I have listened very carefully for the reasons why no investigation was taken forward into potential claims against brokers by the Liquidators. Two answers or possible explanations have been put forward, neither of which I regard as satisfactory:

(1) First, it is said that TFS was a regulated entity (as indeed it was), and so could not warrant investigation. That does not seem to me to amount to any kind of justification for not looking more closely at brokers in the circumstances I have described.

(2) Secondly, I received the very strong sense from Mr Hellard, throughout his oral evidence, that the Liquidators would only "investigate" if they could be confident of the outcome of that investigation. It may be that a concern over cost drove this approach or informed this attitude: but I should be clear that I regard such an

approach as being altogether inconsistent with "investigation", and more consistent with (what should be the subsequent stage of) "pleading a case".

(c) Analysis regarding the "final, necessary piece of the pleading jigsaw"

57. The question is when the Liquidators might, using no more than reasonable diligence, have put themselves into a position to plead out a viable statement of case against TFS. As I have described, that is an objective question, but it is to be asked in relation to the actual circumstances of the Claimants, and specifically the Liquidators who controlled them.

58. Liquidators – particularly these liquidators – are in a special position. They are appointed to get in the assets of the company in relation to which they act, but they do not act gratuitously. A company's assets obviously include the claims it can make against third parties, but such claims are notoriously hard to evaluate and expensive to "get in". It is, therefore, of particular importance to consider the decisions that a liquidator made or could have made in the context of all the circumstances.

59. It was suggested by TFS in closing[33] that the liquidators had called the "wrong witness" in Mr Hellard. TFS noted that Mr David Fairclough was the individual who actually conducted the investigation into Bilta from 2009, and who also conducted the interviews in 2015 on which the Liquidators placed a great deal of stress in terms of how they were "put off the scent".[34] The Vehement and Weston liquidations were run out of a different office by Mr Richardson (and, again, not Mr Hellard).

60. The Liquidators countered this point by asserting that TFS were putting them in an impossible position, by obliging them to call every person who had had anything to do with the process of investigation so as to establish what the exercise of reasonable diligence might and might not have enabled the Liquidators to achieve.

61. I do not accept that criticism. Nor do I accept that Mr Hellard was <u>necessarily</u> the wrong witness for the Liquidators to call – although I accept that Hellard 1 was not a helpful document. Precisely how the Liquidators chose to discharge the burden that was on them was, of course, a matter for them. Certainly, they could have adduced evidence from the primary investigators who worked under Mr Hellard and Mr Ingram to explain *(i)* why the Karra/Bullen Transcript was so important and *(ii)* why certain steps, not taken before the production of the Karra Bullen Transcript, were not part of the liquidator's reasonable diligence. As to this:

(1) If the Claimants were seeking to take such a granular approach to this question, then Mr Hellard <u>was</u> undoubtedly the wrong witness. His oral evidence made absolutely clear that he was not in day-to-day charge of the liquidations. TFS – in a schedule to its closing submissions – listed those documents which were put to Mr Hellard during the course of cross-examination, but in relation to which he simply could not assist. This is not a criticism of Mr Hellard: he was, quite simply, for this purpose, the wrong witness.

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[33] Paragraph 2 of the TFS written closing submissions.
[34] See Hellard 1/§§88*ff*.

(2) As a result, it is impossible to understand the processes by which the claim against TFS came to be pleaded as late as it was. It may be that there is an explanation consistent with due diligence lurking in the detail, but it is not evident from the facts and matters before me.

(3) Indeed, to the contrary, there is a great deal that – on this basis – calls for explanation:

(a) The Liquidators got off to a flying start, given the very considerable work done by HMRC. As I have found, that work – of which the Liquidators had actual notice – essentially resulted in the trigger point for further investigation being met at the end of September 2009.

(b) Further investigation would not have been difficult. It was a question of ascertaining the volume of trades brokered by TFS in this market, including in particular which parties were put together, where they came from, and what "know your client" scrutiny was undertaken. None of these questions is difficult, and the Liquidators had their powers under section 236 which, as has been seen, were used, but not to this end.

(c) TFS submitted that an excellent proxy for what might have been achieved by the Liquidators lay in what HMRC in fact did achieve in their actual investigations. By way of example, I was referred to a meeting note by HMRC recording a meeting with TFS on 27 October 2010. Amongst others, Mr Smallbone was in attendance. I stress that the Liquidators were not present at this meeting, and were not given a copy of this note at the time it was made:

"Brief introductions were made by all attendees. Rod Stone [HMRC] advised that the main reason for the visit was in relation to carbon emissions trading in 2009 and our ongoing investigations into the transaction chains that have resulted in a tax loss.

Rod Stone advised that during the course of our enquiries we had spoken with two of TFS's clients, namely SVS Securities and CarbonDesk. Both of these companies had advised us that a business relationship existed between these two companies and TFS in that TFS would make introductory services of suppliers of carbon emissions to SVS and CarbonDesk. By way of payment for this service, TFS would be entitled to a share of the profits on any transactions then carried out between the suppliers and SVS and CarbonDesk. Rod Stone advised that this being the case we would need to ask a number of questions around this arrangement and request documents to support what actually happened. Ultimately, HMRC need to understand why so many companies came to TFS initially and not directly to SVS or CarbonDesk. It was agreed that the specific questions would be put in writing so that a proper and detailed response could be given.

Peter Weston [TFS] confirmed that the arrangement described was basically correct with TFS acting as an arranging agent on behalf of SVS and CarbonDesk with SVS and CarbonDesk then acting as principal in any transactions with their suppliers.

Rod Stone asked whether or not there was anything in the agreement between TFS and their clients to indicate whether or not the clients would be reliant on TFS for due diligence checks.

Peter Weston advised that this was not the case and that any checks that had been carried out by TFS would have been forwarded to the clients. Peter Weston also advised that their checks were considerably stepped up once it had become clear there was a problem in the market. Again, it was agreed that requests for this information would be put in writing so that a more detailed response could be provided. Peter Weston confirmed that the name of the broker working for TFS that was responsible for these emission deals was Luca Bertoli.

Rod Stone also asked why TFS did not trade as principal in these transactions themselves.

Peter Weston advised that at the time they did not have an emissions trading account and as such would not have been able to trade as principal. Subsequently, a sister company to [TFS] has now obtained an emissions trading account and has membership of the Bluenext exchange.

Rod Stone confirmed that this was not a criminal investigation at this time. HMRC are currently investigating the transaction chains for recovery of the lost tax.

…

Rod Stone confirmed that this information was being provided to the company to make it aware of any potential risks in respect of the emissions trading it entered into in 2009. One of our primary concerns at this stage is why so many businesses approached TFS and did not simply approach SVS and CarbonDesk directly."

I accept that HMRC's investigations provide some indication as to what the Liquidators might, with reasonable diligence, have achieved, but I do not consider that I should place very much weight on this. I know very little about HMRC's investigations, and it seems to me that October 2010 is rather late for such inquiries to have been made. That is, of course, explicable by the fact that HMRC were more focussed on deal chains and *Kittel*-type claims, than on claims against brokers, but I consider that I should be cautious in transposing what HMRC <u>did</u> do to what the <u>Liquidators</u> ought, with reasonable diligence, to have done.

(d) As Mr Scorey, QC stressed in his closing submissions, there was no-one before the court for the Claimants or the Liquidators to explain what the Liquidators' thinking had been in 2009 and 2010. There was no-one before me to explain why the Liquidators did not take their October 2009 inquiries of TFS further. There was no-one before me to explain why it was only thought worthwhile to interview TFS's witnesses in 2015, and to uncritically (and without having obtained the documentation) accept the evidence of TFS's witnesses. All of these were matters that could have been

canvassed in cross-examination had the appropriate witnesses – ones with granular knowledge of the Liquidators' inquiries – been called and subjected to cross-examination.

(4) In short, I am satisfied that – with no more than reasonable diligence – the Liquidators could have placed themselves in a position to plead a case of dishonest assistance against TFS some time in 2009 or 2010. I reject the suggestion that the Karra/Bullen Transcript was necessary to make such a case; and, even if it was, which I do not accept, I strongly suspect that had reasonable diligence been used, it would have been unearthed far sooner.

62. Whilst the Liquidators were obliged to act personally in the discharge of their functions, Mr Hellard and Mr Ingram were leaders of a larger team, and it was that team which conducted the day-to-day work. These were large liquidations, and it would be surprising if Mr Hellard and Mr Ingram did not delegate the day-to-day work of the liquidations to staff. That is why, if a granular explanation of the Liquidators' investigations is required, witnesses other than Mr Hellard (or Mr Ingram) would be required. But another way of assessing how the Liquidators progressed their inquiry – without requiring recourse to members of the team – would have been for Mr Hellard to provide a detailed description of the process he was in charge of. Such a statement – which, to be clear, Hellard 1 does not amount to – would have had to explain in detail how Mr Hellard ran the investigation.

63. It would have been perfectly open to Mr Hellard to say that he had a competent team in place, which he appropriately supervised. On this basis:

(1) The team would promptly and appropriately have reported to Mr Hellard matters he needed to know as liquidator; and

(2) At critical points in the litigation, Mr Hellard would specifically have consulted his team, and pooled what information there was so that an informed decision might be made.

The Liquidators could have adduced evidence – and this probably would have been from Mr Hellard – explaining "top down" how the investigation was conducted. This would have involved a clear statement of the direction and purpose of the investigation – and how that direction and purpose was to be, and was, achieved. The fact is, however, that Hellard 1 makes no effort to explain the Liquidators' conduct in this way.

64. In this regard, there were two areas which needed to be canvassed specifically in any such statement. They were not covered in Hellard 1. These two areas are as follows:

(1) *The effect of funding on the Liquidators' investigations.* The Claimants were in no position to fund any investigation into the conduct of third parties. It would be unreasonable to expect the Liquidators' themselves to fund their investigation absent careful consideration of the merits and demerits of such a course. In the course of cross-examination, it emerged that the litigation initiated by the Liquidators – including the claim against TFS – was funded by a combination of third party litigation funding, funding by Grant Thornton and conditional fee arrangements with solicitors and counsel. The details appear nowhere in Hellard 1, and Mr Hellard was – understandably – vague in cross-examination. The funding of the liquidations is of peculiar importance in terms of how investigations can be

funded and prioritised. I was given no insight into how funding might have affected the investigation process.

(2) *The relationship between the Liquidators' investigations and HMRC.* Quite clearly, there was an appropriately co-operative relationship between the Liquidators and HMRC. Each progressed their own inquiries, but HMRC did provide information to the Liquidators. Having listened very carefully to Mr Hellard's evidence, I have derived no clear understanding of how the relationship between the Liquidators and HMRC was intended to work, and how it did in fact work. Mr Hellard, at times, suggested that HMRC would have provided the Liquidators with "everything", but that was contradicted by his own oral and written evidence. Indeed, the proposition that HMRC would have provided the Liquidators with "everything" is a nonsensical proposition. There must have been some kind of relevance test applied by HMRC in terms of what information was provided by HMRC to the Liquidators, but I have no idea – because there was no evidence on the point – as to how HMRC assessed what information was to be provided or how the Liquidators expected HMRC to operate. What is clear is that:

(a) The Liquidators made no effort to inquire of HMRC what HMRC might have on its files to assist in the Liquidators' investigation that had not been provided by HMRC.

(b) The Liquidators made no effort to understand the reason why or basis upon which the material that HMRC did provide was provided.

(c) The Liquidators did not make any section 236 request against HMRC, save with HMRC's consent, where the purpose of the request was not to obtain new documents that the Liquidators did not have, but to serve as a vehicle for getting documents that the Liquidators did have before the court.

I do not consider that I am in a position to make detailed findings as to what the Liquidators could, with reasonable diligence, have ascertained without some evidence on these points.

65. Accordingly, I repeat my conclusion above: I am satisfied that – with no more than reasonable diligence – the Liquidators could have placed themselves in a position to plead a case of dishonest assistance against TFS some time in 2009 or 2010. But I cannot, on the evidence before me, be more specific than that, and I do not consider that I have to be in order to hold that the Limitation Defence succeeds as against all of the Claimants, except Nathanael and Inline, where further consideration is required. It is to Nathanael and Inline that I now turn.

(6) Nathanael and Inline

66. My conclusion as regards the Limitation Defence does not hold, without more, as against Nathanael and Inline. Both Nathanael and Inline were not wound up until a date after 8 November 2011. Whilst Nathanael and Inline were not wound up prior to November 2011, neither were they under the control of any directors. They were abandoned by the wrongdoing directors who had controlled them, and were dissolved by compulsory strike off from the register. They were then restored to the Companies House register on

application by HMRC as creditor. Between dissolution and restoration, Nathanael and Inline did not exist.

67. Specifically, the chronology is as follows:

(1) As regards Nathanael:

1 February 2011	Company dissolved via compulsory strike off.
19 March 2012	Company restored to the register, and an order made for its winding up on the unopposed petition of HMRC.
19 August 2013	Liquidators appointed.

(2) As regards Inline:

7 December 2010	Company dissolved via compulsory strike off.
8 June 2015	Company restored to the register, and an order made for its winding up on the unopposed petition of HMRC.
8 June 2015	Liquidators appointed.

68. It was common ground between the parties that the knowledge of Nathanael's and Inline's dishonest directors could not be attributed to these companies. The point on which the parties differed was as to the consequence of this. The Claimants contended that no question of time bar could arise because – until liquidators were appointed – there were no parties whose knowledge could be attributed to these companies. In short, the section 32 test did not – indeed could not – apply because there is no knowledge that could be attributed to Nathanael or Inline until the appointment of the Liquidators. Since this occurred after 8 November 2011, Nathanael's and Inline's claims were in time, whatever knowledge I might find attributable to the Liquidators.

69. TFS disputed this contention relying – the argument was put in a variety of ways – on a combination of section 32 of the Limitation Act 1980 and section 1032 of the Companies Act 2006 to create a fiction, namely a notional person in control of Nathanael and Inline, through whom knowledge could be attributed to Nathanael and Inline, so as to cause time to run under section 32 of the Limitation Act sooner than it otherwise would on the Claimants' contention. As to this:

(1) As I have stated in paragraph 31(7)(d), whilst the words "could with reasonable diligence" in section 32 of the Limitation Act 1980 obviously import an objective standard, that standard is informed by the position of the actual claimant, not some hypothetical claimant. Prior to their restoration to the register, Nathanael and Inline did not exist. There was no claimant who could, with reasonable diligence, have discovered the fraud, concealment or mistake. On its own, and without consideration of the effect of an order for the restoration of a company to the register, section 32 does not assist TFS.

(2) Section 1032 of the Companies Act 2006 provides (so far as is material) as follows:

"(1) The general effect of an order by the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck-off the register.

…

(3) The court may give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register."

(3) No direction was made under section 1032(3), but I consider that that subsection casts valuable light on the general effect of an order as made under section 1032(1). The point of the "deeming" provision in section 1032(1) is to place the company and all other persons in the same position as if the company had not been dissolved or struck of the register. Section 1032(3) provides for the specific case where this cannot be achieved, or cannot clearly be achieved, without specific direction or provision.

(4) Inevitably, deeming provisions sit ill with the real world. The company in deemed existence would – but for the contrary provision in section 1032(2) – automatically incur penalties for failing to file accounts. There will be cases – not provided for in the statute – where notwithstanding sections 1032(1) and (3) – it will not be possible to place the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register. Mr Adam Johnson, QC (sitting as a deputy High Court Judge) considered this question in *Davies v. Ford*, [2020] EWHC 686 (Ch) at [376]*ff*, which contains a careful and very helpful review of the case law:

(a) In many cases, the effect of the deeming provision is to validate acts undertaken in relation to the company on the mistaken assumption the company was still in existence, when in fact it had been stuck off: at [382]. This is a very straightforward application of the deeming provision.

(b) Other cases are much less straightforward. For instance, where a contract comes to an end as a result of the striking off and dissolution of the company, does the contract revive on the restoration of the company to the register?[35] In such a case, the deeming provision can cause real prejudice to a third party, by (for instance) putting that party into breach of a contract that had automatically come to an end on the company's striking off. In such cases, the courts do not stretch the deeming provision so as to render a contract that <u>actually ended</u> in retrospective deemed existence.[36]

[35] Considered at [383].

[36] At [384] to [386].

(5) The present case I consider to be very straightforward. It would be anomalous in the extreme, and entirely contrary to the *schema* of the Limitation Act, for the time a restored company spends in enforced non-existence not to count towards the calculation of time for the purposes of limitation, when there is a deeming provision that states in terms that the company is – in such circumstances – deemed to exist. That would be entirely prejudicial to the interests of third parties, and would incentivise the manipulation of the timing of applications to restore a company to the register.[37]

(6) The only difficulty lies in identifying the person or persons who would have been in control of the company during its enforced non-existence. But the difficulty is a minor one. *Bennion on Statutory Interpretation* (quoted at [388] of *Davies v. Ford*) suggests that "[t]he intention of a deeming provision, in laying down a hypothesis, is that the hypothesis should be carried as far as necessary to achieve the legislative purpose, but no further". I agree. The "deeming" provision in section 1032 requires me to deem that Nathanael and Inline were properly constituted companies during the period of their non-existence, and that they had the minimum number of ordinarily competent directors in place.

70. On this basis, the Limitation Defence succeeds as against Nathanael and Inline also. There is no pleaded case that an ordinarily competent director could not, with reasonable diligence, have discovered the fraud by TFS prior to 8 November 2011.

C. SECTION 213 OF THE INSOLVENCY ACT 1986

71. Section 213 of the Insolvency Act 1986 provides as follows:

"**Fraudulent trading**

(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.

(2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper."

72. Section 213 is relied upon by the Claimants as an alternative to their knowing assistance claim. Thus, paragraph 59 of the Unified PoC pleads:

"Further or alternatively, the Defendants are liable to pay compensation pursuant to section 213 of the Insolvency Act 1986 for knowingly being a party to the carrying on of the Companies' businesses with intent to defraud creditors or alternatively for a fraudulent purpose, namely the non-payment of their liabilies to HMRC for VAT. The…Claimants rely on paragraphs 12 to 58 above."

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[37] I am not for a moment suggesting that this has occurred in the present case. But the temptation to investigate a cause of action <u>first</u>, and restore the company to register <u>thereafter</u>, is one that should not be made available for abuse in other cases, unless that outcome is compelled.

73. For the purposes of analysis, TFS accepted that three elements needed to be established before a party could be ordered to make a contribution under section 213:

(1) *The business of the company in liquidation had been carried on with intent to defraud creditors or for any other fraudulent purpose.* Realistically, TFS conceded that whatever the interpretation of this requirement the whole purpose of the Claimants was "to perpetrate carousel fraud in relation to EUAs".[38] It seems to me that this must be right, and that there is little to be gained in further debating this requirement in the context of the facts of this case.

(2) *The defendant sought to be made liable participated in the carrying on of the business of the company in that manner.* The question is whether section 213 is intended to apply only to persons exercising management or control of the company's business (e.g. directors, shadow directors and the like) or whether the provision extends to those who assisted or contributed to breaches of duty by the company or those controlling it. As to this:

(a) In his decision in *Bilta UK Ltd v. NatWest Markets plc*,[39] Snowden J concluded that he was precluded from taking a narrow view of section 213 in this regard because of the conclusion of Neuberger J in *Banque Arabe Internationale d'Investissement v. Morris*,[40] which (so Snowden J held) had been endorsed by the Court of Appeal in *Bank of India v. Morris*.[41]

(b) For this reason, Snowden J concluded that it was not open to him to accept reasoning to the contrary of David Foxton, QC in an article published in the Journal of Business Law under the title *Accessory Liability and Section 213 of the Insolvency Act 1986*.[42]

This point remains live and unaffected by the settlement between the parties, and is a point that I must determine.

(3) *That the defendant did so knowingly.* This is a point that would have been live, but for the settlement. I need consider it no further.

Accordingly, it is only necessary for me to consider further the second of the three points set out above.

74. In *Bilta v. NatWest*, Snowden J reviewed the law, noting that the predecessors to section 213 had been subject to a similarly wide reading. Thus, in *Re Gerald Cooper Chemicals Ltd*,[43] Templeman J pithily stated that "a man who warms himself with the fire of fraud cannot complain if he is singed".[44]

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[38] See paragraph 264 of TFS's written opening.
[39] [2020] EWHC 546 (Ch) at [191].
[40] [2002] BCC 407
[41] [2005] EWCA Civ 693.
[42] [2018] JBL 324.
[43] [1978] Ch 262 at 268.
[44] *Bilta v. NatWest*, [179].

75. Snowden J then turned to the decision of Neuberger J in *BAII*. The issue before Neuberger J was squarely whether it was necessary for a person to come within the ambit of section 213 for that person to perform a managing or controlling role within the company or its business. In other words, it was precisely the point that is before me now. Neuberger J considered the point, and concluded that a wide construction was appropriate:

(1) First, he held that the language of section 213 – although a "little unusual" – was widely drawn:[45]

"…as a matter of ordinary language, the ambit of section 213(2) is not limited to those who perform a managerial or controlling role within the company concerned. Although I accept that the language of section 213(2) is a little unusual, it appears to me that the concept of being "parties to the carrying on" by a company of a type of business, or of a business in a certain way, is not limited to the person who actually directs or manages the business concerned. If anything, it is a more natural reference to people who are not employed by the company at all, but who are third parties to the company."

(2) Secondly, he held that the policy underlying the section favoured a wide reading:[46]

"…there is the question of policy. It is obviously wrong to construe section 213(2) so as to cast its net so wide as to risk stultifying normal business transactions. It appears to me, however, that that is not a good reason for preventing a liquidator from pursuing a person who actively and dishonestly assisted, and/or benefited from, the company in adopting a dishonest course, which predictably led to lenders to, or shareholders of, the company being defrauded."

(3) Thirdly, Neuberger J referred to the wider context – in terms of the Insolvency Act 1986 – in which section 213 appears.[47]

76. Finally, Snowden J turned to the Court of Appeal's decision in *Bank of India v. Morris*, and concluded:[48]

"In my judgment, these statements of principle from *Bank of India v. Morris* stand as clear Court of Appeal authority for the proposition that liability under section 213 is not limited to those who have been involved in the management of the company whose business has been carried on with intent to defraud, but potentially extends to outsiders who simply deal with the company."

Whilst the statements set out by Snowden J do bear out what he says, what Snowden J did not say was that both at first instance and before the Court of Appeal the "wide" construction of section 213 was agreed between the parties, and not the subject of argument.

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[45] At 411.
[46] At 412.
[47] At 412.
[48] At [186].

77. Snowden J went on to consider other cases consistent with the "wide" view of section 213. He concluded:

> "191. The imposition of liability under section 213 on an outsider who has not been directly involved in the management of the company or its business, and in particular the parallels that seem to exist between section 213 and accessory liability for dishonest assistance, have been criticised by David Foxton, QC, in an article, *Accessory Liaibility and Section 213 of the Insolvency Act 1986*, [2018] JBL 324. The author was critical of Neuberger J's reasoning and conclusion in *Banque Arab Internationale d'Investissement v. Morris*. However, given that such reasoning was endorsed at the level of the Court of Appeal in *Bank of India*, I do not consider that I am entitled to hold that the scope of section 213 cannot extend to an outsider to the company which has been carrying on its business with a fraudulent intent.
>
> 192. I acknowledge that a clear note of caution was sounded by Neuberger J in *Banque Arabe* against extending section 213 too far, so as to "risk stultifying normal business transactions". However, for the reasons which Neuberger J then gave, and which I have echoed in the context of dishonest assistance above, if the facts demonstrate that the Traders turned a blind eye whilst causing RBS to enter into trades which facilitated the fraudulent trading by the Claimant companies, then in my judgment that should also be sufficient to found liability under section 213".

Of course, Snowden J's decision did not survive in the Court of Appeal – but Snowden J was not in terms overruled on this point.

78. It seems to me that I am faced with a series of highly persuasive decisions in favour of the wide reading of section 213, from which I should depart only if I am satisfied they are clearly wrong, but that I am not in fact bound by precedent, given the concessions made by the parties in the Court of Appeal in *Bank of India*. I note in this regard that Snowden J appears to have reached a similar conclusion in [191] of *Bilta v. NatWest*, which I have quoted above.

79. With that, I turn to Mr Foxton, QC's article, which is – unsurprisingly, given the author – compellingly and clearly written. However, despite the critique of the decisions recording a wide approach, I am unpersuaded that that approach is clearly wrong. Indeed, given the fact that a defendant must participate knowingly in order for section 213 to bite, I see the force in Templeman J's dictum that "a man who warms himself with the fire of fraud cannot complain if he is singed".[49] It seems to me that if this policy is to be unwound, given that it is based on a reading of the section that is a plausible construction (to put it no higher than that), that is something not for me, but for the Court of Appeal. I certainly do not consider the wide reading of the section to be clearly wrong. Rather, it is a perfectly defensible reading of the provision. In the interests of consistency, I therefore conclude that the claim made by the Claimants under section 213 is a proper one.

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[49] *Bilta v. NatWest*, [179].

D. DISPOSITION

80. For the reasons I have given:

(1) The Limitation Defence succeeds.

(2) The Claimants' claims under section 213 of the Insolvency Act 1986 do not fail as a matter of law. They are not outwith the terms of that section.

81. I consider – particularly given the question of costs, which remains at large – that matters consequential on this judgment should be dealt with at a hearing convenient to counsel and the court. I should also state – although, of course, this is only a provisional view on which I will hear argument – that I would be minded to give permission to appeal in relation to my decision on section 213 of the Insolvency Act 1986.